

*International Terrorism,*

*An excludable act within the Convention Relating to  
the Status of Refugees?*

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“The law is not so much carved in stone as it is written in water,  
flowing in and out with the tide.”

**Jeff Melvoin, Northern Exposure, Crime and Punishment, 1992**

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## Introduction

The world we live in today is one that is evolving with great speed, bringing to us endless possibilities but also many problems. Never has there been an age where our lives have been so interconnected with those around the world. The phenomenon of globalization opens a whole range of different aspects to which the law has to adapt. Conflicts arising throughout the world root up people and scatter them all over the globe. When war erupts in Rwanda, this causes a flood of people trying to escape the horror that comes with a conflict. This goes for people throughout the world, trapped in a fear of persecution, wanting to flee from life threatening situations. In order to regulate this constant flow of people trying to escape from persecution and horror, the Convention Relating to the Status of refugees was drafted in 1951.

The 1951 Convention Relating to the Status of Refugees is the modern legal embodiment of the ancient and universal tradition of providing sanctuary to those at risk and in danger.<sup>1</sup> This is the core of the Convention, as it was adopted after the Second World War, where States fully understood the need for a global protection in times of conflict. The Convention grants certain rights and privileges to those who fall within the definition of article 1A(2), namely a refugee. One can be considered to be a refugee when *“owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”*<sup>2</sup> The status of refugee is declaratory; one does not have to earn this.

Due to the Nazi genocide and other war crimes, the governments drafting the framework for the 1951 Convention Relating to the Status of Refugees felt that there exist cases in which the Refugee Convention should not apply. Certain acts are considered to be so grave that they render their perpetrators undeserving of international protection and the refugee framework should not stand in the way of serious criminals facing justice.<sup>3</sup> With this in mind, the exclusion clauses were incorporated in the Convention enshrined in article 1F. The clauses exclude anyone who:

- a) 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) Has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

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<sup>1</sup> UNHCR, *Refugee protection in International Law, UNHCR's Global Consultations on International Protection*, Cambridge University Press, New York (2003), p3.

<sup>2</sup> Article 1A(2), 1951 Convention Relating to the Status of Refugees

<sup>3</sup> See UNHCR, *'Addressing Security Concerns Without Undermining Refugee Protection'* Nov. 2001.

c) Has been guilty of acts contrary to the purposes and principles of the United Nations.’

Recent developments on a global scale call for the necessity to reanalyze the existing international instruments. The development that will be discussed concerns the upcoming of non-State actors to the international plane, in particular that of international terrorism. The international institutions have found it difficult to collectively act against such acts, due to the highly controversial status of international terrorism. When looking at the Security Council, for example, we see that while certain States consider acts that involve the indiscriminate killing of citizens of a terrorist nature, other States find that considering the context of the situation this can be seen as a legitimate form of establishing ones objectives. The qualification of international terrorism in this case depends on the political background of the State and its own interest in the matter.

International terrorism forms an integral part of the community as a whole and the need to regulate this and combat this in an effective way calls for a revision of all measures that have been available to date. It touches so many different aspects, not in the least immigration, but also criminal. An overlap between these areas has manifested itself within the exclusion clauses, rendering it necessary to closely determine the possibilities provided under the 1951 Convention Relating to the Status of Refugees.

In this dissertation the author will determine whether it is possible to exclude those who have committed terrorist acts or belong to terrorist movements from the refugee status under article 1F(b) and/or 1F(c). In order to do so, the background of article 1F and the definition of terrorism within this context will be analyzed in Chapter I. Secondly the applicability of article 1F (b) and 1F(c) to the terrorist acts and/or the membership of terrorist groups will be discussed in Chapter II respectively Chapter III. Chapter IV will show the consequences for the applicant when he has been excluded and the possible measures to be taken by the State.

## **Chapter One: Legal Analysis of the Exclusion Clause**

The fear people felt after terrorists flew into the World Trade Centers in New York was due to an act that until then had been unimaginable. People could not fathom an act by non-State actors that could cause such destruction and devastation. This fear was felt throughout the Western world, which could follow closely the events as they occurred on their televisions. The appeal by President Bush to Europe and all those who believe in the fundamentals of democracy to combat this new threat ran to the core of us all. This threat is not that new, however. Terrorism has for a long time played a role within the international world. But it has never come as close as it did on the 11<sup>th</sup> of September, and never on such a large scale. The difference being that the acts committed managed to influence inter-State relationships and constituted a threat to the international peace and security. This date forever reflects a turning point in the world order. States became increasingly aware that this new threat may not be contained to the United States only, and started searching for means to combat it. Refugees all over the world found themselves in a difficult situation, since the fear of terrorism was mirrored onto them. It has become very difficult to enter countries in Europe or in Northern America, a trend that persists after the bombings in Madrid on the 11<sup>th</sup> of May.

During the drafting process of the 1951 Convention, one did not foresee this problem. It was not conceivable that a non-State actor could inflict such damage; terrorists operating on such magnitudes did not yet exist. The use of the exclusion clauses within the 1951 Convention is not uncommon, though with the threat of terrorists, the question is raised whether or not this could be a possible means to exclude these individuals before even entering a State in order to preventively protect its citizens. What is the background of the exclusion clauses and what aim has it pursued until now?

## II Background and present-day context

The general impetus for the elaboration of Article 1F of the 1951 Convention Relating to the Status of Refugees (hereinafter “1951 Convention”) was a determination to give legal force to Article 14(2) of the Universal Declaration of Human Rights<sup>4</sup> (UDHR), which provides that the right to asylum “*may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purpose and object of the United Nations*”<sup>5</sup>

Paragraph 7(d) of the United Nations High Commissioner for Refugees (UNHCR) Statute, Article 1F of the 1951 Convention and article I(5) of the 1969 Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa (hereinafter “OAU Convention”) all oblige States and UNHCR to deny the benefits of refugee status to certain person who would otherwise qualify as refugees.<sup>6</sup>

Due to recent developments -as mentioned above- in the world, the exclusion clauses have become increasingly important in regulating international immigration. The dilemma in protecting those who need it against persecution versus those who have persecuted and now seek refuge against this same persecution poses a great moral paradox for States in deciding who to admit and who not to. Conflicts in the Great Lakes and the Former Yugoslavia and their aftermath have resulted in increased requests for clarification of the exclusion clauses.<sup>7</sup> Parallel to the development of the exclusion clauses have been the new efforts by the international community to ensure that perpetrators of serious human rights crimes no longer enjoy impunity.<sup>8</sup> The racial cleansing that occurred in the Former Yugoslav Republic in 1992, followed by the genocide committed in Rwanda in 1994, prompted the creation of international tribunals to bring to justice those who were responsible for these horrific crimes. These were the first such tribunals after the Second World War that produced the Nuremberg Tribunals. Also the creation of the International Criminal Court in 1998 should be mentioned, which has the jurisdiction to prosecute those who have committed crimes of genocide, crimes against humanity, war crimes and crimes of aggression.<sup>9</sup>

The consequences of not excluding such perpetrators during the mass influx after the Rwanda genocide was illustrated by the protection that was offered equally by States to survivors of the genocide as well as to those who planned and committed the massacres. This lead to a collective

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<sup>4</sup> J.C.Hathaway, C.J. Harvey, *Framing Refugee Protection in the new world Disorder*, Cornell International L.J. 257 (2001) p 263

<sup>5</sup> GA Res. 217A, art 14(2), UN Doc. A/180, at 74 (1948)

<sup>6</sup> UNHCR, *Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees*, 2003, p 2

<sup>7</sup> UNHCR, *Background Note on the Application of the Exclusion Clauses*, 2003 International Journal of Refugee Law Vol 15 No. 3 p 503

<sup>8</sup> International Journal for Refugee Law, *Introduction*, Vol 12 Special supplementary Issue p 2

<sup>9</sup> Rome Statute of the International Criminal Court, 17 July 1998, article 5(1)

stigmatization of all Rwandan refugees, who were all considered responsible for the crimes committed during the conflict.<sup>10</sup>

The need for clarification of the exclusion clauses in Europe, as well as in North America has only become more apparent after the recent upcoming of international terrorists, who have committed grave acts against the population of certain countries. Especially in Europe, which was recently targeted by Al Qa'ida on May 11<sup>th</sup> in Madrid, did the call for cooperation and strict border controls within the Union become a high priority. It is becoming increasingly difficult for refugees to enter the European Union, due to the strict policies and boarder controls. The EU hereby hopes to prevent possible terrorists from entering their countries in order to avert such attacks. This is illustrated by an initiative of the United States and the United Kingdom in 1996 when they tried to link asylum seekers with acts of international terrorism in a UN General Assembly Declaration.<sup>11</sup>

### *1.1.1 Objectives and general application*

Under the 1951 Convention, the competence to decide whether a refugee claimant falls under the exclusion clauses lies within the State in whose territory the applicant seeks recognition.<sup>12</sup> Though under paragraph 8 of the UNHCR Statute, in conjunction with article 35 of the 1951 Convention, the UNHCR has a responsibility to help States that may require assistance in their exclusion determinations and to supervise their practice in this regard.

The rationale behind the exclusion clauses is twofold as the *travaux préparatoires*<sup>13</sup> shows. Firstly, certain acts are so grave that they render their perpetrators undeserving of international protection as refugees. Secondly, the refugee framework should not stand in the way of serious criminals facing justice<sup>14</sup>. The reasons for the exclusion clauses must be viewed in the context of the humanitarian objective of the 1951 Convention. The grave consequences of exclusion – possible refoulement to a country of persecution- has led to the notion of a restrictive interpretation of the exclusion clauses<sup>15</sup>. The clauses are meant to be an exception to the principle aim of the 1951 Convention, namely the protection of those who fear persecution. This humanitarian principle should always take precedent over the need to exclude those who are undeserving of the protection.<sup>16</sup> Though the exclusion clauses equally play a role of importance in assuring that those who have committed crimes as laid down in article 1F cannot hide behind the shield of the 1951 Convention. Despite the

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<sup>10</sup> International Journal for Refugee Law, *Introduction*, Vol 12 Special supplementary Issue p 2

<sup>11</sup> 'Declaration on Measures to Eliminate International Terrorism' adopted on 17 December 1996, UNGA Res. 52/210

<sup>12</sup> UNHCR, Background Note, p507.

<sup>13</sup> See P. Weis, *The Refugee Convention, 1951: The Travaux Préparatoires analysed with a Commentary by the late Dr Paul Weis*, Cambridge University Press, 1995.

<sup>14</sup> International Journal for Refugee Law, *Introduction*, Vol 12 Special supplementary Issue p. 2.

<sup>15</sup> UNHCR, Note on the Application of the exclusion clauses, International Journal of Refugee Law Vol 15 No. 3 2003 p503.

fact that this provision provides the means to exclude those who have committed these crimes and to bring them to justice, it does not serve as a replacement for the mechanisms of international criminal law.

### *1.1.2 Exclusion Clauses within the 1951 Convention*

The grounds for exclusion are listed exhaustively<sup>17</sup> in the 1951 Convention:

- a) He who 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 who has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee
- c) He who has been guilty of acts contrary to the purposes and principles of the United Nations.

While the exclusion clauses are subject to interpretation, they cannot be supplemented by additional criteria in the absence of an international convention to that effect.<sup>18</sup>

The exclusion clauses should be strictly distinguished from articles 1D and 1E of the 1951 Convention. Article 1D deals with those who are not in need of protection offered by the 1951 Convention, since they already enjoy protection<sup>17</sup> from another institution or organization; “*This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.*” They are thus not undeserving of protection, but have found other means of protection, rendering a refugee status provided by the 1951 Convention unnecessary.

Under article 1E the 1951 Convention does not apply to a person “*who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.*” The object and purpose of this article can be seen as excluding those from refugee status who do not require refugee protection because they already enjoy greater protection than that provided under the 1951 Convention in another country apart from the country of origin where they have regular or permanent residence and where they enjoy a status that is in effect akin to citizenship.<sup>19</sup>

One should also bear in mind the difference between article 1F and article 33(2) of the 1951 Convention. Article 33(2) states that “*the benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.*” In this case the refugee has already

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<sup>16</sup> International Journal for Refugee Law, *Introduction*, Vol 12 Special supplementary Issue p. 3.

<sup>17</sup> UNHCR, Handbook on Procedures and Criteria for determining Refugee Status. Guidelines on International Protection: Application of exclusion clauses; 1F of the 1951 Refugee Convention, 2003 p 2 under para. 3.

<sup>18</sup> UNHCR, Background Note p 504

been recognized as owning the refugee status. The refugee that poses a threat to the country of refuge may thus be returned to its country of origin -an exception to the non-refoulement principle of article 33(1). The threat posed by the refugee is specifically directed towards the country of refuge, where he has committed a severe crime or may pose a serious threat in the future. Article 1F as stated before, sees to the exclusion of refugee status as a preventive measure to ensure the safety of the country of refuge or to prevent those who have committed acts as laid down in the article from impunity.

