CHAPTER 1

Introduction

The 1951 Convention was drafted in the aftermath of the Second World War, in an attempt to address the problems posed and faced by over 10 million people who had become refugees as a result of the events of the war.[1] The Convention grants a broad host of rights and benefits to those that fall within the definition of 'refugee' contained in its Article 1A.[2] That is, a person who is outside their country of origin, and unable or unwilling to return to that country due to a fear of individual persecution.[3] However, Article 1F provides that the Convention:

shall not apply to any person with respect to whom there are serious reasons for considering that:

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

An individual who falls within the scope of Article 1F is excluded from the scope of the 1951 Convention *per se*, and all rights and privileges contained therein, notwithstanding a well-founded fear of persecution.[4]

The term terrorism does not appear in the text of Article 1F, nor was the issue raised during the debates surrounding the drafting of the provision.

1 Boccardi notes that the five years that followed the end of the Second World War were of pivotal importance for the development of the current international refugee regime. Boccardi I, 'Confronting a False Dilemma: EU Asylum Policy between "Protection" and "Securitisation"' (2007) 60 Current Legal Problems 208.

2 The 1951 Convention provides refugees with key civil and socio-economic rights. See James Hathaway, *The Rights of Refugees under International Law* (CUP, 2005).

3 The temporal limitation of the refugee definition to 'events occurring before 1 January 1951' was removed by the 1967 Protocol Relating to the Status of Refugees (31 January 1967) 606 UNTS 606 (the 1967 Protocol). Hereinafter all references to the 1951 Refugee Convention are taken to include the 1967 Protocol.

4 This does not mean, however, that an excluded individual will cease to benefit from the rights and benefits contained in other international instruments, human rights treaties in particular.

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However, the exclusion of terrorists from refugee protection is a theme which appears in a number of international instruments which both preceded and were adopted subsequent to the 1951 Convention. Prior to the Second World War, international instruments relating to the legal status of refugees did not contain exclusion provisions as such, as these instruments defined refugees in terms of discrete groups of persons considered in need of protection.[5] It was only with the move toward a more individualistic refugee definition, which focused more on the circumstances of the individual, rather than group membership, that the concept of exclusion emerged. The Constitution of the International Refugee Organisation (IRO Constitution) excluded large numbers of individuals from the IRO's mandate. These included: 'war criminals, quislings and traitors' and those who had, since the end of hostilities, participated in any organisation hostile to the government of a member of the United Nations or had participated in any terrorist organisation.[6]

Despite the reference to those who had participated in terrorist organisations in the exclusion clauses of the IRO Constitution, terrorism was not an issue debated during the drafting of Article 1F nor the equivalent provision (paragraph 7) contained in the Statute of the United Nations High Commissioner for Refugees (UNHCR Statute).[7] As both the UNHCR Statute and the 1951 Convention were drafted in the wake of the Second World War, considerable emphasis was rather placed on the need to exclude war criminals and associated persons from refugee protection. However, individuals who commit terrorist acts are explicitly excluded from the protection of a number of regional instruments adopted since the 1951 Convention came into force.

5 Early refugee instruments adopted under the auspices of the League of Nations applied to Russian and Armenian refugees, while later arrangements extended to Assyrians and other Christian minorities from the Ottoman Empire, and a small number of Turkish political refugees. Prior to the outbreak of World War II, a number of instruments also attempted to address the huge numbers of Jewish refugees fleeing Nazi Germany.

6 UN Constitution of the International Refugee Organisation, New York (15 December 1946) 18 UNTS 3, Annex I Part II. Annex to UNGA Resolution 62 (I) UN Doc A/PV.67 (IRO Constitution). The Constitution entered into force 20 August 1948. The Constitution of the IRO also made note of principles contained in Extradition and Punishment of War Criminals, UNGA Res 3(I) (13 February 1946) UN Doc A/PV.32 (later to become Annex III of IRO Constitution).

7 UNGA Statute of the Office of the United Nations High Commissioner for Refugees (14 December 1950) A/RES/428(V) (UNHCR Statute). Paragraph 7 provides: 'In respect of whom there are serious reasons for considering that he has committed a crime covered by the provisions of treaties of extradition or a crime mentioned in Article VI of the London Charter of the International Military Tribunal or by the provisions of Article 14, paragraph 2, of the Universal Declaration of Human Rights'.

The exclusion provision of the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention) does not include a reference to terrorism.[8] Terrorism is, however, explicitly mentioned in the exclusion provisions contained in the 1994 Arab Convention on Regulating Status of Refugees in the Arab Countries (Arab Refugee Convention),[9] and the European Union's (EU) Qualification Directives which form part of the Common European Asylum System (CEAS).[10] Article 2(1) of the Arab Convention provides that the provisions of the Convention shall not apply to any person who '[h]as been convicted of having committed a war crime, a crime against humanity *or a terrorist crime* as defined in the international conventions and covenants'.[11] The Arab Convention has not, however, been ratified, and it is unlikely it will come into force. Terrorism also appears in the exclusion provisions of the EU's Qualification Directives.[12] In relation to Article 1F(c)'s reference to 'acts contrary to the purposes and principles of the United Nations', the preambles to the Qualification Directives provide:

> Acts contrary to the purposes and principles of the United Nations are set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations and are, amongst others, embodied in the United Nations Resolutions relating to measures combating terrorism, which declare that 'acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations' and that 'knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations'.[13]

8 Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa (10 September 1969) 1001 UNTS 45 (OAU Refugee Convention).

9 League of Arab States 'Arab Convention on Regulating Status of Refugees in the Arab Countries' (1994) (not yet ratified) (Arab Refugee Convention).

10 Council Directive 2004/83/EC on the minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. [2004] OJ L304/12 (2004 Qualification Directive); Council Directive 2011/95/EU of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast). [2011] OJ L337/9 (2011 Qualification Directive). The 2004 Qualification Directive was recast in 2011. This did not, however, affect the provisions on exclusion from refugee status.

11 Emphasis added.

12 2004 Qualification Directive, Art. 12; 2011 Qualification Directive, Art. 12.

13 2004 Qualification Directive, Recital 22; 2011 Qualification Directive, Recital 31.

The EU Directives therefore refer directly to UN resolutions which refer to 'acts, methods and practices of terrorism' falling within the scope of Article 1F(c) of the 1951 Convention.[14]

These resolutions are those that have been adopted by the UN General Assembly and Security Council over the last two decades, beginning with the General Assembly's Declaration on Measures to Eliminate International Terrorism (the 1994 Declaration) and Declaration to Supplement the 1994 Declaration (the 1996 Declaration). These declarations contain several paragraphs that concern refugees and asylum seekers. Member States affirm that 'acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations' and also that 'knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations'. States are also called on to 'take appropriate…before granting refugee status, for the purpose of ensuring that the asylum-seeker has not participated in terrorist acts'.[15] These provisions in the 1996 Declaration appear to have begun as a result of a UK proposal.[16]

The reference to asylum seekers and refugees in resolutions on terrorism first appeared in the UN Security Council in Resolution 1269 of 1999. This resolution 'Calls upon all States to…take appropriate measures…before granting refugee status, for the purpose of ensuring that the asylum seeker has not participated in terrorist acts'.[17] Two Security Council resolutions concerning terrorism which included reference to asylum seekers and refugees also followed the 9/11 attacks on the United States in 2001. Resolutions 1373 and 1377 again call on States to 'take appropriate measures…before granting refugee status, for the purpose of ensuring that the asylum seeker has not participated in terrorist acts', and further to '[e]nsure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts'.[18] Both resolutions firmly declare that 'acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations'.[19] This language also appears in Resolution 1624 of 2005, which again seems to be the result of a

14 See Boccardi for consideration of how Article 1F was included in previous EU measures, including the 1996 Joint Position of the Council (4 March 1996) OJ L63/2. Boccardi *Europe and Refugees: Towards an EU Asylum Policy* (n 7) 107–110.

15 UNGA Dec 1994, paras 2 and 5(f); UNGA Dec 1996, paras 2, 3 and 4.

16 United Nations General Assembly 'Summary Record of the 10th Meeting' (3 October 1996) UN Doc A/C.6/51/SR.10.

17 UNSC Res 1269, para 4.

18 UNSC Res 1373, paras 3(f) and (g).

19 UNSC Res 1373, para 5. UNSC Res 1377, preamble para 5.

UK initiative.[20] Indeed, during the drafting debates President Bush of the United States noted the Council was meeting just over two months after the 7/7 terror attacks in London.[21]

It is not clear why references to refugees and asylum seekers were included in these resolutions, since not one of the 9/11 hijackers was a refugee or seeking refugee status in the United States. Similarly, the 7/7 bombings in London were a classic case of 'home grown' terrorism: all the 7/7 bombers were born and bought up in the UK. Nevertheless, similar language concerning asylum seekers and refugees has also been included in a number of later UN General Assembly Resolutions, further entrenching the asylum-terrorism connection and stressing the need to exclude suspected terrorists from refugee status.[22]

In line with the increased international attention focused on the threat posed by international terrorism, there has been a clear inter-governmental desire on the part of States to ensure terrorists are excluded from refugee status. However, the Security Council did not define terrorism in these resolutions, nor did it refer to an existing definition of terrorism.[23] Indeed, whilst the international community has repeatedly condemned terrorist acts, at present there is no universally agreed definition as to what in fact constitutes 'terrorism'.

1 What is Terrorism?

Despite the great amount of legal and political attention within the UN that has focused on the threat posed by international terrorism, terrorism as a

20 UNSC, 5261st Meeting (14 September 2005) UN Doc S/PV.5261, p. 6.

21 UNSC Res 1624, preamble paras 7 and 8. SC, 5261st Meeting, UN Doc S/PV.5261 (14 September 2005), p. 5 (President Bush). The lack of debate surrounding the adoption of SC Resolutions 1373 and 1377 mean it is not possible to draw conclusions on the motivations underlying the inclusion of provisions relating to asylum seekers and refugees, although Tunisia, the UK and the US appear to have been the principle supporters. UNSC, 4413th Meeting, UN Doc S/PV.4413 (12 November 2001), p. 13 (Mr Ben Yahia); p. 15 (Mr Straw); pp. 16–17 (Mr Powell).

22 UNGA Res 56/160 (13 February 2002), paras 7 and 8; UNGA Res 59/195 (22 March 2005), paras 9 and 10; UNGA Res 60/288 (20 September 2006), para 7. The Call for States to 'take appropriate measures…before granting refugee status, with the purpose of ensuring that the asylum seeker has not planned, facilitated or participated in the commission of terrorist acts' has also been included in the UN High Commissioner for Human Rights' Res 2002/35 (22 April 2002), para 8; the European Union's Common Position on Terrorism of 2001 and a 2010 Statement by the President of the Security Council. Common Position on Terrorism, 2001/930/CFSP, see Articles 18 and 17; Statement by the President of the Security Council, S/PRST/2010/19 (27 September 2010), p. 3.

23 UNSC Counter-Terrorism Committee (n 4) 44.

concept has proved one the international community has struggled to define. At present, there is no universally agreed definition of 'terrorism'.

Recently, attempts were made to include terrorism as one of the core international crimes within the jurisdiction of the International Criminal Court. However, these attempts failed, as states were unable to agree on a definition of the crime.[24] There have also been attempts to draft a Comprehensive Convention on International Terrorism, but negotiations have fallen into deadlock, again because a definition of 'terrorism' cannot be agreed upon.[25] The primary problem that states encounter when attempting to agree upon a definition of terrorism concerns the question of whether an exception should be made for the activities of national liberation movements. Hence the old saying 'one person's terrorist is another's freedom fighter'. Was Nelson Mandela a terrorist or a freedom fighter? Is violence unjustified *per se*, or can exceptions sometimes be made, for example, for those fighting against repressive regimes?

Due to the difficulty agreeing upon a universal definition of 'terrorism', the international community has thus far preferred to adopt international conventions concerning certain categories of acts that are considered to be so heinous that they permit no exception for national liberation movements.[26] There are at present a host of international counter-terrorism conventions prohibiting acts such as hostage taking, hijacking, and the use of explosives.[27]

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

24 UNGA 'Final Act of Conference of Plenipotentiaries on the Establishment of an International Criminal Court' (17 July 1998) UN Doc A/CONF.183/10 Resolution E. A definition of terrorism was also not included following the Review Conference in Kampala in 2010.

25 Ben Saul, *Defining Terrorism in International Law* (Oxford University Press, 2006) 184 *et seq*.

26 Anthony Aust, *Handbook of International Law* (2nd edn, CUP, 2010) 265.

27 For example, Convention for the Suppression of Unlawful Seizure of Aircraft (16 December 1970) 860 UNTS 105; International Convention against the Taking of Hostages (17 December 1979) 1316 UNTS 205; International Convention for the Suppression of Terrorist Bombings (15 December 1997) 2149 UNTS 284. For more see Saul, *Defining Terrorism* (n 50) 129–190.

(i) acts normally criminalised under national penal systems;
(ii) which are intended to provoke a state of terror in the population or coerce a state or international organisation to take (or abstain from) some sort of action;
(iii) are politically or ideologically motivated.[28]

Terrorism is therefore an umbrella term that can potentially cover a wide range of acts, provided Cassese's three cumulative conditions are met. These acts will generally already be crimes under domestic and/or international law. The classification of these crimes as 'terrorist' hinges on their underlying motivation, i.e. that the act be politically or ideologically motivated and intended to provoke a state of terror in the public or coerce a government or international organisation.

Despite the difficulties states have encountered in defining an international crime of terrorism, the Special Tribunal for Lebanon recently declared that a customary crime of terrorism in times of peace has crystallised at international law. Basing its decision on the adoption of national laws, judgments of national courts, international and regional treaties and UN resolutions, the Tribunal held that this definition of terrorism comprises three elements:

(a) The perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act;
(b) The intent to spread fear among the population (which would generally entail the creation of a public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; and
(c) When the act involves a transnational element.[29]

This definition of terrorism essentially replicates Cassese's earlier formulations, with the added criteria that the act must involve some transnational

28 Antonio Cassese, 'The Multifaceted Criminal Notion of Terrorism in International Law' (2006) 4 Journal of International Criminal Justice 933, 937. See also Alex Conte, *Human Rights in the Prevention and Punishment of Terrorism* (Springer, 2010), who comes to a similar conclusion. However, the suggestion that a definition of terrorism has emerged as a matter of customary law is contentious, and Saul argues that no separate customary crime of terrorism exists. Saul, *Defining Terrorism* (n 50) 270.

29 *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* STL-11-01/1 (16 February 2011) [85].

element.[30] Again, the definition permits a considerable range of acts that may constitute 'terrorism', and such acts will generally already be crimes under domestic or international law. The Tribunal's assessment of customary law in this decision is, however, highly controversial, and the validity of recognising a crime of terrorism under customary international law severely criticised.[31] It therefore remains to be seen whether the Tribunal's approach will be followed by courts and tribunals around the world, particularly as since the decision is not binding on courts other than the Tribunal itself.[32]

Whilst many definitions of terrorism exist, no one definition has achieved universal acceptance. The closest that the UN Security Council has come to defining the term was in Resolution 1566 of 2004, in which the Council offered a non-binding definition of the term, allowing States to adopt their own definitions.[33] The absence of a universally accepted definition of terrorism means that it is left to individual States, or regional organisations, to determine the range of acts (or crimes) that may be described as 'terrorist', and whether an exception is permitted for national liberation movements.

'Terrorism' is therefore an amorphous and ambiguous term. A multitude of definitions exist at present within international and domestic legal systems, none of which have achieved universal acceptance. The purpose of this research is not to provide a definition of terrorism; this topic has been examined extensively elsewhere.[34] Rather, this research examines whether and in what ways 'terrorism' has featured in the UK's interpretation and application of Article 1F. As will be considered below, although the term 'terrorism' does not appear in the text of Article 1F itself, those who commit terrorist acts may

30 Curiously, the definition does not include the requirement that the act be politically or ideologically motivated.

31 See, for example, Saul, B. 'The Special Tribunal for Lebanon and Terrorism as an International Crime: Reflections on the Judicial Function', in W.A. Schabas, Y. McDermott and N. Hayes (eds), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Ashgate Publishing, 2013), 79–99.