### I.II Definition of Terrorism?

If there is one thing that becomes apparent within the international community and institutions, then it is the fact that the present day rise of international terrorist activities has led to much debate. The will and sometimes need to define this phenomenon are numerous and debates surrounding this topic have become high priority. For how is the international community supposed to act efficiently against these crimes and create a common policy in order to do so? The main problem we run into is the highly political context of this phenomenon. As the well known phrase states; 'A terrorist to one is a freedom fighter to another.' The United Nations has reached consensus on the fact that terrorism is something that should be combated by all means necessary, but the actual definition has remained a source of controversy. The approach therefore has been to include each act committed and viewed as contrary to the object and purpose of the UN in a treaty and qualify the particular act as a terrorist one<sup>20</sup>. Examples of such acts are those related to hijacking, hostage-taking and bomb attacks. There are several resolutions dealing with measures and international instruments to deal with terrorism.<sup>21</sup> As has been the case on the international level, attempts have been made on the regional level as well to define and categorize acts of terrorism. The European Union tried, for example in the December 2001 European Union Common Position on the Application of Specific Measures to Combat Terrorism<sup>22</sup> to

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<sup>19</sup> Ibid. p 505

<sup>20</sup> See for example, A/Res/49/60; S/Res/1368; S/Res/286; S/Res/337

<sup>21</sup> See for example, S/Res/1333; A/Res/38/130; A/56/160; A/54/301

<sup>22</sup> "Terrorist act is defined in article 1(3) of Council Common Position of 27 December 2001 (2001/931/CFSP) as: given its nature or its context, may seriously damage a country or an international organisation, as defined as an offence under national law, where committed with the aims of: I. seriously intimidating a population, or ii. Unduly compelling a government or an international organisation to perform or abstain from performing any act, or iii. seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation: a. attacks upon a person's life which may cause death; b. attacks upon the physical integrity of a person; c. kidnapping or hostage-taking; d. causing extensive destruction to a government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property, likely to endanger human life or result in major economic loss; e. seizure of aircraft, ships or other means of public or goods transport; f. manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons; g. release of dangerous substances, or causing fires, explosions or floods the effect of which is to endanger human life; h. interfering with or disrupting the supply of water, power or any other fundamental natural resource, the effect of which is to endanger human life; i. threatening to commit any of the acts listed under a to h; j. directing a terrorist group; k. participating in the activities of a terrorist group, including by supplying information or

provide a general description of terrorist acts. Since there has been up to date no universally accepted definition of terrorism, the focus has remained on addressing specific types of acts, and prohibiting these.

In the present dissertation a lengthy description of terrorism or a definition of such an act is of no extra value. Chapter II and III will further elaborate on this fact. The two sub articles -1f(b) and 1f(c)- each have a separate manner of dealing with acts qualified as terrorism, depending on the context and formulation of the separate sub articles. The basis of exclusion will depend on the act in question and all surrounding circumstances.<sup>23</sup> This paragraph will therefore be restricted to the notion that international terrorism is a highly political issue, that has to date been the source of great controversy. On a final note; the focus will not be placed national terrorism, such as the ETA in Spain, but will specifically deal with international terrorism, in the sense that it should involve an act that crosses borders and manages to inflict such large scale damages that it has the ability to influence inter-State relationships and may pose a threat to the international peace and security. The most frequently used example of such an organization is Al Qa'ida, and its attacks against the United States on the 11<sup>th</sup> of September 2001, as well as the attack in Madrid on the 11<sup>th</sup> of March 2004. The qualifications of such act vis-à-vis the exclusion clauses will be discussed in the Chapters II and III.

### I.III Individuality v Membership

Article 1F permits the exclusion of people seeking asylum when there are 'serious reasons for considering' that he or she has committed an excludable crime. This is a difficult phrase to interpret, since it remains vague and is explained differently depending on the State and its legal system.<sup>24</sup> There is, however, a consensus that the 'serious reasons for considering' standard has a lower threshold than is required for criminal proceedings, at least within common law systems. The decision maker needs not to prove the guilt beyond a reasonable doubt; in asylum procedures the applicant does not have to actually be found guilty of the crime.<sup>25</sup> State practice varies and does not provide a consistent approach. The UNHCR guidelines also do not provide a clear definition of this phrase.<sup>26</sup> According to the UNHCR Handbook, a high standard is nevertheless required in recognition of the

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material resources, or by funding its activities in any way, which knowledge of the fact that such participation will contribute to the criminal activities of the group.

<sup>23</sup> UNHCR, Background Note, p 532

<sup>24</sup> M.Bliss, Serious Reasons for considering: minimum standards of procedural fairness in the application of the article 1F exclusion clauses, 12 International Journal of Refugee Law, Supplement (2000) p115

<sup>25</sup> France: see for example *Conseil d'Etat*, Ressaif, decision of May 15 1996; Belgium: see for example, CPRR, F390 of 18 January 1996 (Algeria).

<sup>26</sup> The UNHCR Exclusion Clause Guidelines state: 'The applicant's own confession, the credible and un rebutted testimonies of other persons may suffice to establish serious reasons for considering that the applicant should be excluded. However ordinary rules of fairness and natural justice require that an applicant be given the opportunity to rebut or refute any accusations. An applicant who casts reasonable doubt on the "serious reasons for considering" "his or her application should not be excluded from the benefits of refugee status.' UNHCR, The Exclusion Clauses, para. 11

severe consequences of a decision to exclude, the exceptional nature of exclusion and the general protection purpose of the 1951 Convention.<sup>27</sup>

### *I.III.1 Individual liability*

The process of exclusion requires the establishment of individual liability on the part of the asylum seeker for any of the specified excludable offences.<sup>28</sup> When deciding on whether to exclude an asylum seeker there must be a link between the asylum seeker's acts and circumstances, and the legal elements, including the *actus reus* and *mens rea*, which make up the excludable crimes.<sup>29</sup> In general, individual liability will be established when the individual committed, or made substantial contribution to, the criminal act, in the knowledge that his or her act or omission would facilitate criminal conduct.<sup>30</sup> The degree of individual responsibility must be assessed separately in each case.

One must be careful in attributing collective responsibility. This did not happen, for instance, during the Nuremberg trials in the cases of "*persons who had no knowledge of the criminal purposes or acts of the organization and those who were drafted by the State for membership, unless they were personally implicated*"<sup>31</sup> in the commission of the acts in question. "*The criterion for criminal responsibility...lies in moral freedom, in the perpetrator's ability to choose with respect to the act of which he was accused.*"<sup>32</sup>

Since there is no indication within the 1951 Convention as to the meaning of individual responsibility, it is necessary to find guidance in other international criminal mechanisms. When we look at the International Criminal Court Statute, article 25, there is an indication as to the nature of individual responsibility for certain crimes. This involves, apart from the actual commission of the crime, ordering, solicitation, inducement, aiding, abetting, and contribution to a common purpose, attempts and, in the case of genocide, incitement to commit a crime. When we further look at the ICTR and in particular the ICTY, in its *Kvočka et al-case*, certain grounds for criminal responsibility were discussed. In this case the Court elaborated on four grounds; instigation, commission, aiding and abetting, and participation in a joint criminal enterprise.<sup>33</sup> We can thus see that also the ICTY upholds

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<sup>27</sup> The UNHCR Handbook, para 149 states that 'formal proof of previous penal prosecution is not required. Considering the serious consequences of exclusion for the person concerned, however, the interpretation of these exclusion clauses must be restrictive.'

<sup>28</sup> M.Kingsley Nyinah, *Exclusion under article 1F: Some reflections on Context, Principles and Practice*, 12 International Journal of Refugee Law, Supplement (2000) p 300

<sup>29</sup> Ibid. p 300

<sup>30</sup> UNHCR, Background note on the Application of the Exclusion Clauses, International Journal of Refugee Law, Vol 15 No 3, p 520

<sup>31</sup> Quoted in N. Weisman, *Article 1F(a) of the 1951 Convention Relating to the Status of Refugees in Canadian Law*, 8, International Journal for Refugee Law, 1996, p111 at p 132

<sup>32</sup> Ibid

<sup>33</sup> (Omarska and Keraterm Camp), IT-98-30/1, Trial Chamber Judgement, 2 November 2001, para 122. In this case "instigating" was described as the 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

a more broad definition when it comes to individual liability, with a trend towards a more collective responsibility.

### *I.III.2 Membership*

Does involvement with a terrorist organization amount to ‘serious reasons for considering’ that the asylum seeker has committed excludable crimes? The UNHCR is clear when it comes to membership of an organization that commits or incites others to carry out violent crimes. Membership to a criminal organization or in the present case a terrorist movement alone cannot in itself amount to responsibility, resulting in the exclusion of the applicant from refugee status. Consideration needs to be given to whether the applicant was personally involved in acts of violence or knowingly contributed in a substantial manner to such acts.<sup>34</sup> Most States seemed to have recognized that mere membership is not sufficient basis for the decision to exclude. In the United Kingdom, the House of Lords in *T. v. Secretary of State for the Home Department*<sup>35</sup> emphasized that the focus must be on the asylum seeker’s personal responsibility for excludable acts, and the Immigration Appeals Tribunal has held that it is an error to exclude a person on the basis of mere connection with an organization.<sup>36</sup> Canadian courts have also held that membership in an organization is not sufficient basis on which to exclude.<sup>37</sup> The presence of a list of terrorist organizations drawn up by the UN or the US will also not suffice as it stands now in State practice.<sup>38</sup> In the United States on the other hand, a person may be barred from applying for asylum or excluded on the basis of mere membership of a designated terrorist organization: such designation will be made if it is found that an organization is “A) a foreign organization; B) the organization engages in terrorist activities and; C) the terrorist organization threatens the security of the United States nationals or the national security of the United States.”

Considering the present day context, where the non-exclusion of members of terrorist organizations such as Al-Qa’ida could prove to have disastrous consequences on a large scale, the notion of membership and the implications of this membership should be revised. There exist certain

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commission of a crime would be a probable consequence. “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 law, in the knowledge that there was a substantial likelihood that the commission of the crime would be the consequence of the particular conduct. “Aiding or 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.

<sup>34</sup> UNHCR, Background Note, p 524.

<sup>35</sup> *T. v. Secretary of State for the Home Department*, All ER 865 (1996); 2 WLR 766.

<sup>36</sup> See *Sugentham Amirthalingam* (11561), 10 November 1994; *Nadarajah Nanthakumar*, (11619) 22 November 1994.

<sup>37</sup> In *Ramirez v. Canada*, 2 F.C 306 (1992), the Federal Court of Appeals held that ‘personal and knowing participation was required.’ In *Cardenas v. Canada*, 23 Imm. L.R. 92 (d) 244 (1994), the Federal Court states ‘to implicate the claimant as accomplice to international crimes, the Board must be satisfied of the claimants having knowledge of commission of international crimes, and sharing the organization’s purpose in committing them. The applicant’s mere membership in the Front does not attract culpability.’

<sup>38</sup> Immigration and Naturalization Act para. 219 (a), 8 U.S.C, para (a) (1).

organizations (such as the one mentioned above) that have stated their aims, and have demonstrated by what means they wish to accomplish these goals. They exist merely for the purpose of committing excludable crimes. One could therefore safely assume that the membership of such an organization means that this person endorses such activities. These organizations, which are largely mentioned in several ‘black lists’<sup>39</sup> distributed over Europe and the United States, should be carefully assessed before admitting such members to the State under the auspices of the 1951 Convention. In the opinion of this author mere participation or membership in these cases should qualify as sufficient grounds to at least reverse the burden of proof, which would require the asylum-seeker to prove that despite his membership, he does not pose a threat to the country of which he is seeking refuge.

The UNHCR in fact, states that *“the purposes, activities and methods of some groups or terrorist organizations are of particularly violent and notorious nature. Where membership of such a group is voluntary, the fact of membership may be impossible to disassociate from the commission of terrorist crimes. Membership may, in such cases, amount to the personal and knowing participation, or acquiescence amounting to complicity in the crimes in question.”*<sup>40</sup>

In any event, relevant factors in determining whether there exists ‘serious reasons for considering’ that the asylum seeker has committed excludable crimes, should be taken into account. This would be the size of the group, whether the asylum seeker joined the group voluntarily, and the nature of the crime committed by the group during the time the asylum seeker was a member.<sup>41</sup> The difficulty in placing the burden of proof on the member of such an organization, when he is seeking asylum, is that it contradicts the main purpose of the 1951 Convention. The main goal is to offer protection to those who are in need of this, out of fear of persecution, not keeping out those who are undeserving of such a protection. It also contradicts the principle of ‘innocent until proven guilty’. One already presumes that the asylum seeker is guilty; it is up to him to prove otherwise.

#### I.IV Inclusion v Exclusion

Not only does the presumption of guilt within a criminal sense pose a problem when it comes to the exclusion of asylum seekers, but also whether the State has the possibility to exclude an asylum seeker before there has been the establishment of the refugee status. Despite the fact that the status of

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<sup>39</sup> Examples of movements on the European blacklist: Al-Qa’ida, Muslim-Arab, Antifascist Resistance Groups First of October (Grapo), Spain, Aska Tasuna, Aum Shinrikyo, Japan, Babbar Khalsa, Sikh separatist group, India, Gama’a al-Islamiyya, (Islamic group), Egypt, Hamas (Islamic Resistance Movement), Palestinian, International Sikh Youth Federation (ISYF), India, Kurdistan Workers’ Party (PKK), Turkey, Lashkar-e-Tayyiba (Army of the Righteous), Pakistan, Mujahedine Khalq Organisation, Iran, Palestinian Islamic Jihad, Palestinian, Popular Front for the Liberation of Palestine, Palestinian; <http://archives.tcm.ie/breakingnews/2002/05/03/story48791.asp>.

<sup>40</sup> UNHCR, The Exclusion Clauses: Guidelines on their Application, December (1996), para. 47.

<sup>41</sup> M.Bliss, *Serious Reasons for considering: minimum standards of procedural fairness in the application of the article 1F exclusion clauses*, 12 International Journal of Refugee Law, Supplement (2000), p 126.

refugee is declaratory, and is thus not granted, one in this case will not even arrive at this step. In other words, the exclusion clause is used as a pre-emptive measure to protect the country from those who pose a threat when entering the country in question.

Justification of using the exclusion clauses at the outset of the status determination process is sought, prior to investigating any inclusion issues, in the mandatory wording of Article 1F: *“This Convention shall not apply [...]”* This would mean that the whole Convention does not apply to those who have committed excludable crimes before even determining refugee status. The same wording is found in Article 14(2) of the UDHR, which is the historical basis for the exclusion clauses: *“This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purpose and object of the United Nations.”*

Opponents of this point of view state that immediately upon fulfilling the criteria for refugee status a person becomes a refugee and is entitled to claim protection under the principle of *non-refoulement*, unless the claim is rejected or exclusion is established. It is at this point that the right to enjoy asylum ‘may not be invoked.’ In other words, the wording of Article 1F should not be overly literally interpreted, since it completely neglects the humanitarian context of the situation and disregards the true object and purpose of the 1951 Convention<sup>42</sup>. That is, not to establish a mechanism to detect the criminals, but to help the victims of such acts and offer them the international protection that was not provided elsewhere. The use of the exclusion clauses is meant to be a last resort, an exception to the rule. When a State attributes priority to exclusion as a threshold to inclusion, the emphasis is placed on criminal issues instead of the persecution that is feared by the applicant.