32 *Interlocutory Decision on the Applicable Law* (n 55) 142. While this decision was referred to by the UK Supreme Court in the criminal case *Gul, R. v* [2013] UKSC 64, [33]–[36], it is notable that the Supreme Court in *Al-Sirri* stated that 'there is as yet no internationally agreed definition of terrorism', as considered in Chapter 4. *Al-Sirri* [2012] (n 13) [37].

33 UNSC Res 1566 (8 October 2004) UN Doc S/RES/1566 (2004), para 3. As considered further in Chapter 4.

34 For example, Saul, *Defining Terrorism* (n 50); Conte (n 54). Klabbers J, 'Rebel with a Cause? Terrorists and Humanitarian Law' (2003) 14(2) European Journal of International Law 299–312. Singh S, 'Will Acceptance of a "Universally Approved Definition" of Terrorism Make Article 1F of the 1951 Refugee Convention More Effective in Excluding Terrorists?' (2006) 2(3) Journal of Migration & Refugee Issues 91–119.

fall to be excluded from refugee status under the provision, as the acts in question may fall within the definitions of the crimes enumerated therein. Similarly, those who participate in the activities of a terrorist organisation may be considered responsible for the commission of such acts and therefore fall within the scope of the provision.

2 Article 1F and Terrorism

Although the term 'terrorism' does not appear in the text of Article 1F, terrorism has at least the potential to feature largely in the interpretation of the provision. Many individuals suspected of committing terrorists acts will not qualify as refugees under Article 1A of the 1951 Convention at all, since they may not be fleeing persecution but legitimate *prosecution* in a third state.[35] Those that are fleeing persecution may nevertheless be excluded from refugee status under Article 1F. A terrorist act could be considered to amount to a war crime or crime against humanity under Article 1F(a). Provided they take place in the context of an armed conflict, the concept of 'war crime' includes many acts that would be considered terrorist in nature, such as intentionally directing attacks against civilians and civilian objects, using indiscriminate means of warfare, and taking hostages.[36] Massive attacks on a civilian population may also constitute a 'crime against humanity' under Article 1F(a). Attacks on a civilian population committed by a terrorist organisation, in the context of a widespread and systematic attack against it, may therefore

35 James Hathaway and Colin Harvey, 'Framing Refugee Protection in the New World Disorder' (2001) 34 Cornell International Law Journal 257, 284–285. However, illegitimate or irregular prosecution may amount to persecution where relevant forms of discrimination result in selective prosecution, denial of procedural or adjudicative fairness, or differential punishment.

36 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 August 1949) 75 UNTS 31 (Geneva Convention I), Art. 50; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949) 75 UNTS 85 (Geneva Convention II), Art. 51; Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949) 75 UNTS 135 (Geneva Convention III), Art. 130; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (12 August 1949) 75 UNTS 287 (Geneva Convention IV), Art. 147; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (8 June 1977) 1125 UNTS 13 (Additional Protocol I), Articles 11 and 85; Rome Statute of the International Criminal Court (17 July 1998) 2187 UNTS 3 (Rome Statute), Art. 8.

fall within the definition of crimes against humanity as a matter of international law.[37]

Terrorist acts that do not meet the gravity of a war crime or crime against humanity may nevertheless fall within the scope of Article 1F(b) of the 1951 Convention, which excludes those that have committed 'a serious non-political crime'[38] from refugee status. Although Article 1F(b) refers to serious *non-political* crimes, terrorist acts may fall within the scope of this provision despite being committed with political objectives when the act in question is disproportionate to the alleged objective.[39] Many terrorist acts will also be considered sufficiently 'serious' to fall within the scope of the provision.

The final ground of exclusion under Article 1F is for those who are 'guilty of acts contrary to the purposes and principles of the United Nations'. As highlighted above, a number of UN resolutions call on states to exclude terrorists from refugee status and state that 'acts methods and practices of terrorism are contrary to the purposes and principles of the United Nations', specifically recalling the wording of Article 1F(c) of the 1951 Convention, and including terrorism within this ground of exclusion.[40] Terrorism has therefore explicitly been held to fall within the scope of Article 1F(c).[41] Those who participate in the activities of a terrorist organisation may also be considered responsible for the commission of such acts, and therefore fall within the scope of the Article 1F.

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37 It has now been recognised that crimes against humanity can be committed during peacetime, and the application of crimes against humanity to non-state actors, in particular terrorist groups, has been confirmed. Statute of the International Criminal Tribunal for Rwanda (ICTR Statute) (8 November 1994), established by Security Council Res 955 (8 November 1994) and last amended by Security Council Res 1717 (2006) (13 October 2006) UN Doc S/Res/955, Art. 3; Rome Statute, Art. 7; *Prosecutor v Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1 (2 October 1995) [140]–[141].

38 '…outside the country of refuge prior to his admission as a refugee'.

39 UNHCR 'Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees (UNHCR Guidelines)' (4 September 2003) HCR/GIP/03/05UNHCR 5; UNHCR 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (UNHCR Handbook)' (January 1992) HCR/IP/4/Eng/REV.1, para 152.

40 UNGA Dec 1994, para 2; UNGA Dec 1996, para 2; UNSC Res 1373, para 5; UNSC Res 1377, preamble role 5; UNSC Res 1624, preamble role 8.

41 Goodwin-Gill however points out that a number of these resolutions also oblige Member States to act in accordance with international human rights and international refugee law implementing such measures. Goodwin-Gill G, 'Forced Migration: Refugees, Rights and Security' (n 5) 1–17.

Individuals who are suspected of committing terrorist acts may therefore be excluded from refugee status under Articles 1F(a), (b) and/or (c) of the 1951 Convention. However, in the absence of a universally agreed definition of terrorism, considerable discretion is left to Member States to determine what 'terrorism' is and who a 'terrorist' is. A number of commentators have expressed concern that this discretion leaves the 1951 Convention's exclusion clause open to abuse by Member States seeking to exclude genuine asylum seekers from refugee status.[42]

There has clearly been a strong political drive within the UK to ensure that terrorists are excluded from refugee status. As noted above, a number of the UN resolutions relating to terrorism and refugees began life as UK proposals. In addition, in 2006 the UK's Immigration Asylum and Nationality Act came into force, s 54 of which provides that '[i]n the construction and application of Article 1(F)(c) of the Refugee Convention the reference to acts contrary to the purposes and principles of the United Nations shall be taken as including… (a) acts of committing, preparing or instigating terrorism… and (b) acts of encouraging or inducing others to commit, prepare or instigate terrorism'. The meaning of 'terrorism' here is that given by the UK's broad domestic definition contained in the Terrorism Act 2000. Since the 1951 Convention has not been formally incorporated into the UK's domestic legal system, Article 1F represents one of the very few provisions of the 1951 Convention that are the subject of primary legislation in the UK. The increasing importance of Article 1F in the UK is furthermore highlighted by the fact that in the past few years the UK Supreme Court and the Court of Appeal have handed down an unprecedented number of decisions concerning the interpretation of the provision.[43]

42 Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP, 2007) 191–197; Andreas Zimmermann and Philipp Wennholz, 'Article 1F 1951 Convention', in Andreas Zimmerman (ed.) *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (OUP, 2011) 606–607. Zanchettin M, Asylum and Refugee Protection After September 11: Towards Increasing Restrictionism? (n 5); Mathew P, 'Resolution 1373 – A Call to Pre-empt Asylum Seekers?' (n 3) 19–61; Goodwin-Gill G, 'Forced Migration: Refugees, Rights and Security' (n 5); Zard M, 'Exclusion, Terrorism and the Refugee Convention' (n 3) 32–34; Saul B, 'Protecting Refugees in the Global "War on Terror"' (n 5).

43 *AA-R* (*Iran*) *v Secretary of State for the Home Department* [2013] EWCA Civ 835; *Al-Sirri v Secretary of State for the Home Department* [2012] UKSC 54; *SK* (*Zimbabwe*) *v Secretary of State for the Home Department* [2012] EWCA Civ 807; *AH* (*Algeria*) *v Secretary of State for the Home Department* [2012] EWCA Civ 395; *SS* (*Libya*) *v Secretary of State for the Home Department* [2011] EWCA Civ 1547; *Secretary of State for the Home Department v DD* (*Afghanistan*) [2010] EWCA Civ 1407; *JS* (*Sri Lanka*), *R* (*on the application of*) *v Secretary of State for the Home Department* (*Rev 1*) [2010] UKSC 15; *JS* (*Sri Lanka*), *R* (*on the application of*)

Despite the increased importance of Article 1F in UK asylum law, there is at present a lack of clear information on the application and interpretation of the provision in the UK. Unlike many other European States, the UK does not at present publish comprehensive data on exclusion from refugee status under Article 1F.[44] Furthermore, although an important and highly politicised area of law, the use and interpretation of Article 1F in the UK is a little researched topic. While there is a body of literature which focuses on terrorism and the interpretation of Article 1F of the 1951 Convention, this literature primarily examines the international UN measures outlined above.[45] Where the UK's domestic practice has been considered, this has principally been subsumed within comparative analyses with Canada, Australia, the United States and other European countries.[46] The wide scope of this research has restricted the depth of this examination and resulted in a rather limited analysis of the issue. Literature which has specifically considered the UK's domestic practice has been limited to examination of case law and not taken into account the UK's legislative framework,[47] and all this research fails to situate the UK's practice within the wider international legal context, with the result that there appears

v Secretary of State for the Home Department [2009] EWCA Civ 364; *KJ* (*Sri Lanka*) *v Secretary of State for the Home Department* [2009] EWCA Civ 292; *MH* (*Syria*) *v Secretary of State for the Home Department* [2009] EWCA Civ 226; *Al-Sirri v Secretary of State for the Home Department & Anor* [2009] EWCA Civ 222.

44 See for example UNHCR 'Asylum in the European Union' (n 8); ECRE 'The Impact of the EU Qualification Directive' (n 8).

45 Guy Goodwin-Gill, 'Forced Migration: Refugees, Rights and Security' (n 5); Penelope Mathew, 'Resolution 1373' (n 3); Matthew Gibney, 'Security and the Ethics of Asylum after 11 September' (2002) 13 Forced Migration Review 40.

46 Umut Turksen, *Protection Seekers, States and the New Security Agenda – A Comparative Analysis of the Impact of Anti-Terrorism Legislation on the Law Relating to Asylum Seekers in the United Kingdom, the United States of America and Australia* (DPhil, University of West of England, 2008); Won Kidane, 'The Terrorism Bar to Asylum' (n 3) 300; Evelien Brouwer, Petra Catz and Elspeth Guild (eds) *Immigration, Asylum and Terrorism: A Changing Dynamic in European Law* (Recht & Samenleving, 2003); Kapferer S, 'Exclusion Clauses in Europe – A Comparative Overview of State Practice in France, Belgium and the United Kingdom' (2000) 12 (Special Supplement) International Journal of Refugee Law 195–221; Guild E, and Garlick M, 'Refugee Protection, Counter-Terrorism, and Exclusion' (n 6) 63–82; Simeon JC, 'Complicity and Culpability and the Exclusion of Terrorists from Convention Refugee Status Post 9/11' 29(4) Refugee Survey Quarterly 104–137; Satvinder Juss, 'Complicity, Exclusion, and the "Unworthy" in Refugee Law' (2012) 31 Refugee Survey Quarterly 1; Rikhof J, *The Criminal Refugee: The Treatment of Asylum Seekers with a Criminal Background in International and Domestic Law* (Dordrecht, 2012).

47 Satvinder Juss, 'Terrorism and the Exclusion of Refugee Status in the UK' (2012) 17 Journal of Conflict and Security Law 465.

to be lack of sustained *legal* appraisal of the UK's practice in interpreting and applying Article 1F.

The purpose of this research is therefore to provide, in an unprecedented way, knowledge and understanding of the ways in which terrorism is being employed in the UK's interpretation and application of each of the individual limbs of Article 1F. The importance of this topic, and limited amount at present known about the use of Article 1F in the UK, was recognised by the Senior President's Office of the UK's immigration tribunal, which granted the present researcher permission to conduct research on Article 1F with immigration judges throughout the UK. The methodologies employed in this research are considered below.

3 Methodology

As noted above, the UK does not at present publish comprehensive data on exclusion from refugee status under Article 1F of the 1951 Convention. This means it is extremely difficult to establish what is happening in relation to the application of the provision in practice. As explained by a member of the Home Office's Special Cases Unit (SCU), which handles Article 1F cases:

> SCU 1: "But of course at the root of all this, which is for you, and for me and for the judiciary, is the lack of reliable data. It isn't recorded by them it isn't recorded by us, particularly at appeal."

A number of sources are therefore drawn on in this research in an attempt to provide an overview of the application of Article 1F in the UK.

Data concerning exclusion from refugee status in the UK under Article 1F was obtained from the Home Office in response to a number of Freedom of Information (FOI) requests made by the present researcher. This data relates to initial decisions made by the UK Border Agency (UKBA), and details the number of individuals excluded from refugee status under Article 1F of the 1951 Convention, the nationality of those excluded and the limb of Article 1F relied on in the exclusion decision. Due to the nature of the UKBA Case Information Database, this data does not concern decisions made prior to the last quarter of 2007 and relates only to initial decisions of the Agency.[48]

48 It therefore does not include instances where Article 1F is raised at a later stage, i.e. after asylum has been granted or upon appeal, or information on whether the initial decision was upheld or overturned upon appeal. Data was also not available for the number of

A quantitative analysis was also made of UK cases at tribunal and court level concerning exclusion from refugee status under Article 1F. These cases were compiled from searches of legal databases and the Upper Tribunal (Immigration and Asylum Chamber) Reported Determinations Database, in an attempt to capture all reported decisions. The method used in selecting cases for analysis involved a comprehensive survey, rather than selection of the most interesting or provocative cases. Decisions on leave to appeal or leave to seek judicial review were excluded from the sample of cases selected for analysis, as were cases in which Article 1F was briefly mentioned but considered irrelevant to the outcome of the case.[49] In total 33 cases were analysed. Two of these were conjoined cases, and it was decided to consider these as four separate cases, bringing the total to 35.[50] These cases were analysed and coded thematically, in order to draw out key information.

In order to triangulate and expand upon the data provided by the Home Office and the case analysis outlined above, a qualitative research study was undertaken that focused on the experiences of three stakeholder groups: immigration judges, legal representatives and Home Office staff with experience in Article 1F cases.

The primary method of data collection involving judicial participants was questionnaires. The sample of immigration judges was based on a convenience sampling technique, with the sole criteria of selection being individuals wishing to take part in the research project. Introductory letters and questionnaires prepared by the present researcher were electronically distributed to all full-time and part-time immigration judges sitting in both the First Tier and Upper Tribunal of the Immigration and Asylum Chambers in England, Scotland, Wales and Northern Ireland by the President's Office of the Immigration & Asylum Chamber in February 2013. In total 36 completed questionnaires were returned to the researcher in March 2013. The judicial participants that responded to questionnaires included

individuals excluded from subsidiary (humanitarian) protection, or granted protection but removed under Article 33(2) of the 1951 Convention.

49 For example, in a number of cases the asylum applicant was not considered credible and therefore found not in need of protection, but the tribunal made comments to the effect that if they had been found credible, they would fall to be excluded under Article 1F. *PM and others* (*Kabul – Hizb-i-Islami*) [2007] UKAIT 00089; *MA* (*Palestinian Arabs – Occupied Territories – Risk*) [2007] UKAIT 00017.

50 The sample included cases heard before the Supreme Court, the House of Lords, the Court of Appeal, the Upper Tribunal (Asylum and Immigration Chamber) and its predecessor the Immigration and Asylum Tribunal (IAT) and the Special Immigration Appeals Commission. Some of these cases are duplicated as they concern a case which rose through the higher courts.

experience at the First Tier and Upper Tier of the Asylum and Immigration Chambers (including the tribunals' previous incantations) and the Special Immigration Appeals Commission (SIAC). 21 judicial participants gave details of the specific tribunals they had experience sitting at. Experience included tribunals in England, Wales, Scotland and Northern Ireland.[51]

Interviews were also conducted with a number of immigration judges. These took place between April and July 2013. In total five interviews were conducted with judicial participants.[52] Interviewees included judges with experience sitting at the First-tier and Upper Tribunal of the Asylum and Immigration Chamber, the High Court and the SIAC. Interviews were also conducted with a number of legal representatives with experience in Article 1F cases. The sample included legal representatives that had acted both on behalf of asylum applicants and the Home Office. In total eight barristers were interviewed and one barrister responded in writing to questions provided by the present researcher. Three of the barristers that took part in this research had acted as counsel for the Home Office, and six had acted as counsel for asylum applicant(s), some also on behalf of interveners such as the UNHCR and Justice. A solicitor who had acted on behalf of asylum applicants in Article 1F cases was also interviewed via telephone. In June 2013 a member of the Home Office's Special Cases Unit (SCU) was also interviewed as part of this research. This interviewee had over ten years of experience working for both the War Crimes Unit and the SCU within the Home Office, and had personally handled and overseen scores of Article 1F cases.[53]

All these methodologies all involve relatively small sample sizes, which is reflective of the exceptional use of Article 1F in the UK and therefore the small number of people involved in the exclusion process. Viewed together, however, they provide a unique and compelling overview of the use and application of Article 1F in the UK.