The UNHCR, who stresses the importance of inclusion versus exclusion, states in paragraph 141 of the Handbook: *“Normally it will be during the process of determining a person’s refugee status that the facts leading to exclusion under these clauses will emerge. It may, however, also happen that facts justifying exclusion will become known only after a person has been recognized as a refugee. In such cases, the exclusion will call for a cancellation of the decision previously taken.”*

The cancellation is one that is *ex tunc*, which means that the status of refugee has never existed. This enables a State to give priority to inclusion over exclusion without placing it at risk. The situation of the asylum seeker is fully examined, paying respect to the humanitarian principles guiding the 1951 Convention, and protecting the integrity of the Convention at the same time. It gives full effect to the applicant’s right to be heard and ensures decisions are made in accord with standards of fairness and natural justice.<sup>43</sup> In the case of terrorist, this would allow for an initial determination as to

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<sup>42</sup> M.Kingsley Nyinah, *Exclusion under article 1F: Some reflections on Context, Principles and Practice*, 12 International Journal of Refugee Law, Supplement (2000) p 295, p 304.

<sup>43</sup> UNHCR, The Exclusion Clauses, para.9 ‘in principle, the applicability of the exclusion clauses should be considered only after the decision maker is satisfied that the individual fulfils the criteria for refugee status...’

whether the individual fears legitimate criminal prosecution (and is therefore ineligible for refugee status anyway) as opposed to persecution.<sup>44</sup>

According to the UNHCR, exclusion clauses may exceptionally be considered without particular reference to inclusion issues: “(i) where there is an indictment by an international criminal tribunal; (ii) in cases where there is an apparent and readily available evidence pointing strongly towards the applicant’s involvement in particularly serious crimes, notably in prominent IF(c) cases, and (iii) at the appeal stage in cases where exclusion is the question at issue.”<sup>45</sup>

This should mean, as mentioned before<sup>46</sup> that those belonging to groups whose existence is based on the violence, or who wishes to accomplish their goals by violent means, should be excluded before there is the question of determination of refugee status. As said before, those belonging to terrorist movements such as Al Qa’ida or who have committed terrorist acts within this sort of structure, raise the presumption of guilt. The burden of proof that is placed on them, *a fortiori* means that exclusion is considered before inclusion. The issue of fairness and natural justice would still apply, since the determination cannot be considered without taking into account all aspects of the case and the situation in which the asylum seeker finds him. As shown before, each case should be evaluated individually, where all circumstances must be taken into consideration in determining the possible exclusion of the applicant.

In practice one might say that when the exclusion comes before inclusion, the possibility for abuse of the provisions is much larger. In an age where States in the West for example, consider Muslims to be a group that is a larger risk to their national security, the exclusion may be too hastily determined without fully considering the merits of the case. The paradox of the exclusion clauses is well illustrated by this, since the fear of persecution that lead the claimant to apply for the refugee status is not taken into consideration, while his possible exclusion is. The crimes that he allegedly committed will be the primary focus, thus putting the applicant at risk of being extradited or otherwise prosecuted in a country from which he fled, without paying attention to his reasons of his departure. The 1951 Convention will then run the risk of loosing its primary function of providing international protection and is at jeopardy of becoming yet another instrument available to prevent acts of terrorism occurring within the State.

#### *I.IV.1 Case law*

State practice regarding the issue of inclusion versus exclusion is not one that is uniform. Several States have given preference to the assesment of the refugee status under Article 1A, before dealing with issues of exclusion. In Europe the United Kingdom, the Court of Appeal held in *O.Immigration*

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<sup>44</sup> UNHCR, Background note, p 539.

<sup>45</sup> Ibid, p 539.

<sup>46</sup> See para. I.I.2 under Terrorism.

*Appeals Tribunal & Secretary of State for Home*<sup>47</sup> that the proper approach was to determine whether an individual was liable to persecution for a Convention reason and then to consider the application of Article 1F(b). This decision has not always been followed in later cases.<sup>48</sup> In France there also seems to be a preference for inclusion over exclusion.<sup>49</sup> Belgium, however, held in recent cases, that since it was not part of the 1951 Convention, the concepts of exclusion and inclusion have been developed in the doctrine, and they are therefore acting in conformity with the Convention when they decide to apply the exclusion determination before raising the inclusion issue.<sup>50</sup>

In Northern America, Courts have not recognized the obligation to look at inclusion before exclusion. In *Moreno v Canada* the Court found that only with spousal and dependant refugee claims is the court legally obligated to rule on the principal's refugee claim where he or she falls within the scope of the exclusion clauses.<sup>51</sup> The Court did raise the fact that inclusion may be favorable to consider before exclusion, since it can be very difficult to distinguish refugees on the grounds of exclusion.<sup>52</sup>

#### I.V. Conclusion

The main principle of the 1951 Convention Relating to the Status of Refugees is to extend international protection to those who fear for persecution as specified under Article 1A. There are those, however, that are deemed undeserving of this protection. When the individual has committed an act specified within one of the sub categories of Article 1F, he may be excluded from refugee status. The exclusion clauses must be applied restrictively, due to the grave consequences it has for the applicant. The use of the exclusion clauses is rather an exception and should not be considered as a means to assist the international criminal mechanisms. The 1951 Convention should be interpreted in a dynamic manner though, adapting to the present-day context to fully preserve the intent of this provision.

The exclusion clauses should be applied in the case where an individual has committed an excludable act. Individual liability thus gives rise to responsibility under Article 1F. The issue of liability caused by an individual not actively or directly involved in commission of an excludable act is not as clear. The exclusion clauses speak of the commission of an act and not of either an omission or otherwise participation. Indirect participation or knowledge of the commitment may nonetheless in circumstances give rise to liability. It is the belief of the author that, for example, the membership to

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<sup>47</sup> Imm.A.R. 494 (1995).

<sup>48</sup> See for example, *Srirangan Kathiripillai* (12250a) 23 September 1996

<sup>49</sup> See for example, *Charour*, CRR, SR, 231.390, 20 July 1993; *Warnakulasuriya Patabendige*, CRR, SR, 222.900, 26 November 1993; *Wilfred Karalasingam*, CRR,SR, 233.673, 20 July 1993; *Khairzad*, CRR,SR, 253.901, 26 October 1994.

<sup>50</sup> CPRR, F629, 18 May 1998 (Rwanda).

<sup>51</sup> *Moreno v Canada*, 1 F.C. 298 (C.A.), 1994.

<sup>52</sup> *Ibid.*

an organization that exists but for the notion of violence may also give rise to culpability. In this case the burden of proof should be placed on the individual, not on the State, to contradict the allegations of the membership. The culpability of membership of an international terrorist organization shall be further discussed in the Chapter II and III.

During the process of determining the excludability of an act, the question of inclusion before exclusion plays a crucial role. It is up to the State to determine its mechanisms and interpretation of the exclusion clauses, which leads to a variation in practice. In the majority of cases in Europe we see the tendency to give priority inclusion over exclusion. In Northern America, however, we see that there is no clear rule when applying the exclusion clauses. There have been recent judgments allowing to start exclusion procedures before assessing the status of the refugee. The UNHCR stresses the main goal of the 1951 Convention, namely the protection of those in fear of persecution, which should lead to the inclusion of such an individual before his exclusion is ascertained. The practical consequences for the applicant lay mainly in the possibility of abuse by the State. His right to a fair and impartial trial might be jeopardized.

The present-day context of which we are talking concerns the upcoming threat of international terrorism. It has proven very difficult to create a common international policy to combat this phenomenon because there exists to date no international consensus as to the scope and definition of international terrorism. States rather resort to condemning specific acts as they occur in treaties and resolutions and take the appropriate measures to fit the particular situation. It is the opinion of the author that consequences of international terrorism to the international peace and security are so grave, that it should fall within the scope of Article 1F. The qualification and application of international terrorism within the exclusion clauses will be further discussed in the next chapters.

## Chapter Two: Article 1F (b) ‘serious non-political crimes’

Article 1F (b) provides that: ‘this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

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

Article 1F (b) shows the core of the Article 14(2) UDHR by which the right to asylum “*may not be invoked in the case of prosecutions genuinely arising from non-political crimes [...]*”<sup>53</sup>

The application of article 1F (b) and the exclusion clauses in general raise difficult questions when it comes to the presumption of the 1951 Convention that those in need should be afforded protection. One may be a refugee in the sense of article 1A (2), fleeing from persecution in ones country, though having committed excludable, in the present case non-political crimes. When faced with this provision, persons accused of committing non-political acts often claim their use of force was legitimate. It was the only way possible of resistance, and in fact highly political, since it aimed to counter political systems within their country. Considering the increasing political disturbances over the world, it is often not clear what may be considered as political. The qualification given to certain acts depends on the political context, the national interests of other States who are in some way involved and the political ideology that is being professed. In certain countries for instance, it is impossible to achieve certain goals through the judicial mechanisms (such as we see for example in Western Europe), since this simply does not exist. In other countries where the freedom of speech does not apply one cannot demonstrate against the political structures out of fear for persecution. This leaves people little possibilities to express their opinions, or to achieve their political goals. But how far can one go in trying to counter political systems or to pursue ones ideology? Is there a limit to the extent of force permitted? Does it depend on the political goal? For example, are all means deployed to secure democracy legitimate, whereas the goal of establishing a fundamentalist Islamic State not? In order to further exam these questions, it is necessary to first closely examine the concepts we are speaking of, and to set the framework we are operating within.

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<sup>53</sup> Universal Declaration of Human Rights, GA Res. 217 A, art 14(2), UN Doc. A/810 at 74 (1948).

## II.I Definition of Terms

### *II.I.1 'Serious Crime'*

Article 1F (b) provides for the possibility to exclude those who have 'committed a serious non-political crime'. The term 'serious crime' is not one that is applied in a similar matter in each country, since it has different connotations depending on the legal system of the country. There has been no clear definition given by the UNHCR. It does follow from the wording that the intention was not to exclude all those who have committed crimes from refugee status. The gravity of the crime should be judged against international standards and not simply by its characterization in the host State or country of origin.<sup>54</sup>

In determining the seriousness of the crime the following factors should be taken into consideration<sup>55</sup>:

- The nature of the act;
- The actual harm inflicted;
- The form and procedure used to prosecute the crime;
- The nature of the penalty for such a crime;
- Whether most jurisdictions would consider the act in question as a serious crime.

Acts such as theft, robbery or other petty crimes, however inconvenient or aggravating, will not qualify as serious enough to fall within the scope of this Article. Certain crimes will surely fall within the scope when "they *are crimes...against physical integrity, life and liberty.*"<sup>56</sup>

The UNHCR Handbook<sup>57</sup> states that the act should qualify as a capital crime or a very grave, punishable act, but without authority in domestic or international law for this particular assertion. Each case must be asserted individually, to determine the seriousness of the crime.<sup>58</sup> The UNHCR 'guidelines on Exclusion'<sup>59</sup> offer the suggestion that the worse the persecution feared if the applicant were to be returned, the greater must be the seriousness of the crime committed. One can say that it is up to the discretion of each court to determine the seriousness of the crime and in doing so may follow the guidelines provided by international legal instruments, the 1951 Convention and other factors<sup>60</sup>.

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<sup>54</sup> UNHCR: *Background Note on the Application of the exclusion clauses*, International Journal of Refugee law, Vol15, no 3 p502, 4 September 2003 p 515.

<sup>55</sup> Ibid. p 515.

<sup>56</sup> G.S.Goodwin-Gill, *The Refugee in International Law*, Clarendon Press; Oxford 1996, p. 99.

<sup>57</sup> UNHCR, Handbook para 155.

<sup>58</sup> *Betkoshabeh v. Minister for Immigration and Multicultural Affairs*, Federal Court of Australia, 157 ALR 95. (1998).

<sup>59</sup> Guidelines on International Protection: Application of exclusion clauses; 1F of the 1951 Refugee Convention, 2003, para 53.

### II.1.2 'Non-political Crimes'

As has been the case with the term of 'serious crimes', there is no universal definition of the term 'non-political crime'. Historically article 1F(b) was connected to extradition law<sup>61</sup> and its definitions of political crimes, in which case the extradition law can serve as a guide for the interpretation of political crimes in the context of the 1951 Convention. This was confirmed in 1996 British decision *T v. Home Secretary*, where the House of Lords denied the refugee status to an Algerian member of the *Front Islamique du Salut* (FIS), who was involved in the planting of a bomb at the Algiers airport and attacking army barracks to protest against the political outcome of elections in which the FIS was annulled as winner<sup>62</sup>. The House of Lords found in this case that the notion of a political crime as stated in article 1F (b) 1951 Convention, should be based on the same interpretation as given to extradition. As 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, 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, although the application of the concept would, of course, be of a different purpose."*<sup>63</sup>

The guidelines on the application of the exclusion clauses further states that a serious crime should be considered non-political when other motives are the predominant feature of the crime committed.<sup>64</sup> When a clear link is absent between the crime committed and the political goal pursued, or when there is a disproportionate use of means to the objective pursued, one may presume that the act committed is non-political.<sup>65</sup> As the US supreme Court stated in *McMullen v. INS*:

*"a serious non-political crime is a crime not committed out of genuine political motives, not directed toward the modification of the political organization or ...structure of the State, with no direct causal link between the crime committed and its alleged political purpose or object, or where the act is disproportionate to the objective."*<sup>66</sup>

Only when the political goal is consistent with fundamental human rights and freedoms can the crime be regarded as politically natured<sup>67</sup>. As the UNHCR formulates it:

*"The serious crime must also be non-political, which implies that other motives, such as personal reasons or gain, predominate. Increasingly, extradition treaties specify that certain crimes, notably acts of terrorism, are to be regarded as non-political for the purpose of those treaties, although they*

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<sup>60</sup> see for example; *BVerwG*, Federal Administrative Court of the Federal Republic of Germany,(1962).

<sup>61</sup> G.Goodwin-Gill, *Refugee in International Law*, Clarendon paperbacks, Oxford (1996) p 103.