51 The majority of participants had experience sitting at more than one immigration tribunal. Tribunals included: Belfast (1); Birmingham (1); Bradford (4); Croydon Magistrates Court (1); Field House (2); Glasgow (3) Harmondsworth (1); Hatton Cross (9); Havant (1); Manchester (3); Newport (1); North Shields (3) Nottingham (1); Stoke (1); Surbiton (2); Sutton (2); Taylor House (7). One participant also indicated London (unspecified).

52 Two judicial participants elected to be interviewed rather than complete the questionnaire.

53 For the purpose of this book, judicial participants who completed questionnaires are given anonymised numerical participant numbers (i.e. Judge 23). Participants who took part in interviews are assigned alphabetised participant labels (e.g. Judge C, Barrister E) in order to distinguish these from the comments and responses provided in the questionnaires. The Special Cases Unit team member who took part in this research is accorded the anonymised label SCU 1.

CHAPTER 5

Responsibility and Membership of a Terrorist Organisation

Perhaps the most important aspect of Article 1F is the level of complicity in the commission of Article 1F acts that must be established for an asylum applicant to be excluded from refugee status. Whilst Article 1F clearly applies to those who personally perpetrate excludable acts, responsibility may also arise where the asylum applicant has contributed to or been complicit in the commission of such crimes. Terrorism has featured to a large extent in the UK's interpretation of responsibility for the purpose of Article 1F. This has arisen primarily in relation to the extent to which an asylum applicant can be held responsible for the commission of the activities of a terrorist group or organisation of which they are a member. Since terrorism has featured largely in the interpretation of individual responsibility as a result of membership of an organisation in the context of Article 1F, this mode of incurring responsibility for Article 1F acts will be the primary focus of this chapter.

Article 1F excludes from the benefits of the 1951 Convention those for whom there are serious reasons for considering have 'committed' or 'been guilty of' the acts specified therein. The IRO Constitution went a little further than this. In addition to 'war criminals, quislings and traitors' and ordinary criminals extraditable by treaty, the IRO Constitution excluded from the organisation's mandate those who had 'participated' in any organisation with the purpose of overthrowing the government of a UN Member State, 'participated' in any terrorist organisation or 'become leaders' of movements hostile to the government of a UN Member State.[1] However, these forms of responsibility were not included in the terms of Article 1F, nor were they raised during the drafting of the provision. During the drafting of Article 1F, reference was repeatedly made

1 IRO Constitution, Annex I Part II, Article 6: '(a) participated in any organization having as one of its purposes the overthrow by armed force of the Government of their country of origin, being a Member of the United Nations; or the overthrow by armed force of the Government of any other Member of the United Nations, or have participated in any terrorist organization; (b) become leaders of movements hostile to the Government of their country of origin being a Member of the United Nations or sponsors of movements encouraging refugees not to return to their country of origin'.

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to those who had 'committed' one of the enumerated acts, rather than being a member of or participated in a particular organisation or movement.[2]

The OAU Refugee Convention similarly makes reference to those who have 'committed' or 'been guilty' of the crimes and acts listed in its exclusion provision. The Arab Refugee Convention rather refers to individuals that have 'been convicted' of a war crime, crime against humanity, terrorist crime or serious non-political crime. However, Article 1F's 'serious reasons for considering' clearly mandates that a lower standard of proof is required than a criminal conviction.[3] Indeed, the EU Qualification Directives do not include the requirement that an individual must be convicted of a crime in order to be excluded from refugee status, but rather replicate Article 1F's references to those who have 'committed' or 'been guilty' of excludable acts. The Directives furthermore specify that the exclusion provisions apply 'to persons who incite or otherwise participate in the commission of the crimes or acts mentioned therein'.[4]

The EU Qualification Directives' reference to those who 'incite or otherwise participate' in the commission of an Article 1F act may be seen as reflecting the well established principle of international criminal law, by which, although criminal liability clearly attaches to the physical perpetration of a crime,

2 Although the formulation of Article 1F referred to those who had '*committed* a crime specified in Article VI of the London Charter of the International Military Tribunal' or '*falls under'* the provisions of article 14(2), UDHR, the reference to an individual falling under the terms of the UDHR appears to have been understood by delegates to mean an individual having 'committed' the acts specified therein. Thus, in criticising reference to the UDHR in paragraph (b), the UK delegate noted that the clause would seem to include refugees who had 'committed' a crime, no matter how trivial, provided it was a non-political crime. The UK delegate was further concerned that persons who 'committed' minor crimes in their country of refuge should not be excluded from the benefits of the Convention. UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons 'Twenty-ninth Meeting' (n 348) (Mr. Hoare [United Kingdom]). The final text of Article 1F(b) ultimately adopted at the Conference refers to an individual who has 'committed' a serious non-political crime…'. The text of Article 1F(c) was similarly revised during the drafting debates to refer to an individual who has 'committed' acts contrary to the purposes and principles of the United Nations. However, this was finally amended to refer to a person who has been 'guilty of' acts contrary to the purposes and principles of the United Nations. UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons 'Twenty-ninth Meeting'.

3 See Chapter 7 for interpretation of 'serious reasons for considering' and standard of proof required in Article 1F cases. The wording 'has been guilty of' contained in Article 1F(c), as opposed to the 'has committed' contained in the previous two paragraphs of Article 1F, cannot be interpreted as inserting a different threshold for individual responsibility in the context of Article 1F(c). Zimmermann and Wennholz (n 68) 603.

4 Qualification Directives, Art. 12(2)(3).

liability also attached to various forms of participation in the commission or attempted commission of the act. The rationale for this approach to responsibility for participation in an international crime was outline by the Appeals Chamber of the ICTY as follows:

> Most of these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design. Although some members of the group may physically perpetrate the criminal act (murder…), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less – or indeed no different – from that of those actually carrying out the acts in question.[5]

Thus an individual may be held responsible for the commission of an international crime through various modes of participation. For example, Article VI of the London Charter provides that individual responsibility for crimes against peace, war crimes and crimes against humanity attaches to 'Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes' who are responsible for 'all acts performed by any persons in execution of such plan'. Article 7(1) of the ICTY Statute similarly provides:

> A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.[6]

The Rome Statute of the ICC for the first time explicitly systematises the requirements of individual criminal responsibility, and in Article 25(3) distinguishes modes of criminal participation to which individual responsibility attaches.[7] Furthermore, the *ad hoc* tribunals of Rwanda and former Yugoslavia

5 *Prosecutor v Tadic* (Appeal Judgment) ICTY-94-1-A (15 July 1999) [191].

6 Articles 2–5 define war crimes, the crime of genocide and crimes against humanity.

7 These are: (a) the commission a crime, whether as an individual, jointly with another, or through another person; (b) ordering, soliciting or inducing the commission of a crime; (c) aiding, abetting or otherwise assisting in the commission of the crime, or; (d) in any other way contributing to the commission or attempted commission of the crime by a group of

have developed in their jurisprudence the concept of 'joint criminal enterprise', whereby an individual may be held criminally responsible for participating in crimes committed by a group where they share a 'common plan or purpose'.[8]

The UN resolutions on terrorism similarly declare not only that 'acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations', but also that 'knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations'.[9] Indeed, in Resolution 1377 the Security Council stressed that 'the financing, planning and preparation of as well as *any other form of support* for acts of international terrorism are similarly contrary to the purposes and principles of the Charter of the United Nations'[10]

In the UK, Regulation 7(3) of the Qualification Regulations provides that Articles 1F(a) and (b) of the 1951 Convention apply 'to a person who instigates or otherwise participates in the commission of the crimes or acts specified in those provisions', echoing Article 12(3) of the EU Qualification Directives.[11] Section 54 of the UK Immigration, Asylum and Nationality Act 2006 goes further for the purpose of Article 1F(c), providing that the reference to acts contrary to the purposes and principles of the United Nations shall be taken as including… (a) acts of committing, preparing or instigating terrorism…and (b) acts of encouraging or inducing others to commit, prepare or instigate terrorism. Responsibility for Article 1F crimes in the UK is therefore not limited to those who physically perpetrate them, but extends to those who instigate or participate in the commission of such crimes. Although these provisions provide different modes of liability for Article 1F(c), as opposed to Articles 1F(a) and (b), in practice courts and tribunals in the UK have relied on the same approaches to responsibility under all three limbs, as will be considered throughout the course of this chapter.