<sup>62</sup> *T. v Secretary of State for Home Department*, imm. A.R. 142 (1995) at 753.

<sup>63</sup> *Ibid.* at 778.

<sup>64</sup> UNHCR Guidelines, p 515.

<sup>65</sup> UNHCR Handbook, para 152. See also for example: *Aguirre-Aguirre v INS*, 119 S.Ct.1439 (1999).

<sup>66</sup> *McMullen v. INS*, 788 F. 2d 591 (1986). See for non-political crimes also: *T. v Secretary of State for Home Department*; concerning the link between the crime committed and the alleged purpose.

<sup>67</sup> UNHCR Guidelines, p 516.

*typically also contain protective clauses in respect of refugees. For a crime to be regarded as political, its political objective must also, [...]. be consistent with the exercise of human rights and fundamental freedoms. Crimes which deliberately inflict extreme human suffering, or which violate jus cogens rules of international law, cannot possibly be justified by any political objective.”*

This means that once the ideology that is pursued (as stated above) is not consistent with the fundamental human rights, or that it breaches international instruments protecting these fundamental rights, it will not be considered politically natured. When for example in a particular State, a movement tries to establish a fundamentalist government, though a political ideology, this may still be considered non-political because it does not endorse the fundamental human rights.

### *II.1.3 ‘outside the country of refuge’*

Article 1F (b) requires the crime to have been committed ‘outside the country of refuge prior to his admission to that country as refugee.’ This requirement is only found in this article of the exclusion clauses, since the other two (sub a and c) are considered of such a serious nature that there should be no limitations attached and should be applicable at all times, no matter where it was committed. Thus crimes committed after entry to the country of refuge would fall outside the scope of article 1F (b), whether or not they can be considered non-political. It is then for the national court to deal with the act committed in accordance with its national criminal legal system. Or one may assess whether the crime is of such gravity that it would fall within the scope of article 1F (a) or (c). Another possible solution for those who have committed a non-political crime within the country of refuge is to be subjected to Article 32 and 33(2)<sup>68</sup> of the 1951 Convention, which protects the country of refuge against those who pose a threat to the security of the State.

## II.II Terrorism within the scope of article 1F (b)

After the Second World War there was an increase in the amount of States in the world, due to a strong belief of self-determination, giving to those who deserve it the right to a State. This process

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<sup>68</sup> Article 32 states that: (1) The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order. (2) The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority. (3) The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

Article 33(2) states that: 2) The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

was brought on by the decolonisation that followed the war. After World War II there was an increase in the amount of internal, civil conflicts. These conflicts existed between civilians, but also between governments and their civilians, who sought to improve their situation and life standard.

The attacks on the 11<sup>th</sup> of September show a whole new battle that is being fought. This time it is not between States or amongst the population, but between States and international terrorist movements who seek to destroy the political establishment of the West and wish to bring their ideology to practice. This new battle has forced many to rethink their systems, which are inadequate to deal with this kind of threat. In order to prevent this threat from establishing itself within the West, they have sought to preventively keep those responsible for terrorist attacks out of their country. Is it possible however, to exclude one who has committed terrorist acts or belongs to a terrorist movement from refugee status due to the non-political nature of this act? As we have seen before, the qualification of what is terrorism and what is a freedom fighter is a thin line. How can we then generalize this term without a universal definition in order for it to qualify as an excludable act?

### *II.II.1 Terrorism as a crime*

When we look at the nature of a criminal act as described above<sup>69</sup>, there are several factors that one should keep in mind while determining the criminal nature of the act committed. This criminal aspect may vary depending on the criminal legal system of the State. In this case one has to keep in mind the relevant international instruments, instead of focussing on the local qualifications.

Taking into consideration the existing treaties concerning terrorism<sup>70</sup>, we see that despite the absence of a clear definition, there are certain elements, which characterize these acts. In most countries the act of terrorism is one that is punishable and falls within the framework of the criminal justice system. Terrorism as such often involves an element of violence, whether by conventional tools or through new age means. One may think of the bombing of persons and killing indiscriminately or through the Internet by hacking websites and disrupting economic policies. Terrorist acts most likely involve the killing of others, which in itself is a serious crime. These acts have all been qualified as criminal as they occurred, in treaties and resolutions.

The nature of these acts is intended to produce grave consequences, since that is the essence of the act. There is the need to bring across ones message, which is accomplished by creating great destruction. Terrorism exists by means of disruption and fear, in which case it needs widespread attention to attain that goal.

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<sup>69</sup> see para II.I.1 '*serious crime*'.

<sup>70</sup> See for example; Convention on Offences and Certain Acts Committed on Board Aircraft (1963) Convention for the Suppression of Unlawful Seizure of Aircraft (1970) Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (1971) Convention on the Prevention and Punishment of Crimes Against Internationally Protected People (1973) (outlaws attacks on senior government officials and diplomats.)

Therefore one can conclude that no matter what the political goals, terrorism itself in whatever form and committed by whomever can be qualified as a crime. The main question however is whether this constitutes a non-political crime that is excludable under article 1F (b).

### *II.II.2 Terrorism non-political?*

In determining whether a crime that has been committed is of political nature, one has to look at the motivations behind the act, the existence of a link between the crime committed and the object pursued and the proportionality of the means that are used to pursue the objective<sup>71</sup>. These factors have been found within the extradition law that should be read in conjunction with article 1F (b). The extradition law serves as a guide in determining the (non-) political background of the act committed.

Terrorism almost always has a political nature. The main goal that one committing this kind of act wants to achieve is the collapse or change of an existing political structure. Within the extradition law terrorism is expressly excluded from the political offence category.<sup>72</sup> The main reason for the exclusion of terrorism as political offences within extradition law is the idea that such acts are a grave threat to the international community as a whole and have a destabilizing effect on the international peace and security<sup>73</sup>, which calls for strong measures to combat this form of violence.

In the case of terrorism, where violence is usually deployed in order to achieve certain goals, one can almost always conclude that the means used are disproportional to the objective. The indiscriminate killing of people, the hijacking of planes, and the bombing of certain locations, however politically motivated cannot be considered proportional. There exist other means by which one can achieve the objectives in mind. We can think of electoral campaigns in the West, instead of planting bombs in trains (Madrid 11-4-2004), through media coverage, education etc. Despite the fact that in certain countries there is no freedom of speech or such means to establish political changes, the use of violence in this matter can never be legitimized.

The above-discussed crimes concern mainly acts committed by an individual. The question to be examined now is whether the mere membership of a terrorist organization may qualify as a serious crime, and therefore an excludable act as described in article 1F (b). There are international instruments that deem the funding of terrorism a criminal act<sup>74</sup>. Though whether this reaches the requirement of 'serious' crime is debatable. This person might however, prove to be individually liable for the acts committed, since he in a way contributed to the act through financial support.

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International Convention Against the Taking of Hostages (1979) International Convention for the Suppression of Terrorist Bombing (1997) International Convention for the Suppression of the Financing of Terrorism (1999).

<sup>71</sup> See para II.I. 2 '*non political crimes*'.

<sup>72</sup> See for example: 'Additional Protocol to the European Convention on Extradition' 15 December 1975, art 1.

<sup>73</sup> W.Kalin, J.Kunzli, Article 1F(b): Freedom Fighters, Terrorists and the notion of serious non-political crimes 12 International Journal of Refugee Law, Supplement (2000) p 68.

<sup>74</sup> International Convention for the Suppression of the Financing of Terrorism (1999).

The nature of Article 1F (b) is to exclude those who have committed ‘serious non-political crimes’, which implies that the mere participation is either not serious enough or cannot qualify as a crime. The wording of Article 1F (b) is that of a commission not an omission. This follows from ‘committed’. A passive involvement due to membership therefore seems to be irreconcilable within this Article. There have also not been any treaties criminalizing the membership of a terrorist movement. This does depend on the extent of the membership; an individual who actively endorses or proves to be involved in another way, may prove to have as such committed an excludable act. All relevant factors must be taken into consideration, in each individual case. Only through active endorsement or involvement of the participant can individual liability then arise.

The UNHCR has stated however, that the *“the purposes, activities and methods of some groups or terrorist organizations are of particularly violent and notorious nature. Where membership of such a group is voluntary, the fact of membership may be impossible to disassociate from the commission of terrorist crimes. Membership may, in such cases, amount to the personal and knowing participation, or acquiescence amounting to complicity in the crime in question.”*<sup>75</sup> In determining the non-political status of the group in question, there are several aspects that should be taken into consideration. These may, as mentioned earlier<sup>76</sup> involve the size of the group, whether the applicant has joined the group voluntarily, and the nature of the crime committed by the group during the time the applicant was a member.

The trial chamber in the *Kvočka et al* case found that individual liability arises where the person has *“carried out acts that substantially assisted or significantly effected the furtherance of the goals of the (in the present case) criminal enterprise, with the knowledge that his acts or omissions facilitated the crimes committed through the enterprise...”*<sup>77</sup> One may thus conclude that the membership to a terrorist organization may lead to individual culpability in the case where the participant has contributed to the system in such a way that it facilitated the commission of such crimes.

### II.III Case Law: a comparison

As stated above, State practice concerning the exclusion clauses is fairly diverse. This is especially the case when comparing the jurisprudence of States concerning Article 1F (b), since the notion of what the definition of a ‘crime’ varies within each State and their criminal judicial system. It is necessary however, to compare State practice concerning the application of the exclusion clauses because there

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<sup>75</sup> UNHCR, The Exclusion Clauses: Guidelines on their Application, December (1996), para 47.

<sup>76</sup> See above nr 37.

<sup>77</sup> Case No. IT-98-30/1, Trial Chamber judgement, 2 November 2001, para 312. The Trial Chamber further states that the “culpable participant would not need to know of each crime committed. Merely knowing crimes are being committed within a system and knowingly participating in that system in a way that substantially

exists no external or supranational organ that could provide clarity on this matter. Unlike for example the European Court of human rights that provides binding decisions when it comes to disputes arising over European Human Rights, the 1951 Convention does not have a higher judicial court or other means to enforce the application of its provisions. It is thus up to each State to interpret the provisions of the 1951 Convention. There are international instruments used as guides as well as the UNHCR that states its vision on the interpretation of the Convention, but this is not binding.

When comparing the application of Article 1F (b) the focus will be on France and the United Kingdom in Europe and Canada and the United States in Northern America. The reason for selecting these countries lies in the fact that they provide the most extensive jurisprudence on this matter. In addition, the focus is not only on separate States, but also a comparison of the difference (or resemblance) in the application of the exclusion between the two continents. It provides an insight in the difference in reactions of the two continents concerning their refugees and international terrorism. Furthermore both France and the UK have a long history in dealing with terrorism in their respective countries, already existent before 9/11. The United States and Canada are relatively new in dealing with this kind of threat within their own countries.

### *France*

The notion of a 'serious crime' under art 1F (b) is different from the notion of a 'crime' within French law.<sup>78</sup> The nature and gravity must be taken into consideration in order to determine the seriousness of the crime. When referring to the gravity of the crime, the punishment that stands for the crime may function as an indication, though it is not of decisive nature<sup>79</sup>. Also the conditions, under which the crime was carried out when involving violence, can prove to be an indication.<sup>80</sup>

The *Conseil d'Etat* held that despite the political nature of the crime, it might still be qualified as non-political when the act was particularly serious.<sup>81</sup> The court does make a distinction between those who actually committed the crime and those indirectly participated in the commission of the crime. It states that those who merely supported movements that are violently involved in committing crimes that may be qualified as non-political, do not fall within the scope of Article 1F(b) and may thus not be excluded from refugee status.<sup>82</sup>

When it comes to the direct involvement of an individual in a terrorist act, the Commission des Recours des Refugies (CRR) found that those who committed acts of violence against civilian

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assists or facilitates the commission of a crime or which allows the criminal enterprise to function effectively or efficiently would be enough to establish criminal liability. (Ibid.)

<sup>78</sup> *Gardai*, CRR, 2800, 7 February 1958; *Saleh*, CRR, 130.181. 15 January 1991

<sup>79</sup> *Rajkumar*, CRR, 230.875 (in this case 6 years imprisonment was awarded), 12 March 1993; *Saleh* (the sentence was 5 years imprisonment), CRR, 130.181. 15 January 1991.

<sup>80</sup> *Can*, CRR, 260.466, 14 November 1997; *Ladshaprathshita*, CRR, 272.678 21 December 1994.

<sup>81</sup> *Urizar-Mugoitio*, Conseil d'Etat, decision of 14 December 1987.

<sup>82</sup> *Charhour*, CRR, SR, 231.390, 20 July 1993; *Wilfred Karasalingam*, CRR,SR, 233.673, 20 July 1993.

targets were found to be excludable under this provision.<sup>83</sup> There is no judgment that directly deals with terrorism as an excludable act within the scope of Article 1F (b). However, terrorism often entails the indiscriminate targeting of civilian population, which as stated, is deemed an excludable act. The CRR has chosen not to define the concept of terrorism, but does consider certain acts to be ‘terrorist’.<sup>84</sup>

### *United Kingdom*

The Immigration Appeals Tribunal (IAT) has examined the applicability of Article 1F (b) in several different cases. One of these is relevant for the scope of Article 1F (b) concerning terrorism. In this first case<sup>85</sup> it involved a senior commander of the Kurdistan Workers Party (PKK), who was excluded from refugee status despite political motivation, after his organization had become involved in the indiscriminate killing of citizens.

When it comes to terrorism explicitly, the House of Lords, as in France, refrained from actually defining this concept. In its decision *T. v Secretary of State for Home Department*, the IAT stated that each individual case should be evaluated as such and that the mere labeling of an act as terrorist or the membership to such a movement would be against the principle of restrictive interpretation<sup>86</sup>. The IAT further noted that the term ‘terrorist’ is not to be found within the 1951 Convention, and that if an individual is to be excluded, this should follow from the conditions laid down in the 1951 Convention.<sup>87</sup> As mentioned above<sup>88</sup> the House of Lords finds that instead of defining an act as terrorist, one must ascertain whether it qualifies as a ‘serious crime’<sup>89</sup>. When this is the case, the terrorist act may fall within the scope of Article 1F (b), and the person may be excluded from refugee status.

### *Canada*

The term ‘political’ is referred to in detail in the case *Gil v Canada*<sup>90</sup>, where a detailed analysis is given to whether an act can be qualified as political. This concerned a case where civilians were killed in a bombing at a crowded market place. The applicant claimed the act was political, since his targets

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<sup>83</sup> *Gonder*, CRR, 252.321, 29 November 1993; *Mayoyo*, CRR.284.705, 14 September 1995; *Mendoza Martinez*, CRR, 315.086, 22 October 1997.

<sup>84</sup> *Keles*, CRR, 136.526, 29 January 1991 (where someone who had participated in violent acts within a certain ‘revolutionary organization’ in Turkey was described as being involved in ‘terrorist acts’.); *Bahar*, CRR, 154.749, 5 February 1991.

<sup>85</sup> B( 13827), 22 July 1996.

<sup>86</sup> *T. v Secretary of State for Home Department*, imm. A.R. 142 (1995).

<sup>87</sup> *Sugentham Amirthalingam*, 11561, 10 November 1994; *Nadarajah Nanthakumar*, 11619, 22 November 1994; *Kanagaratnam Arulendran*, 11827, 19 Januari 1995.

<sup>88</sup> See para II.II.2 ‘Terrorism non-political?’.

<sup>89</sup> *Re Q.T.M.T.*, BIA interim Decision No 3300 639-7, 23 December 1996.

were the governmental shops and businessmen, and thus did not fall within the scope of Article 1F (b). The Court found that the link between the act committed and the purpose of the act did not exist, and that the means used were ‘*wholly disproportional to any legitimate political objective.*’ Though in this same case, the court held that the killing of innocent bystanders alone was ‘not quite enough’ for the act to be non-political. For this to be the case, ‘*the act should not have been carried out against armed adversaries and was bound to injure the innocent.*’<sup>91</sup>

In Pushpanathan, Bastarache J. said at paragraph 73<sup>92</sup> that “*Article 1F(b) contains a balancing mechanism in so far as the specific adjectives ‘serious’ and ‘non-political’ must be satisfied*”. He added that serious “*non-political*” crimes in Article 1F (b) are those which may result in extradition pursuant to a treaty.”

Association with a person or organization responsible for international crimes may constitute complicity if there is personal and knowing participation or toleration of the crimes. Mere membership in a group responsible for international crimes, unless it is an organization that has a “*limited, brutal purpose*”, is not enough.<sup>93</sup> Moreover, the closer one is to a position of leadership or command within an organization, the easier it will be to draw an inference of awareness of the crimes and participation in the plan to commit the crimes.<sup>94</sup>

### *United States*

The US has, like Canada, incorporated this provision almost literally in its national legal system. In the decision of the Supreme Court, *Aguirre-Aguirre v. INS*<sup>95</sup>, we can find the most important explanation of what constitutes a ‘non-political crime’. It did not give a clear definition, but rather provided guidance as to what may fall within its scope.<sup>96</sup> It noted that in considering a case it “*identifies a general standard (whether the political aspect of an offense outweighs its common-law character) and then provides two more specific inquiries that may be used in applying the rule: whether there is a gross disproportion between means and ends, and whether atrocious acts are involved.*”<sup>97</sup>

In this same case the Court further held that one only needed to address “*the relationship between respondent’s political goals and his criminal acts, concluding that the violence and destructiveness of the crimes, and their impact on civilians, were disproportionate to his*

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<sup>90</sup> *Gil v. Canada*, I F.C. 508 (C.A.) (1995).

<sup>91</sup> *Ibid.* at 533.

<sup>92</sup> *Pushpanathan v Canada*, I SCR 982 (1998).

<sup>93</sup> *Ramirez v Canada*, 1992 2FC 306.

<sup>94</sup> *Ibid.* p 317.

<sup>95</sup> *Aguirre-Aguirre v INS*, 119 S.Ct.1439 (1999).

<sup>96</sup> *Ibid.* at 1448 The Court stated that a rigid definition was not at place, and that its meaning is to be developed by the BIA over time on a case by case basis.

<sup>97</sup> *Ibid.* at 1448.

*acknowledged political objectives.*<sup>98</sup> When the applicant is involved in terrorist acts one must (as seen before) ascertain whether the crime committed has an element of disproportionality. Like the earlier discussed cases, the definition of terrorism is not given, but just stated and examined against the light of its proportionality. As the Court stated in its judgment *McMullen*<sup>99</sup> that crimes were “*not sufficiently linked to their political objective and, by virtue of their primary targets, so barbarous, atrocious and disproportionate to their political objectives that they constitute ‘serious non-political crimes’ for the purpose of the United States law and... the Convention.*”<sup>100</sup> In this same case the Court held that “*acts of violence directed at civilians are not ‘political crimes.’*”<sup>101</sup> Terrorist acts thus fall within the scope of Article 1F (b), as being highly disproportional acts of violence, constituting a ‘serious non-political crime’.

#### II.IV Conclusion

Article 1F (b) seeks to exclude those who have committed ‘serious non political crimes’ from obtaining the refugee status for which they have applied. The difficulty however, lies in the definition of the terms within this provision. Each State has its own criminal system, and its own concept of what constitutes a crime. The State in this case should apply this in conformity with the existing international instruments. Whether a crime is non-political is difficult to establish. For example, when hostages are taken and killed by a militant group trying to establish a different political structure, certain people will stress this is a completely legitimate and necessary way to establish this goal. The aim after all, is a political change, which should place this crime outside the range of Article 1F (b). There exist thus certain elements that have to be met in order for a crime to be rendered non-political. These elements that have been distilled from the case law examined entail the absence of a clear link between the crime committed and the political goal pursued, or when there is a disproportionate use of means to the objective pursued. A crime should furthermore be considered non-political when other motives are the predominant feature of the crime committed.

In determining whether an act can be qualified as political, the law on extradition may be used as a guide, as was confirmed in the 1996 British decision *T v. Home Secretary*.<sup>102</sup> When a terrorist act has been committed, the aim in general will be one that is politically motivated. The means used will almost always be considered disproportionate, placing it within the scope of Article 1F (b). The indiscriminate killing of civilians, for example, is an act that will be qualified as a crime in most States. The fact that the attack has been carried out to establish ones political goal does not however,

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<sup>98</sup> Ibid. at 1448.

<sup>99</sup> *McMullen v. INS*, 788 F. 2d 591 (1986).

<sup>100</sup> Ibid. at 598.

<sup>101</sup> Ibid. at 598. This was stated so as to prevent America from becoming a safe haven for terrorists.

<sup>102</sup> *T. v Secretary of State for Home Department*, imm. A.R. 142 (1995).

place this act within the political scope. A terrorist act can thus be qualified as a 'serious non-political crime' as laid down in Article 1F (b).

In determining who is responsible and can be excluded from refugee status, one can firstly conclude this applies to those who committed the act. It does not follow from the wording of Article 1F (b) that the mere membership of a terrorist movement may qualify as a serious non-political crime. The provision talks of a 'commission', which implies the active involvement of an individual in the act. One may argue though, that when an individual is a member of a terrorist movement that exists merely on the basis of violence, that this person endorses such activities. The problem however, is that this does not qualify as a crime in most States, and if it does, it is not considered 'serious' enough to fall within the scope of Article 1F (b). We can see though, that the UNHRC as well as States have opened the door to the liability of an individual based on his membership to a terrorist organization. When such an individual has voluntarily become a member, he may be found liable due to his participation to the system, which facilitates the commission of acts of terrorism. As we have seen earlier, there is no clear definition of the elements within the provision, like 'serious' or 'crime'. The States may use international instruments as a guideline, but are left with a wide range of discretion when it comes to the interpretation of the provisions within the 1951 Convention.

In the countries examined (France, the UK, Canada and the US), both France and the UK expressly did not wish to define terrorism, so as not to limit the range of the provision. France has not dealt directly with acts of terrorism, but does find that the indiscriminate killing of civilians constitutes a crime. Both the UK and France have come to the conclusion that the mere membership of a terrorist movement does not qualify as a serious non-political crime. One must first ascertain whether the act can be qualified as a crime, then whether it is serious enough, and finally if it is non-political. Once this has been established, the applicant may be excluded from refugee status. Acts of terrorism will usually adhere to these requirements.

Canada and the US both concluded that in order for the act to be qualified as political, there should be a link between the means used and the goal to be achieved. When this is lacking, one may find that the means are disproportionate to the aim. In this case the act will fall not be seen as political. A terrorist act will thus generally fall within the scope of Article 1F (b), because the means used will be disproportionate to the aim that is to be achieved. Only in Canada did the Court discuss the matter of membership to a terrorist movement as a serious non political crime. It found that when one is associated to a movement, which is responsible for an international crime, one might be liable when there was personal knowledge or toleration of the crime. The mere membership to a terrorist or violent movement is not determinative; only when one can speak of a truly barbarous and grave act can this be evoked.

### Chapter Three: Article 1F(c) ‘contrary to the purpose and principles of the UN’

Article 1F(c) provides that:

*“This Convention shall not apply to any person with respect to whom there are serious reasons for considering that: He has been guilty of acts contrary to the purposes and principles of the United Nations.”*

As the UNHCR handbook states, Article 1F(c) shows a clear overlap with Article 1F (a)<sup>103</sup>, in the sense that crimes against humanity and peace will also be contrary to the principles and purpose of the UN Charter.<sup>104</sup> It further states that Article 1F(c) is intended to cover, in a more general way, such acts that are contrary to the principles and purpose of the UN Charter<sup>105</sup>. This means that it serves as a sort of net for all those crimes committed that cannot fall within the scope of the other two provision, but are still of such gravity that they must be excluded from refugee status.

The UNHCR is of the opinion that this provision is applicable to those individuals that function within State organs. This would be, for example, those who have committed grave acts while acting as state officials. This point of view is based on the fact that the UN Charter concerns inter-State relations and does not engage in regulating relationships other than these. It is therefore not possible for non-State actors to fall within the scope of Article 1F(c). However, as we have seen before, the world order has changed dramatically after the terrorist attacks of 9/11. States are not the only actors on the international plane that can cause extensive damage, or change political systems to their advantage. It is therefore necessary to reanalyze the notion of the UN Charter solely regulating inter-State relationships. The question to be answered is if non-State actors in the present-day context, -in this case international terrorist- fall within the scope of Article 1F(c), due to the changing of the world order.

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<sup>103</sup> Article 1F(a) states that: He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; This provision is not discussed in this dissertation, since it concerns a situation of war. This does not apply to international terrorism, as researched for this matter. The focus of this Article is on war crimes, like genocide.

<sup>104</sup> UNHCR Handbook, p 26 para 162.

<sup>105</sup> Ibid.

### III.I The definition of principles and purpose of the UN

In order to determine what the purpose and principles of the UN are, one must turn to Article 1 of the UN Charter that states that the purpose is:

1. “To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
4. To be a center for harmonizing the actions of nations in the attainment of these common ends.”

The principles of the UN are to be found in Article 2 of the Charter:

“The Organization is based on the principle of the sovereign equality of all its Members.

All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.

All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations. All Members shall give the United Nations all assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.”

#### *III.I.1 Context of Article 1F(c)*

Article 1F(c) must be interpreted “*in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*”<sup>106</sup> This means that it should be interpreted in a restrictive manner, since the aim of the 1951 Convention is to offer protection to those who have fled their countries out of fear for persecution. As mentioned before, the

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<sup>106</sup> Vienna Convention on the Law of Treaties, Article 31.

1951 Convention is first and foremost an instrument to provide protection under humanitarian law, and should not to be seen as a mechanism that may replace or aid criminal law and bringing those who committed grave acts to justice. The wording of this provision stems from Article 14(2) UDHR: “*This right may not be invoked in the case of [...] acts contrary to the purposes and principles of the United Nations.*” The UDRH does not provide for a definition as to the exact meaning of the principles and purposes of the UN.

Article 1F(c) differs from Article 1F(b) in several ways. Where article 1F(b) speaks of ‘crimes committed’, Article 1F(c) talks about ‘guilty of acts’. This may be explained by the fact that when drafting Article 1F(c) the objective was for it to be a net for all those acts that could not fall within the other two provision<sup>107</sup>. Unlike Article 1F(b) that concerns a specific crime, namely one that is non-political, this provision is generally stated, leaving more space for interpretations.

Furthermore Article 1F(c) speaks of ‘acts that he has been guilty of’, this suggest a higher standard when proving responsibility or culpability than in Article 1F(b), that merely speaks of ‘crimes committed’. The UNHCR Handbook states on this matter “*it has to be assumed, although not specifically stated, that the acts covered by the present clause must also be of a criminal nature.*”<sup>108</sup>

### III.II Terrorism within the scope of Article 1F(c)

International terrorism are acts committed by individuals or movements outside of a State-like framework. They manage, however, to inflict serious and large-scale damages the way States do. This involves not only conventional weaponry such as bombs, but also non-conventional, such as the disruption of economies and Internet hackers. This change has become a reality and one that has to be addressed and dealt with in an effective manner. Is it possible however, for terrorism to fall within the scope of Article 1F(c)? Are acts committed by terrorists or the membership of terrorist movements contrary to the principles and purpose of the UN Charter?

#### *III.II.1 UN Treaties, Resolutions and the UNHCR*

In order to examine what acts may be contrary to the principles and purpose of the UN, it is first of all necessary to look at the relevant treaties and resolutions and what they state about acts of terrorism. This might shed more light on what exactly the UN itself finds on the subject matter.

The UN, through countless Security Council resolutions and General Assembly decisions, has stated that acts of terrorism are a real and dangerous threat to the international community as a whole and to the existing peace and security. This is for instance clearly reflected in the Security Council

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<sup>107</sup> E.Kwakwa, Article 1F(c): acts contrary to the purposes and principles of the United Nations, 12 International Journal of Refugee Law, Supplement (2000) p 84.

<sup>108</sup> UNHCR Handbook, para 162.