Terrorism has featured largely in the UK's interpretation of Article 1F responsibility in the jurisprudence of courts and tribunals in the UK, particularly where an individual has not personally committed one of the crimes or acts

persons acting with a common purpose. Articles 25(3)(e) and (f) also criminalise certain preparatory actions.

8 *Prosecutor v Tadic* (n 460).

9 UNGA Dec 1994, para 2; UNGA Dec 1996, para 2; UNSC Res 1373, para 5; UNSC Res 1377, preamble para 5; UNSC Res 1624, preamble para 8.

10 UNSC Res 1377, preamble para 5 (emphasis added).

11 Qualification Directives, Art. 12(2): 'Paragraph 2 applies to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein'.

listed in Article 1F, but is a member of, or associated with, a terrorist organisation that has committed such a crime. The UK Supreme Court has, however, recently disapproved the previous guidance on responsibility which focused on the terrorist nature of the organisation of which the individual was associated, and applied an interpretation which is more akin to that employed in international criminal law, although there still appear to be significant divergences between the approaches adopted in the refugee and criminal legal contexts. Parts 1 and 2 of this chapter examine the *Gurung* approach to Article 1F responsibility, and the difficulties encountered when trying to apply this approach in practice. In Part 3 the recent decisions of the Supreme Court and Court of Appeal are examined, while in Parts 4 and 5 there is a wider discussion of these different approaches to Article 1F responsibility and their interplay with the standards of liability employed in international criminal law.

1 The *Gurung* Doctrine

The leading case on Article 1F exclusion in the UK for a number of years was *Gurung v Secretary of State for the Home Department*, a starred decision of the immigration tribunal which pre-dated the UK Qualification Regulations and the EU Qualification Directive.[12] In the *Gurung* decision, the tribunal sought to provide guidance on the interpretation of Article 1F following the recent 9/11 terrorist attacks on the United States. The tribunal in this case advocated a dynamic approach to interpreting the provision, and noted that '[i]n deciding such issues as complicity we will need to look more and more to international criminal law definitions'.[13]

One of the key issues the tribunal had to determine in this case was whether simple membership of an organisation that had committed acts or crimes proscribed by Article 1F was enough to bring an individual within the scope of the provision. Whilst the tribunal acknowledged that mere membership of an organisation that committed such acts was not generally enough to bring an individual within the scope of Article 1F,[14] it went on to state:

> it would be wrong to say that an appellant only came within the Exclusion Clauses if the evidence established that he has personally participated in acts contrary to the provisions of Art. 1F. *If the organisation is one or has*

12 *Gurung* (*Exclusion, Risk, Maoists*) (n 85).

13 Ibid. [34].

14 Ibid. [104].

> *become one whose aims, methods and activities are predominantly terrorist in character, very little more will be necessary*.[15]

The tribunal held that there was a presumption an asylum applicant was excluded from refugee status under Article 1F where they were a voluntary member of an organisation that was 'predominantly terrorist in character', even if there was no evidence the individual had personally participated in the terrorist activities of the group. The tribunal considered this form of complicity necessary in order to adequately reflect the realities of modern-day terrorism, as the 'terrorist acts of key operatives are often possible only by virtue of the infrastructure of support provided by other members who themselves undertake no violent actions'.[16] The tribunal did, however, stress that:

> whilst complicity may arise indirectly, it remains essential in all cases to establish that the appellant has been a voluntary member of such an organisation who fully understands its aims, methods and activities, including any plans it has made to carry out acts contrary to Art. 1F.[17]

Although the tribunal observed that international criminal law and international humanitarian law should be the principal sources of reference when dealing with issues such as complicity in international crimes, and referred to the Rome Statute and the ICTY's Statute and jurisprudence,[18] the tribunal did not go on to analyse these sources. Rather, individual responsibility under the *Gurung* approach may be incurred where an individual is a voluntary member of an organisation that is 'predominantly terrorist in character'.

In reaching this conclusion, the tribunal in *Gurung* drew on a long standing line of jurisprudence on the interpretation of Article 1F responsibility, established by the Canadian Federal Court of Appeal in the seminal *Ramirez* decision.[19] Since this decision pre-dated the statutes of the *ad hoc* tribunals and the Rome Statute, the Canadian Court based its analysis of individual responsibility in large part on domestic US and Canadian decisions, commentaries of academic writers, and the London Charter of the International Military Tribunal (IMT). Drawing particularly on the London Charter's reference to '[l]eaders,

15 Ibid. [105] (emphasis added).

16 *Gurung* (*Exclusion, Risk, Maoists*) (n 85) [106].

17 Ibid. [108].

18 Ibid. [109].

19 *Ramirez v Canada* (*Minister of Employment and Immigration*) [1992] 2 FC 306 (Federal Court of Appeal), [23].

organizers, instigators and accomplices' in its Article VI, the Court held that Article 1F exclusion attaches not only to those that had physically perpetrated an Article 1F crime, but also accomplices and abettors. The question then remained 'What degree of complicity is required to be an accomplice or abettor?' In its judgment, the Canadian Court based its analysis of Article 1F responsibility on the concept of 'personal and knowing participation in persecutorial acts'.[20] In the case of crimes committed by a group, the court was of the opinion that 'complicity rests…on the existence of a shared common purpose and the knowledge that all of the parties in question may have of it'.[21] The requirement of 'personal and knowing participation' meant that 'mere membership in an organization which from time to time commits international offences is not normally sufficient for exclusion from refugee status'.[22] However, the court went on to state that 'where an organization is principally directed to a *limited, brutal purpose*…mere membership may by necessity involve personal and knowing participation in persecutorial acts'.[23] On this reasoning, responsibility so as to give rise to exclusion may be incurred as a result of simple membership of an organisation, where the organisation is considered particularly violent in nature. The Canadian approach to Article 1F individual responsibility found widespread support within jurisdictions such as New Zealand, the UK and the United States, and was also approved by the UNHCR.[24]

Although the UNHCR advises that 'membership per se of an organisation that commits or incites others to carry out violent crimes is not necessarily decisive or sufficient to exclude a person from refugee status',[25] it further notes that 'the purposes, activities and methods of some groups are of a particularly violent nature, with the result that voluntary membership thereof may also raise the presumption of individual responsibility'.[26] This presumption of individual responsibility reverses the burden of proof, so it rests on the asylum

20 Ibid. [23].

21 Ibid. [19].

22 Ibid. [16]. This conclusion was supported by the jurisprudence of the IMT, which excluded from criminal responsibility persons who had no knowledge of the criminal purposes or acts of the organisation of which they were a member.

23 Ibid., [17] (emphasis added).

24 Rikhof J, 'War Criminals Not Welcome; How Common Law Countries Approach the Phenomenon of International Crimes in the Immigration and Refugee Context' (2009) 21(3) International Journal of Refugee Law 453–507. Rikhof includes a detailed analysis of the approaches to Article 1F responsibility adopted in the United States, Canada, Australia and New Zealand.

25 UNHCR Background Note (n 164) para 59.

26 UNHCR Guidelines (n 65) para 19.

applicant to demonstrate that they have not been involved in the criminal activities of the organisation. In the context of membership of a terrorist organisation, in its 2001 document, 'Addressing Security Concerns', published shortly following the 9/11 terrorist attacks, the UNHCR stated:

> Where, however, there is sufficient proof that an asylum-seeker belongs to an extremist international terrorist group, such as those involved in the 11 September attacks, voluntary membership could be presumed to amount to personal and knowing participation, or at least acquiescence amounting to complicity in the crimes in question.[27]

This approach therefore presumes individual responsibility where an asylum applicant is a voluntary member of an 'extremist terrorist organisation'. This paragraph of the UNHCR's 2001 document was cited by the AIT in the *Gurung* decision in support of its conclusion that an individual could be excluded under Article 1F for mere membership of an organisation that is 'predominantly terrorist in character'. There are a number of difficulties with applying this approach to Article 1F responsibility in practice, however, as will be considered in the following section.