Resolution 1373: “*Reaffirming further that such acts, like any act of international terrorism, constitute a threat to international peace and security.*”

The UNHCR in its Background Note on the application of the exclusion clauses emphasizes that when considering this provision, the act should be *fundamentally* contrary to the principles and purposes of the UN Charter<sup>109</sup>. Only in very extreme cases may this provision be applied. An extreme case only occurs when the fundamental coexistence of the international community is at threat. The UNCHR further elaborates on this threshold by stating that this should be defined against the background of certain criteria: one should take into account the “*gravity of the act in question, the manner in which the act is organized, its international impact and long-term objectives and the implications for international peace and security.*”<sup>110</sup> In this view acts that have managed to seriously undermine inter-State relations, therefore posing a threat to international peace and security would fall within the scope of Article 1F(c).

The acts as committed by Al Qa’ida have managed to alter the world order in such a way that was not conceived before. This concerns a ‘pre-9/11 context’, which implies a difference in political structure has occurred. These are acts that have indeed managed to change essentially the inter-State relations, and not only that. International terrorism furthermore brings to the international scene an actor that poses a real threat to the nation State, as we know it. It undermines the whole political structure, where the nation State until now had been the only actor on the international plane to exercise such power. Acts committed by international terrorists therefore not only seriously undermine inter-State relations, but also pose a real and present threat to international peace and security. Not only are the means through which they try to establish their goals fundamentally against human rights (the indiscriminate killing of civilian population) but the goal itself poses a threat to the stability and security of the international community. As the General Assembly states concerning the means that are deployed, it is “*deeply disturbed by the world-wide persistence of acts of international terrorism in all its forms and manifestations, including those in which States are directly or indirectly involved, which endanger or take innocent lives, have a deleterious effect on international relations and may jeopardize the security of States.*”<sup>111</sup> It further states that: “*Acts, methods and practices of terrorism constitute a grave violation of the purposes and principles of the United Nations, which may pose a threat to international peace and security, jeopardize friendly relations among States, hinder international cooperation and aim at the destruction of human rights, fundamental freedoms and the democratic bases of society*”<sup>112</sup>

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<sup>109</sup> UNHCR Background Note, p 318.

<sup>110</sup> Ibid.

<sup>111</sup> A/Res/49/60 annex.

<sup>112</sup> Ibid, under I, nr 2.

Over time the UN has repeatedly condemned any form of terrorism on such a scale as well as signed multilateral treaties to combat these acts<sup>113</sup>, since it poses a threat to the very core of the UN. For this reason we may conclude that acts of terrorism in fact do amount to acts which are fundamentally contrary to the international peace and security and therefore contrary to the principles and purposes of the UN.

### *III.II.2 State v non-State actors*

We have established that terrorist acts are contrary to the principles and purposed of the UN Charter. This does, however, raise another question, namely that of culpability. Who in this case may be held liable for acts committed under the auspices of international terrorism and more importantly can this person be excluded under Article 1F(c)?

Many believe<sup>114</sup> that Article 1F(c) sees to those acts committed by States or officials acting within a State capacity. This is derived from the fact that the UN Charter deals with inter-State relationships and does not attribute any such capacity to individuals other than acting under the umbrella of a State. The UNHCR Handbook states: *“an individual, in order to have committed an act contrary to these principles, must have been in a position of power in a member State and instrumental to his State’s infringing of these principles.”*<sup>115</sup>

As mentioned earlier though, States are no longer the only actors in the international plane who have the capability to inflict grave damages. It is therefore necessary to interpret Article 1F(c) in the present-day context -namely the upcoming emphasis on the individual liability and the loss of the central position of the nation State- in such a way that these acts may constitute an excludable crime under this provision. International law is not a static given; it evolves and must be interpreted in a dynamic way in to effectively serve its purpose within the international community. As Edward Kwakwa says: *“ There is no persuasive reason why individuals who are neither affiliated or associated with a government, not acting in an official capacity, are not also capable of performing acts contrary to the principles and purposed of the United Nations. There are certain situations in which individuals, acting in a personal capacity, are clearly capable of carrying out acts that are*

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<sup>113</sup> see for example: S/Res/1535(2004), S/Res/1526(2004) ‘Threats to international peace and security caused by terrorist acts’; S/Res/1373(2001); S/Res/1377(2001); as well as numerous treaties such as: the Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on 14 September 1963, the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, concluded at Montreal on 23 September 1971, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted in New York on 14 December 1973, the International Convention against the Taking of Hostages, adopted in New York on 17 December 1979, the Convention on the Physical Protection of Nuclear Material, adopted at Vienna on 3 March 1980,

<sup>114</sup> UNHCR Background note, p 318; UNHCR Handbook, A.Grahl-Madsen, The Status of Refugees in International Law, Vol 1 Sijthof, Leyden (1966 p. 286); J. Hathaway, The Law of Refugee Status, (1991) p 226-29.

<sup>115</sup> UNHCR Handbook, para. 163.

*contrary to the purposes and principles of the UN.*<sup>116</sup> The Security Council has clearly stated on several occasions<sup>117</sup> that terrorism constitutes an act contrary to the principles and purpose of the UN. It is thus in line of Article 1F(c) to exclude those who have committed these acts from refugee status. In 1996 the UK sponsored an initiative taken by the General Assembly that attempted to exclude anyone who “*financed, planned and incited terrorist deeds.*”<sup>118</sup> This attempt did not materialize, since the authority of the General Assembly to indirectly amend the 1951 Convention was highly contested.<sup>119</sup>

The mere membership to a terrorist organization is not likely to fall within the scope of Article 1F(c); even if it would be qualified as contrary to the principles and purposes of the UN, it is not so grave that it gives rise to the possibility of exclusion under this provision. Article 1F(c) is used only in the most grave circumstances, when the act is fundamentally contrary to international norms and values. Membership to a terrorist movement cannot be deemed so grave as to warrant an exclusion under Article 1F(c).

### III.III Case law; a comparison

For the same reasons as in Chapter II, cases coming from France, the United Kingdom, Canada and the United States will be examined. The case law regarding Article 1F(c) and international terrorism is to date almost non-existent.

#### *France*

Article 1F(c) is mostly applied by the Conseil d’Etat when it involves serious violations of human rights and fundamental freedoms. In cases where Article 1F(c) is applied, this is usually in conjunction with Article 1F(a). This also includes the application of those who belong to a particular armed group who have committed acts against civilians. The Conseil d’Etat found in its judgment *Duvalier*<sup>120</sup> that respect for human rights and fundamental freedoms was among the principles and purposes of the United Nations. The occupation of a high position was not deemed necessary to commit grave acts against the fundamental human rights and freedoms, when the individual knew

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<sup>116</sup> E.Kwakwa, Article 1F(c): acts contrary to the purposes and principles of the United Nations, 12 International Journal of Refugee Law, Supplement (2000) 79, p 85.

<sup>117</sup> See above nr. 11.

<sup>118</sup> UN. GAOR 6th Comm. 51st Sess., 10<sup>th</sup> mtg. 19, UN. Doc. A/C.6/51/SR.10, at 5 (1996) ( statement of Ms Wilmherst of the United Kingdom).

<sup>119</sup> J.C.Hatheway, C.J. Harvey, Framing Refugee Protection in the new world Disorder, Cornell International L.J. Vol 34 p 257 (2001) p 267.

<sup>120</sup> Duvalier, 50, 265 19 July (1986) The former dictator of Haiti was denied the refugee status.

what was going on or should have known.<sup>121</sup> Following this line of interpretation, it would therefore be possible to exclude those who have committed acts of terrorism as well as those aiding a terrorist movement from refugee status based on Article 1F(c).

### *United Kingdom*

In the decision *T. v Secretary of State for Home Department*<sup>122</sup> the UK applied Article 1F to offences it considered to be terrorism. It did not; however elaborate on the definition of terrorism, or did it provide the elements necessary to constitute a crime of terrorism. It has been generally stated within the UK that article 1F(b) provides for a better application when it comes to acts of terrorism. It is then considered to fall within the scope of ‘a serious non-political crime’, since it involves the indiscriminate killing of civilians. Article 1F(c) has not been applied when it comes to the commission of terrorist acts.

### *Canada*

The most important case dealing with the applicability of Article 1F(c) in Canada is the *Pushpanathan v Canada*<sup>123</sup> case. Before this case Article 1F(c) had been used in a general matter, for a wide range of crimes, since its scope is larger than Article 1F(a) and it is not limited to crimes committed outside of the country as is required in Article 1F(b). In the *Pushpanathan*-case, the Court found that Article 1F(c) did not apply to drug trafficking, the crime for which the applicant had been excluded.<sup>124</sup> The Court stated this provision sees to “*exclude those individuals who are responsible for serious, sustained or systematic violations of fundamental human rights which amount to persecution in a non-war setting.*”<sup>125</sup> The Court found that Article 1F(c) applies in two categories: one based on an explicit designation and one based on the court’s determination. It follows that where a widely accepted international agreement or UN resolution explicitly declares that the commission of certain acts is contrary to the purposes and principles of the UN, there is a strong indication that those acts

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<sup>121</sup> See for example: *Nou v France*, Doc.Ref. November 1988, supp. p.5f ‘que même s’il n’a pas personnellement commis des agissements contraires aux buts et principes des Nations Unies, il a nécessairement, étant donné le caractère et les méthodes du régime Khmer Rouge, couvert leurs agissements en raison de ses responsabilités.’

<sup>122</sup> *T. v Secretary of State for Home Department*, imm. A.R. 142 (1995).

<sup>123</sup> *Pushpanathan v Canada*, I SCR 982 (1998) A Sri-Lankan citizen applied for refugee status in Canada in 1985. No action was taken and he was granted permanent residency under an administrative program in 1987. Shortly after that he became involved in narcotic trafficking and was sentenced to 8 years imprisonment. When on parole he attempted to renew his refugee status, which was referred to the Immigration and Refugee Board. This was denied on the basis of Article 1F(c).

<sup>124</sup> 69. It does not appear from international law that drug trafficking is contrary to the principles and purposes of the UN Charter.

<sup>125</sup> *Ibid.* at.1029.

will fall within Art 1F(c)<sup>126</sup>. Where such declarations or resolutions represent a reasonable consensus of the international community, that designation should be considered determinative.<sup>127</sup> The Court in this case gave international terrorism as an example of an explicit designation.

The Court disagreed with the UNHCR's point of view concerning the fact that in order to fall within the scope of Article 1F(c), the violator is required to hold a position of power. It stated that: "*some crimes that have specifically been declared to contravene the purposes and principles of the United Nations are not restricted to State actors.*"<sup>128</sup> "*Although it may be more difficult for a non-State actor to perpetrate human rights violations on a large scale amounting to persecution without the State thereby implicitly adopting those acts, the possibility should not be excluded a priori.*"<sup>129</sup>

### *The United States*

The difficulty in comparing case law regarding Article 1F(c) when it comes to the United States, is that this provision has not been incorporated within domestic law. It has several other articles, one specifically relating to the admission of those who seek refuge and have committed acts of terrorism. Under US law, courts must refuse to withhold deportation on grounds of national security if the government believes the applicant has engaged in 'terrorist activities.' A person engages in terrorist activities when he or she provides any material support or funding to an individual who has already committed, or plans to commit, a terrorist act.<sup>130</sup> There is however no case law making a link with 'acts contrary to the principles and purposes of the UN Charter.'

### III.IV Article 1F(b) v Article 1F(c)

We have looked at the applicability of the exclusion acts when it comes to acts of international terrorism and the membership to international terrorist organization under Article 1F(b) and Article 1f(c). After examining both provisions, it has been shown that to different degrees acts of international terrorism will fall within the scope of both Articles. The excludability of those who belong to a terrorist movement is still a matter of debate under both provisions. An important question to ask oneself is what provision is best suitable to determine the excludability of such an act; what provision provides the most effective manner to exclude an applicant under these circumstances.

The final determination of exclusion will not in any way change the position of the applicant. Whether his exclusion has been determined within Article 1F(b) or Article 1F(c), the applicant will not find himself in a different position. It may, in practice, be of importance for the applicant when the

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<sup>126</sup> Ibid at.1030.

<sup>127</sup> Ibid; This was stated by J. Bastarache in the dictum of the judgement as a summary.

<sup>128</sup> Ibid. at 1031.

<sup>129</sup> Ibid.

State decides to prosecute the applicant for the crimes committed. Considering the gravity of the crime that is necessary if one is to fall within the scope of Article 1F(c), the possibility for prosecuting the applicant under national law will be greater. The applicant may face higher penalties due to the high standard of proof required under this provision and the recognition under international law that the acts are fundamentally contrary to the principles and purposes of the UN.

The difference lies not only in the outcome for the applicant, but also within the possibilities for the country of refuge. Article 1F(b) provides a far more stable manner to exclude one who has committed acts of terrorism or even belongs to a terrorist movement. When violence is involved and the killing of civilians is used to obtain one's goal, it most likely will fall within the scope of this provision, since it concerns a serious non-political crime. As we have seen, the indiscriminate killing of civilians in most countries is qualified as a crime, and cannot be deemed political due to the absence of proportional use of means. It also has a lower threshold in establishing culpability. One does not have to prove beyond reasonable doubt the guilt of the applicant. Article 1F(b) does however, have a strong drawback; it only provides for the possibility to exclude those who have committed serious non-political crimes *outside* the country of refuge. States are thus much more restricted in their use of the exclusion clause under Article 1F(b).

Article 1F(c) has a much higher threshold when it comes to the culpability of the individual. The threshold in proving the applicant is guilty of the alleged crime is much higher, due to the gravity of the acts that are to fall within this clause. It may thus prove more difficult to exclude an applicant under this provision. There is however, one large advantage over Article 1F(b). This concerns the temporal scope of sub b. Article 1F(c) does require the act to have been committed outside the country of refuge, which provides for a much wider range in the use of the exclusion clauses. As has been argued, acts of international terrorism such as the Madrid bombings have such grave consequences for the international peace and stability that they are contrary to the principles and purposes of the UN. Article 1F(c) gives Spain the possibility (when for example the applicant finds himself on Spanish territory, has partaken in the bombings and has applied for refugee status) to exclude this individual from refugee status. This would not have been possible under Article 1F (b).

To date Article 1F(b), despite its temporal requirement, has proven to be the most frequently used provision when excluding acts of international terrorism. States are however, increasingly searching for possibilities to exclude applicants under Article 1F(c) due to the wider range concerning the temporal scope and possibly due to the aftermath; the prosecution of the applicant under national law, in which the individual may face a far more severe sentence due to the gravity of the crime that is sought to exclude under Article 1F(c).

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<sup>130</sup> 8 US.C. para 1182(a)(3)(B)(2000).

### III.V Conclusion

Article 1F(c) seeks to exclude those who have committed crimes which are contrary to the principles and purposes of the UN. When one is to apply this provision, it becomes clear that there is a certain overlap with Article 1F (a), in the sense that acts which are excludable under sub a will almost always fall within the scope of sub c; crimes that give rise to exclusion under sub a are most likely contrary to the principles and purposes of the UN.

According to some (for example the UNHCR), Article 1F(c) determines the excludability of those who have committed crimes within their State-like function. This means that those in positions of power or who have acted under the auspices of the State and have committed grave crimes may be excluded from refugee status. The reason that only such individuals may fall within the scope of this provision is due to the nature of the UN Charter. The UN Charter was set up to regulate inter-State relations and does therefore not apply to individuals other than those in the position of power or influence. One should nonetheless bear in mind that the 1951 Convention as well as the UN Charter are a dynamic given, and has to be interpreted according to the present-day context. Due to the globalisation and the upcoming of international organizations, which have managed to have a large-scale impact on the international plane, it is necessary to reanalyse this provision and interpret it in such a way that it is adapted to the situation as it is now. The UN has stated that acts of international terrorism are contrary to the principles and purposes of the UN. This means that, considering the gravity of international terrorism and the impact it has on inter-State relations and the international peace and security, it should fall within the scope of Article 1F(c). The mere membership of an international terrorist organization has not yet been found contrary to the principles and purposes of the UN and it does not affect in the same manner the international peace and security. Membership will thus not be an excludable act under this provision.

The case law on Article 1F(c) concerning acts of international terrorism is sparse. France determined that acts against civilians will provide for the possibility of exclusion, and does not deem it necessary for the applicant to have been in the position of power in the States frameworks. Individuals other than State functionaries have been found capable of committing grave acts contrary to the fundamental freedoms and human rights. The Conseil d'Etat even found that those who have actively aided international terrorism might be found guilty of acts contrary to the principles and purposes of the UN. The United Kingdom has showed preference Article 1F (b) in excluding acts of international terrorism. Canada found two circumstances in which Article 1F(c) would be applicable; in the case of explicit designation and when due to the Court's determination. It has similarly found that non-State actors may be held responsible for crimes committed against the principles and purposes of the UN. It mentioned international terrorism as an example of an act that could fall within

the scope of Article 1F(c), though it has not to date expressly dealt with this provision in conjunction with international terrorism. The United States has not incorporated Article 1F(c) and deals with such matter through different national provisions, which make it impossible to compare its case law with that of the other countries.

The difference between the exclusion of an applicant under Article 1F(b) and 1F(c) is twofold. Firstly there is the consequence the applicant will undergo after the exclusion has been established. It does not change the situation of the applicant in the sense that his status differs, but it may change his position when it comes to the prosecution of his crimes under national law. When he has been excluded under sub c, he may face graver penalties since the crimes committed within this clause are fundamentally contrary to the principles and purposes of the UN. The weight given to the crimes is much larger. It is also of importance for the possibilities of the State. The standard of prove is lower with sub b, and acts of international terrorism will in general be considered a crime as well as one that is serious and non-political. Whereas sub c requires a higher standard of prove, it does not have the temporal element. No matter where the crime has been committed, it may always fall within the scope of sub c, provided that it is fundamentally contrary to the international human rights and freedoms.

## Chapter Four: The Post Exclusion-Phase

When one has come to the conclusion that there are ‘serious reasons to believe’ that one has committed either a non-political crime or an act contrary to the principles and purposes of the United Nations, and should therefore be excluded from refugee status, what procedure is to follow?

There is to date no coordinated system that ensures this individual will be brought to justice for the crimes he is thought to have committed. The question that remains is the status that should be accorded to the persons who falls outside the scope of refugee protection, but cannot be expelled for humanitarian reasons and the absolute character of the non-refoulement as laid down in international instruments. The determination of the status of an excluded person as well as the mechanisms to be used by the State are not regulated within the 1951 Convention, nor is it regulated in other international instruments.

It is necessary however, to examine this question in the context of the question concerning the excludability of terrorist related acts. Since we are now dealing with a problem that is affecting the international community, it is imperative that this is dealt with on a global level, that States cooperate and harmonize the procedures to be followed after an applicant has successfully been excluded.

Considering the main goal of the 1951 Convention, namely the protection of those in need of it against persecution, the paradox between the exclusion from refugee status versus the fear of persecution from the applicant must be solved. The fear of persecution does not disappear once one is not considered to be a refugee. Does this person still have any rights or has he lost all claim to protection and is subjected to a different set of rules?

The position of the country the applicant sought refuge in must also be clarified. Since the State is granted a large amount of discretion on applying the exclusion clauses, this may be the same concerning the consequences it wishes to afford to the applicant. Though as we have seen earlier, the State does have to bear in mind the international instruments in applying the exclusion clauses. There is no provision within the 1951 Convention relating the instruments available for the State after the applicant has been denied the status of refugee. Does there exist any obligation for the State to step up and bring this person to justice according to its own national legal system, or can this person simply be returned to the country he fled from?

The answers to these questions are essential, since it runs to the very core of the exclusion clauses. Denying refugee status is a determinative procedure. What is the validity of the exclusion clauses if there are no consequences for the applicant, and what legal protection does this individual still own? The clauses would be void should there be no such consequences or obligations for the applicant and the State.

#### IV.I The rights and obligations of a non-Refugee

When the applicant has come to the country of refuge, seeking protection against feared persecution and is then excluded from this protection by the denial to grant him the refugee status, there should be a process, which should be followed after this determination. Like the determination of the status of refugee, the exclusion of this same status is one that is declaratory, but this does not provide an answer to what should follow. When the exclusion clauses have been found applicable, the individual cannot be recognized as a refugee and benefit from international protection afforded within the 1951 Convention. The applicant may still enjoy protection against forced return as a result of human rights obligations imposed on States. The 1951 Convention does not shed any light on this subject matter, which means that the answers must be sought in other international or regional instruments. In the following Chapter the author will provide a general overview of the relevant treaties and rights that are afforded to the applicant.

##### *IV.I.1 Treaties and Conventions*

The general standards concerning the fundamental Human rights, which are non-derogable, are largely treaty-based. The most significant Treaties that place restrictions on the forced return of the applicant to its country are the Convention on Torture; the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter The EU Convention) and the International Covenant on Civil and Political Rights (hereafter ICCPR). An applicant in the present case thus remains within the framework of the human rights protection afforded by several international and regional instruments. The protection afforded to the individual is based on certain criteria. The treaties do not all have the same legal or binding effect. This means that the degree to which the States are obliged to adhere to the treaties may vary depending on the status of the treaty. The principle of non-refoulement is one that we will find, directly or indirectly in all the Conventions and Treaties mentioned above.<sup>131</sup> The protection which is afforded under international humanitarian law does not oblige a State to accord a permanent right of residence when the applicant is not to be sent back to a third country. The applicant cannot derive the right to residence from the protection it inherently owns against torture or other breaches of fundamental human rights.

##### *1951 Convention*

This principle is one that we also find in the 1951 Convention: “*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 be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.*"<sup>132</sup> This principle is not absolute; once the State has determined that the individual poses a threat to its country it may derogate from this principle and nonetheless send the person back to another State. In the case of an applicant who has been excluded from refugee status this might very well be the case. The exclusion clauses are meant to bar those who have committed heinous acts from refugee status. The 1951 Convention clearly states that the Convention does not apply to those who have committed excludable acts. This means that a claim based on the 1951 Convention, more precisely the non-refoulement principle will not apply to this applicant. He has been deemed unworthy of this right.

### *European Convention*

This does not mean though, that the applicant may thus be returned to another State. If the applicant has been excluded from refugee status within the European Union, there are certain rights that he may claim that are absolute. This is illustrated by the fact that there is no exception formulated within the provision. One example of such a provision is Article 3 of the EU Convention that says: "*No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*" The European Court for Human Rights has determined in several cases<sup>133</sup> that a State may not derogate from this right. If one fears he will be subjected to torture or inhuman or degrading treatment or punishment upon return to another country, it is prohibited for the country to expel this person. One seeking refuge, as noted earlier, will be applying for a refugee status on the basis of fear for persecution. When the refugee status is not given due to the commission of an excludable act, this applicant most likely will fall within the range of this Article. This was found in the *Chahal* case<sup>134</sup>, where the Court stated that: even when the applicant has committed a terrorist act, he still has the right to protection against return to a country where persecution is feared.

### *The Convention Against Torture*

The Convention Against Torture states in Article 3(1): "*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.*" This is an explicit prohibition of refoulement.<sup>135</sup> Contrary

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<sup>131</sup> EU Convention Article 3, which can be considered to be an indirect prohibition; ICCPR Article 7; Article 3 CAT.

<sup>132</sup> 1951 Convention Article 33(1).

<sup>133</sup> See for example: *Soering v. United Kingdom*, 7 July 1989, par. 88; *Vilvarajah v. United Kingdom*, 30 October 1991, par. 103.

<sup>134</sup> *Chahal*, 15 November 1996.

<sup>135</sup> Indirect refoulement is prohibited as well. See for example: *Mutombo v. Switzerland*, 27 April 1994; *K v. Sweden*, 16 November 1998.

to Article 3 of the EU Convention, the existence of a risk of being exposed to torture is enough to protect one's right against refoulement. Though this Convention only applies to cases where torture is involved. All other forms of human rights abuse do not fall within the scope of this provision. States do not have the possibility to derogate from this Article, it is an absolute prohibition. An example can be found in the *Arana case*<sup>136</sup>, where France arrested Mr. Arana. He was suspected to belong to the terrorist movement ETA. Spain requested for him to be extradited, in order for him to be criminally prosecuted. Mr. Arana complained at the Anti-Torture Committee, who concluded that his extradition would be contrary to Article 3 ATC.<sup>137</sup> This was decided after the Committee had received numerous reports on the treatment of prisoners in the Spanish jails, where torture has been known to occur.

#### *International Covenant on Civil and Political Rights*

Article 7 ICCPR also entails the prohibition of the State to expose the applicant to forbidden treatment through expulsion, extradition or other means of return. This is an implicit prohibition<sup>138</sup>: “*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.*” As with The EU-Convention and the Torture Convention, Article 7 of the ICCPR is a non-derogable right. There are thus no exceptions allowed.<sup>139</sup>

#### IV.II The possibilities of the State

The State needs to act according to the international standards and obligations, assuring fundamental human rights and freedoms to the applicant, despite the fact that this person has committed excludable acts. But does the obligation to ensure certain rights to the applicant also entail the obligation to ensure certain rights to the international community in the sense that the excluded applicant should face criminal procedures? And if so, should this be according to its national criminal law system or is the State required to adhere to international instruments?

##### *IV.II.1 Prosecution*

Following a denial to grant refugee status international law offers the State the possibility to either surrender or prosecute the person excluded from refugee status. This principle is otherwise known as

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<sup>136</sup> *Arana v. France*, CAT 5 June 2000, no. 63/1997 para. 11.4 .

<sup>137</sup> *Ibid.* at para. 12.

<sup>138</sup> This was declared by the Human Rights Committee that sees to State practice that has to conform to this Convention. General Comment, 10 April 1992, nr.20 para. 9. See also *Kindler v. Canada*, 18 November 1993.

*aut dedere aut judicare*. The principle is not one that can be considered to belong to hard law, but will take effect when this has been regulated between States in bilateral or multilateral treaties concerning extradition. This to an extent provides a solution to the contradiction between the State's inherent right to protect itself and its citizens, the obligation it has to combat criminal acts, more specific acts such as terrorism and the applicant's right to protection against refoulement.<sup>140</sup> This principle is to be found in for example Article 7 of the European Convention on the Suppression of Terrorism: "A Contracting State in whose territory a person suspected to have committed an offence mentioned in Article 1<sup>141</sup> is found and which has received a request for extradition under the conditions mentioned in Article 6, paragraph 1, shall, if it does not extradite that person, submit the case, without exception whatsoever and without undue delay, to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any offence of a serious nature under the law of that State."

It is the implementation of this principle that causes the problem, since the manner in which it is applied differs from State to State. As mentioned before, it depends highly on the treaties concerning extradition between States. It is not desirable to send the applicant back to the country he fled from, and one cannot extradite when there is no State to whom the applicant may be sent.

If a State's national criminal system allows for it, an attempt is often made to prosecute the person accordingly. In rare cases does the State have universal jurisdiction<sup>142</sup>, this entitles the State to prosecute and punish anyone who is suspected of having committed crimes that fall within the scope of universal jurisdiction, such as genocide and crimes against humanity.

International tribunals have also played a role on the prosecution of those who have committed excludable acts. The ICTY and ICTR<sup>143</sup> are two of the more prominent examples in which the international community sought to ensure the fact that these crimes would not go unpunished. The International Criminal Court (ICC) is another example of such a tribunal, though it does not cover

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<sup>139</sup> R.J.A. Bruin & C.W. Wouters, *Terrorism and the Non-derogability of Non-Refoulement*, Vol.15 International Journal of Refugee Law, 2003, p. 23.

<sup>140</sup> Commission of the European Communities; Commission Working Document, The Relationship between safeguarding internal security and complying with international protection obligations and instruments, 5 December 2001, COM(2001) 743 final, para 2.1.

<sup>141</sup> Article 1 of the European Convention on the Suppression of Terrorism holds that: For the purposes of extradition between Contracting States, none of the following offences shall be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives: a an offence within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970; b an offence within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971; c a serious offence involving an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents; d an offence involving kidnapping, the taking of a hostage or serious unlawful detention; e an offence involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons; f an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence.

<sup>142</sup> See for example Belgium, though this is not the case anymore.