2 The Problems in Identifying an 'Extreme Terrorist Organisation'

The *Gurung* approach to Article 1F responsibility based on simple membership of an organisation grounds individual responsibility in the *nature* of the organisation, i.e. whether the organisation is 'predominantly terrorist in character'. One of the main difficulties with this approach surrounds the issue of determining whether an organisation is 'predominantly terrorist in character' so as to fall within the *Gurung* doctrine.[28]

Many States and international organisations have adopted their own lists of proscribed terrorist organisations.[29] However, automatic exclusion based on membership of an organisation included in one of these proscribed lists has been cautioned against. In its recent Advisory Opinion, the CJEU stated that:

27 UNHCR 'Addressing Security Concerns without Undermining Refugee Protection – UNHCR's Perspective' (29 November 2001) para 18.

28 Saul notes that it is questionable whether front-line decision-makers can easily make such complex judgments. Saul B, 'Protecting Refugees in the Global "War on Terror"' (n 5).

29 For example, see UK Terrorism Act 2000, Schedule II; Council Common Position 2001/931/CFSP, 93.

> the fact that a person has been a member of an organisation which, because of its involvement in terrorist acts, is on the [proscribed list of terrorist organisations adopted by the European Union]…does not automatically constitute a serious reason for considering that that person has committed 'a serious non-political crime' or 'acts contrary to the purposes and principles of the United Nations'.[30]

Rather, the CJEU was of the opinion that regard must be had to the specific facts of each case individually. Although membership of an organisation included on such a list is a factor to be taken into account during the exclusion decision, 'the mere fact that the person concerned was a member of such an organisation cannot automatically mean that that person must be excluded from refugee status'.[31] Indeed, the UNHCR itself has cautioned against exclusion based on membership of a proscribed organisation, noting that 'lists established by the international community of terrorist suspects and organisations…would be drawn up in a political, rather than a judicial process and so the evidentiary threshold for inclusion is likely to be much lower [than ICTY/ICTR indictments]'.[32] Similarly, the UNHCR notes that '[n]ational lists of terrorist suspects or organisations will tend to have a lower evidentiary threshold than their international counterparts, due to the lack of international consensus'.[33] This is amply demonstrated in the UK context, as considered below.

The UK's list of proscribed terrorist organisations is contained in Schedule 2 of the Terrorism Act 2000. Organisations are included in this list at the discretion of the Secretary of State, where he or she believes that the organisation is 'concerned in terrorism'.[34] The subjective nature of this test, coupled with the broad definition of terrorism contained in Section 1 of the Terrorism Act 2000, means the decision to include an organisation within this list is at the discretion of the Secretary of State. It is not therefore clear that organisations included in this list will necessarily meet the threshold necessary to be considered 'predominantly terrorist in character' under the *Gurung* doctrine.

30 *Bundesrepublik Deutschland v. B and D*, (n 283) [99].

31 Ibid. [88].

32 UNHCR Background Note (n 164) para 106.

33 Ibid. para 109.

34 UK Terrorism Act 2000, s 3(4), see also s 3(5). At present there are 59 proscribed terrorist organisations contained in this schedule. The Home Office Exclusion APG advise that: 'Case owners should consider exclusion particularly carefully where there is evidence that an individual has been convicted of an offence under Section 11 of the Terrorism Act 2000 (belonging, or professing to belong, to a proscribed organisation)'. Home Office Exclusion APG, s 2.4.3.

Thus the Court of Appeal has held that, although the Kurdistan Workers' Party (Partiya Karkeren Kurdistan: PKK) was included in the UK's list of proscribed terrorist organisations, there was 'no suggestion that it fell at the extreme end of the continuum'[35] so as to give rise to the *Gurung* presumption of exclusion.[36] Similarly, the Court of Appeal has held that the Tamil Tigers (LTTE), again included on the UK's list of proscribed terrorist organisations, could not be considered 'predominantly terrorist in character' under the *Gurung* doctrine.[37]

The UNHCR advises that a presumption of exclusion should arise only where the list has a credible basis and if the criteria for placing a particular organisation on the list are such that all members can reasonably be considered to be individually involved in violent crimes.[38] In the absence of an international list of proscribed terrorist organisations with a clear and credible legal basis, it therefore falls to the national courts to determine whether an organisation is 'predominantly terrorist in character' so as to give rise to the *Gurung* presumption of Article 1F exclusion. The tribunal in *Gurung* suggested considering organisations along a 'continuum' for this purpose with, at one end:

> an organisation that has very significant support amongst the population and has developed political aims and objectives covering political, social, economic and cultural issues. Its long term aims embrace a parliamentary, democratic mode of government and safeguarding of basic human rights. But it has in a limited way or for a limited period created an armed struggle wing in response to atrocities committed by a dictatorial government.[39]

The tribunal considered that in such a case an adjudicator should be extremely slow to conclude an applicant's mere membership of the organisation raises any real issue under Article 1F. However, at the other end of the continuum, the tribunal hypothesised an organisation which:

35 See below for the Gurung 'contimuum approach' to determining the nature of an organisation.

36 *MH* (*Syria*) (n 69) [36].

37 Since the organisation 'pursued its political ends in part by acts of terrorism and in part by military action directed against the armed forces of the government of Sri Lanka'. *KJ* (*Sri Lanka*) (n 69) [38].

38 UNHCR Background Note (n 164) 62.

39 *Gurung* (*Exclusion, Risk, Maoists*) (n 85) [112].

> has little or no political agenda or which, if it did originally have genuine political aims and objectives, has increasingly come to focus on terrorism as a modus operandi. Its recruitment policy, its structure and strategy has become almost entirely devoted to the execution of terrorist acts which are seen as a way of winning the war against the enemy, even if the chosen targets are primarily civilian. Let us further suppose that the type of government such an organisation promotes is authoritarian in character and abhors the identification by international human rights law of certain fundamental human rights.[40]

In the case of this latter type of organisation, the tribunal was of the opinion that 'any individual who has knowingly joined such an organisation will have difficulty in establishing he or she is not complicit in the acts of such an organisation'.[41] Thus, following the Canadian *Ramirez* decision, the tribunal considered the key factor in establishing Article 1F responsibility rested on the nature of the organisation: 'The more an organisation makes terrorist acts its *modus operandi*, the more difficult it will be for a claimant to show his voluntary membership of it does not amount to complicity'.[42]

However, a more recent trend in state practice has been to move away from focus on the nature of an organisation when determining whether an asylum applicant is responsible for the commission of Article 1F acts. As noted above, in its recent Advisory Opinion, the CJEU stated that the fact that an asylum applicant had been a member of a proscribed terrorist organisation does not automatically constitute serious reasons for considering they are individually responsible for the crimes committed by that group.[43] Rather, the Court stressed that there must be an individual assessment of the facts of each case, so as to make it possible to determine whether there are serious reasons for considering the individual committed, instigated or participated in an Article 1F crime or act within the meaning of the Qualification Directive.[44] Indeed, a number of problems with the *Gurung* approach to Article 1F responsibility

40 Ibid. [113].

41 Ibid. [113].

42 Ibid. [151].

43 *Bundesrepublik Deutschland v B and D* (n 283) [99].