<sup>143</sup> The ICTY was adopted by UNSC Res. 827 (1993), 32 ILM 1192 1993; The ICTR was adopted by UNSC Res. 935 and 955 (1994).

terrorism as such. It only does so when it is associated with other serious crimes that implicate the international community. There is no obligation for the State to refer the applicant to an international tribunal. This will depend on the crime committed and the jurisdiction of the court in question. The ICC will thus not provide a universal insurance in preventing the impunity of Article 1F acts, but it does pose an alternative manner to prosecution.<sup>144</sup> The International Court of Justice (ICJ) also offers the possibility of prosecuting those who have been excluded under Article 1F, though this road has to date not been taken by States.

There exists also the possibility of extraditing the person. That is, if this is legally possible to either the country of origin or a third country. It also depends on the nature of the offence.<sup>145</sup> When an individual has committed an excludable act it will facilitate the extradition to a country that is willing to prosecute crimes of universal jurisdiction, as well as to international tribunals.<sup>146</sup> It is important in this case, that States come to a generally agreed upon definition of a serious non-political crime or what constitutes an act contrary to the principles and purposes of the UN, to enhance the effectiveness of the extradition process. Both the 1977 European Convention on the Suppression of Terrorism and the International Convention for the suppression of the Financing of Terrorism state that in case of extradition States are under no obligation to accede to the extradition “*if they have substantial grounds for believing that such request has been made for the purpose of prosecuting or punishing the person on account of reasons stated in Article 1A of the 1951 Convention or other reasons that would prejudice that person’s position*”<sup>147</sup>

#### IV.III Conclusion

When an act has been found to fall within the scope of the exclusion clauses, the question is then what the consequences of this determination are. The applicant finds himself in the position where he is denied the international protection offered under the 1951 Convention. Despite this finding the individual does remain in the legal sphere of the country of refuge, who is obliged under various international human rights treaties to provide him with protection against human rights violations such as torture. It is not possible for the State to derogate from this responsibility, no matter how grave the act committed by the applicant.

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<sup>144</sup> Edited by: E.Feller, V.Turk, F.Nicholsen, Refugee Protection in International Law; UNHCR’s Global Consultations on International Protection, Cambridge University Press, New York 2003 p. 468.

<sup>145</sup> UNHCR: Background Note on the Application of the exclusion clauses, HCR/GIP/03/05, International Journal of Refugee law, Vol 15, no 3 p502, 4 September 2003 p 508.

<sup>146</sup> J.C.Hatheway, C.J. Harvey, Framing Refugee Protection in the new world Disorder, Cornell International L.J.Vol 34 p 257 (2001) p. 318.

<sup>147</sup> Commission of the European Communities; Commission Working Document, *The Relationship between safeguarding internal security and complying with international protection obligations and instruments*, 5 December 2001, COM(2001) 743 final, para 2.3.

The presence of the applicant in the country of refuge poses a dilemma for the State. It has the possibility to secure the prosecution of the crimes committed by the person, so as to assure that this act does not go unpunished. The option open to the State to either prosecute according to its own criminal legal system, or if this is not possible, to extradite the applicant stems from the seriousness of the crime and the impact it has on the international community. There is no consensus as to the exact procedure to be followed when the State chooses to prosecute the applicant, leaving the State with a high degree of discretion. The prosecution of such crimes is may be based on the principle *aut dedere aut judicare*, this should be sought through extradition treaties or by having the individual face up to his acts in front of an international court, such as the ICC. When one wants to avoid the abuse of the 1951 Convention it is imperative to attribute consequences to the breach of fundamental human rights. Excludable acts should, according to the author, face prosecution in whatever form, so as not to let the exclusion clauses become void provisions.

## Conclusion

The 1951 Convention Relating to the Status of Refugees was drafted with the aftermath of World War Two freshly present in the background. In order to afford international protection in a rapidly developing world, the regulation of the refugee status became a necessity. It was clear however, that those who were responsible for the atrocities leading to persecution should not be able to fall within this protection by using the 1951 Convention as a shield. With this in mind the exclusion clauses were incorporated in order to render it impossible for those who are undeserving of international protection and should not escape prosecution for the individual to attain the refugee status. It is imperative to bear in mind that the exclusion clauses should only be applied in the case where it is strictly necessary and must thus be seen as an exception to the primary focus of protection.

The dilemma concerning the exclusion clauses that presents itself lies in the main objective of the 1951 Convention. The 1951 Convention's first and far most important goal is to grant international protection to those in fear of persecution. Those who have committed excludable acts also wish to obtain this protection out of fear of persecution. The grounds for exclusion should hence be applied restrictively and assessed closely in each individual case. This should be done due to the grave consequences for the applicant when he has been excluded from refugee status.

At the time one could not have foreseen the impact non-State actors could have on the international community. The upcoming of acts of international terrorism and the threat this poses to the international peace and security, has led to the necessity to reanalyze the existing legislation to effectively combat this phenomenon. Due to the absence of a binding international court supervising the application and interpretation of the provisions within the 1951 Convention, the need for States to harmonize their legislation is imperative. The process of globalization further demonstrates this need.

In this dissertation the applicability of the exclusion clauses concerning the commission of terrorist acts as well as the membership to a terrorist organization was examined. The focus was placed on Article 1F(b) ('serious non-political crimes) and 1F(c) (contrary to the principles and purposes of the UN). Article 1F(a) was not included since this provision sees to crimes committed in a war-like situation and international terrorism is not committed within the framework of a conventional war.

Terrorism as such has to date not been defined on an international level. Despite many attempts that have been made to find a common definition, it has proven more effective to criminalize and condemn acts as they occur. There are those who<sup>148</sup> believe that terrorism should not be defined as such, since it limits the scope and may thus exclude possible acts in the future. Though the author does feel there are certain elements, which are commonly found to be consistent with the notion of terrorism. This entails the indiscriminate killing of civilians in order to create a sense of chaos and

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<sup>148</sup> Prof.J.Dugard in his lecture at the university of Leiden, on the prohibition of the use of force.

disorder based on fear. Terrorism is used to change or destabilize the existing political structure by means of violence. The use of terrorism is not a new use of force, though the proportions that it has taken on have dramatically changed. Terrorism is gaining a more international element, in which it has the ability to influence the international peace and security as well as inter-State relations.

#### *Article 1F(b)*

Article 1F(b) has been found applicable when it comes to the commission of acts of terrorism. Despite the absence of a general agreed upon definition of terrorism, and the lack of this same definition with other elements of this provision, the case law reviewed distillates certain requirements that should be met in order for the act to be considered a crime that is of a non-political nature. The indiscriminate killing of civilians -as is intended with terrorist attacks- is considered a serious crime in most countries. When assessing the non-political nature of the crime the following elements are of importance as the relevant case law has shown; the required link between the means used and the aim that is pursued in such a case is lacking, and will furthermore be disproportional. The loss of its political character may also be determined when other motives are the predominant feature of the crime committed. When these requirements have been met, this will lead to the loss of the political status of the crime, making it possible to exclude the applicant from refugee status.

The applicability of the exclusion clauses when it comes to the membership of an international terrorist organization is more complicated. Article 1F(b) clearly states that it concerns the exclusion of one who has 'committed' a serious non-political crime. The belonging of an individual to an organization does not entail an element of commission. The UNHCR supports this by arguing that membership to criminal or terrorist organization alone is not enough to amount to responsibility; one must have been aware of the violence or in some other way contributed to the act.<sup>149</sup> This point of view has been acknowledged in several of the cases observed, generally expressing the requirement of a substantial involvement of the individual in the organization. The UNHCR also stated<sup>150</sup>, however, that the voluntary membership to a particularly violent organization may amount to complicity in the crimes in question. When the individual is a voluntary member, it may prove impossible to disassociate him for the actual commission of the terrorist act.

The trial chamber in the *Kvočka et al case*<sup>151</sup> found that the membership to a terrorist organization may lead to individual culpability in the case where the participant has contributed to the system in such a way that it facilitated the commission of such crimes.

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<sup>149</sup> UNHCR, Background note, p. 524.

<sup>150</sup> UNHCR, The Exclusion Clauses: Guidelines on their Application, December 1996, para. 47.

<sup>151</sup> Case No. IT-98-30/1, Trial Chamber judgement, 2 November 2001, para 312.

It is thus the opinion of the author that when an organization exists for the mere purpose of creating chaos and fear through violence, destabilizing the international peace and security and breaching fundamental human rights, it in fact amounts to a crime serious enough to be excluded in itself. Further, the burden of proof that lies with the State should be reversed and placed on the applicant who is thought to be a member of such a terrorist organization. Elements such as the position of the applicant within the group, the size of the group and the nature of the crimes committed during the time of his membership should be taken into consideration when exploring the possibility of his exclusion.

#### *Article 1F(c)*

Article 1F(c) was construed to enclose those who commit such grave crimes that they form acts contrary to the principles and purposes of the UN. In this sense it shows some overlap with Article 1F(a), because acts that fall within the scope of sub a will almost automatically be excludable under sub b. Article 1F(c) is seen as a net, in order to cover those acts which are not excludable under the other two provisions, but are nonetheless considered non-deserving of the refugee status. To date the interpretation of the UNHCR concerning Article 1F(c) was to exclude individuals in the case they acted under the auspices of the State. Only such individuals have the capacity to commit such grave acts that they form a threat to the international peace and security and are thus contrary to the principles and purposes of the UN.

In the opinion of the author this interpretation is not consistent with the present-day context, where non-State actors have managed to influence inter-State relations and can undermine the international stability. The UN has acknowledged in several resolutions that international terrorism is contrary to the principles and purposes of its organization.<sup>152</sup> The UNHRC stated that in order for acts to fall within the scope of Article 1F(c) they must be fundamentally contrary to the principles and purposes of the UN.<sup>153</sup> International terrorism as we have seen it seems to apply to this criterion, considering the extensive political consequences, not to mention the violence that is used that is fundamentally contrary to the norms of international human rights.

The fact that acts of international terrorism are contrary to the principles and purposes of the UN thus implies that those who are actively involved in the commission of such acts can be held accountable for their actions under Article 1F(c). As Edward Kwakwa<sup>154</sup> emphasizes, an individual other than one who is associated with a government is certainly capable of inflicting large-scale damages contrary to the UN principles. Such an individual may thus be excluded under Article 1F(c).

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<sup>152</sup> See for example: SCRes 1373, A/Res/49/60 annex

<sup>153</sup> UNHCR Background Note, p.318

<sup>154</sup> E.Kwakwa, *Article 1F(c): acts contrary to the purposes and principles of the United Nations*, 12 International Journal of Refugee Law, Supplement (2000) p. 85

This was confirmed in all the cases studied in which the courts decided that it is not necessary for a person to be in a high governmental position in order for the individual to commit acts contrary to the principles and purposes of the UN.

A different aspect concerns the excludability of the mere membership to an international terrorist organization. The UN has not elaborated in its resolutions on this matter, not explicitly stating that this may constitute an act that is contrary to the principles and purposes of the UN. Active involvement or indirect support, such as financing such organizations<sup>155</sup> has been condemned, but does not constitute an act, which is fundamentally contrary to the UN principles. It therefore seems that the mere membership will not fall within the scope of Article 1F(c) because it is firstly not mentioned as such by the UN members and does not constitute a threat so grave that it impairs the international peace and security. The cases observed all did not deal with membership of an international terrorist organization as an excludable act under Article 1F(c). It is hence not possible to exclude an individual from refugee status based on his membership to an international terrorist organization.

When comparing Article 1F(b) and Article 1F(c) concerning international terrorism, it becomes clear that to date sub b has been utilized most frequently. This is due to the fact that despite the absence of a general definition of a ‘serious non-political crime’, there seems to be a consensus over the fact that acts of terrorism qualifies as such. It is considered a crime and disproportional to the goal achieved, and thus excludable. Sub b also requires a lower standard of proof. It is not necessary to prove beyond reasonable guilt. Sub c has a significant higher threshold when proving the applicant’s guilt. An advantage for States is that it does not require the act to have been committed outside the country if refuge. Its scope is larger because the temporal requirement is not needed. Sub c serves as a last resort or a net, excluding those acts, which do not fall within the scope of the other two provisions, but are certainly fundamentally contrary to the principles and purposes of the UN.

The status of the applicant does not change depending on provision. In both cases he is undeserving of the refugee status and may not invoke the 1951 Convention in search of international protection. In practice however, the individual may find himself in a different position when a State has decided to prosecute him for his crimes. Due to the higher threshold of sub c and the gravity of the crimes committed, the individual might face a higher punishment when his culpability has been proven under this provision.

When the exclusion of the applicant has been established there is in principle no international protection afforded under the 1951 Convention. This does not mean that the individual has no right at all, on the contrary. The basic human rights prevent States from returning the applicant to a country where he faces persecution in the form of torture or other degrading and inhuman punishments. He may have not been granted the status of refugee, but he does have the right to life and protection

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<sup>155</sup> A/Res/54/109

against other human right abuses. The State, on the other hand, is not left empty handed. It may instigate its own criminal prosecution against the applicant, to prevent the act from going unpunished. The State in fact has the possibility to secure this prosecution under the principle *aut dedere aut judicare*, whether this is by extraditing the individual through bilateral or multilateral treaties, or by having him trialed at an international tribunal. This is necessary in order for the exclusion clause not be considered a void provision.

It has become clear that it is imperative for there to be cohesion amongst States when combating international terrorism. The harmonization of legislation and the cooperation is an absolute necessity in order to fully tackle this new threat to the international peace and security. The creation of a tribunal to facilitate this harmonization is but one example of instruments that could be used to effectively utilize the existing legislation. The International Court of Justice, for example, does have the jurisdiction to address the prosecution of those who fall within the scope of Article 1F, though this road has to date not been taken. One must bear in mind however, the core principle of the 1951 Convention, namely the international protection of refugees. The balancing of this principle with the State's concern for security should in principle not form a contradiction.

The world has to wake up to the new reality and create a sense of cohesion concerning common values and norms and take a clear stand in protecting this. The responsibility must be sought in a collective answer to this problem and must be dealt with accordingly.

“The future belongs to those who prepare for it today.”

**Malcolm X**

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