44 Ibid. [94]. The CJEU similarly advised that, rather than focus on the terrorist nature of an organisation, Article 1F exclusion: 'is conditional on an assessment on a case-by-case basis of the specific facts, with a view to determining whether the acts committed by the organisation concerned meet the conditions laid down in those provisions and whether individual responsibility for carrying out those acts can be attributed to the person concerned' *Bundesrepublik* [99].

were highlighted by the Court of Appeal and Supreme Court in the seminal *JS* (*Sri Lanka*) case, which concerned exclusion under Article 1F(a).[45]

In the *JS* (*Sri Lanka*) case, both the Court of Appeal and the Supreme Court considered the level of responsibility required to bring an individual within the scope of Article 1F. The Court of Appeal stated it did not find it helpful to try and place organisations along a 'continuum' as suggested by the tribunal in *Gurung*.[46] In his leading judgment, Toulson LJ noted that 'it provides a subjective and unsatisfactory basis for determining whether as a matter of law an individual is guilty of an international crime'.[47] Firstly, he considered that the tribunal:

> rolled up a number of factors which might cause somebody wedded to the ideals of western liberal democracy to take a more or less hostile view of the organisation and to use an assessment of where the organisation stands in relation to those values in deciding whether its armed acts were "proportionate."[48]

In Toulson LJ's opinion, factors such as whether the organisation's long term aims embraced a democratic mode of government did not seem relevant to the question of individual responsibility for the purpose of Article 1F.[49] Indeed, his Lordship considered the fundamental problem with the continuum approach adopted by the tribunal in *Gurung* was that it:

> takes the decision maker's eye off the really critical questions whether the evidence provides serious reasons for considering the applicant to have committed the actus reus of an international crime with the requisite mens rea and invites a less clearly focused judgment.[50]

The Supreme Court in the *JS* (*Sri Lanka*) case also criticised the 'continuum' approach, stating that '[t]he reality is that there are too many variable factors involved in each case, some militating one way, some the other, to make it helpful to try to place any given case at some point along a continuum'.[51] Lord Brown, in his leading judgment, found it 'more troubling still' that:

45 *JS* (*Sri Lanka*), *R* EWCA (n 69) [95]; *JS* (*Sri Lanka*), *R* UKSC (n 69).
46 *JS* (*Sri Lanka*), *R* EWCA (n 69) [95] [111].
47 Ibid. [112].
48 Ibid. [112].
49 Ibid. [113].
50 Ibid. [114]. Approved by the Supreme Court *JS* (*Sri Lanka*), *R* UKSC (n 69) [45].
51 *JS* (*Sri Lanka*), *R* UKSC (n 69) [32].

> the tribunal in these paragraphs introduces considerations which properly have no place at all in determining how article 1F applies. Whether the organisation in question is promoting government which would be "authoritarian in character" or is intent on establishing "a parliamentary, democratic mode of government" is quite simply nothing to the point in deciding whether or not somebody is guilty of war crimes. War crimes are war crimes however benevolent and estimable may be the long-term aims of those concerned. And actions which would not otherwise constitute war crimes do not become so merely because they are taken pursuant to policies abhorrent to western liberal democracies.[52]

The Supreme Court and Court of Appeal in these cases therefore disapproved the *Gurung* approach to exclusion. Rather than focus on the nature of the organisation in question when determining Article 1F responsibility, both the Court of Appeal and the Supreme Court preferred to approach the issue from the basis of international criminal law, as considered below.

3 Towards Convergence with International Criminal Law

In the *JS* (*Sri Lanka*) cases, both the Court of Appeal and Supreme Court preferred to approach the issue of Article 1F responsibility by employing the standards of international criminal law, rather than focus on the nature of an organisation of which an asylum applicant was a member.

In his leading judgment in the Court of Appeal, Toulson LJ based the standard of individual responsibility in Article 1F cases on the ICTY's doctrine of joint criminal enterprise,[53] formulating the requirements for joint criminal enterprise liability as follows:

> in order for there to be joint enterprise liability, there first has to be a common design which amounts to or involves the commission of a crime provided for in the statute. The actus reus requirement for criminal liability is that the defendant must have participated in the furtherance of the joint criminal purpose in a way that made a significant contribution to the crime's commission. And that participation must have been with the

52 Ibid. [32].

53 After referring to the Rome Statute of the ICC, the ICTY Statute, and considering in some detail the *Tadic* decision of the ICTY and subsequent ICTY jurisprudence.

> intention of furthering the perpetration of one of the crimes provided for in the [Rome] statute.[54]

His Lordship thus aligned Article 1F responsibility closely with international criminal jurisprudence on individual responsibility, departing from the 'personal and knowing participation' standard traditionally employed by States Parties to the 1951 Convention. Toulson LJ's approach rather focuses on the level of participation of the asylum applicant in the commission of the international crime, employing the standards of *mens rea* and *actus reus* established by the ICTY. In particular, the individual must have made a 'substantial contribution' to the commission of the crime, with the mens rea intent of furthering the perpetration of one of the crimes enumerated in the Rome Statute.

As regards membership of an extremist organisation, Toulson LJ noted that:

> [a] person who becomes an *active* member of an organisation devoted exclusively to the perpetration of criminal acts may be regarded as a person who has conspired with others to commit such acts and will be criminally responsible for any acts performed in pursuance of the conspiracy.[55]

However, Toulson LJ cautioned that he used the words 'active member' deliberately, since issues of responsibility were unlikely to present a problem in the case of an active member of an organisation dedicated entirely to terrorist activities.[56] However, he considered that 'it is another matter if an organisation pursues its political ends in part by acts of terrorism and in part by other means. Joining such an organisation may not involve conspiring to commit criminal acts or in practice doing anything that contributes significantly to the commission of criminal acts'.[57] Toulson LJ's approach therefore departs from the *Gurung* decision of the tribunal in two important respects. Firstly, his Lordship bases Article 1F responsibility predominantly on the standards of individual responsibility established by the ICTY's doctrine of joint criminal enterprise, rather than the 'personal and knowing participation' standard traditionally employed by States Parties in the refugee context. Secondly, membership of an organisation will only give rise to Article 1F responsibility where the individual was an 'active member' of an organisation 'devoted exclusively

54 As this case concerned exclusion under Art. 1F(a), the court referred to the definition of war crimes contained in the Rome Statute *JS (Sri Lanka), R* EWCA (n 69) [95] [104], [119].

55 *JS (Sri Lanka), R* EWCA (n 69) [95] [107] (emphasis added).

56 Ibid. [107].

57 Ibid. [107].

to the perpetration of criminal acts', rather than a voluntary member of an organisation that is 'predominantly terrorist in character'. The Court of Appeal in *JS* (*Sri Lanka*) thus set a much higher standard of complicity required to give rise to exclusion under Article 1F, particularly in relation to membership of a 'terrorist organisation'.

The UK Supreme Court in *JS* (*Sri Lanka*) similarly based its analysis of Article 1F responsibility largely on international criminal sources.[58] In disapproving the *Gurung* approach to individual responsibility, Lord Brown in his leading judgment stated that the correct approach to Article 1F responsibility is that 'article 1F disqualifies those who make "a substantial contribution to" the crime, knowing that their acts or omissions will facilitate it'.[59] However, Lord Brown considered Toulson LJ's formulation of Article 1F responsibility in the Court of Appeal too narrowly drawn, as it 'is all too easily read as being directed to specific identifiable crimes'. Rather, Lord Brown considered that liability should attach to wider concepts of common design, 'such as the accomplishment of an organisation's purpose by whatever means are necessary'.[60] Lord Brown therefore stated:

> Put simply, I would hold an accused disqualified under article 1F if there are serious reasons for considering him voluntarily to have contributed in a significant way to the organisation's ability to pursue its purpose of committing war crimes, aware that his assistance will in fact further that purpose.[61]

Thus under Lord Brown's formulation of Article 1F responsibility, it must be established that the individual made a 'substantial contribution' to the criminal purpose of the organisation, although this does not need to be directed toward the commission of a specific crime. It will suffice if the individual intended to further the organisation's general criminal purpose.

Lord Brown furthermore outlined a number of factors which should be taken into account by a decision maker when determining Article 1F responsibility, which 'ultimately must prove to be the determining factors in any case'. These include: (i) the nature and the size of the organisation (ii) whether and, if so, by whom the organisation was proscribed, (iii) how the asylum-seeker came to be recruited, (iv) the length of time he remained in the organisation

58 Including the Rome Statute of the ICC, the ICTY Statute, and the ICTY's decision in *Tadic*.

59 *JS* (*Sri Lanka*), *R* UKSC (n 69) [35].

60 Ibid. [38].

61 Ibid. [38].

and what, if any, opportunities he had to leave it, (v) his position, rank, standing and influence in the organisation, (vi) his knowledge of the organisation's war crimes activities, and (vii) his own personal involvement and role in the organisation.[62]

The Supreme Court's decision in *JS* (*Sri Lanka*) has been followed by a number of decisions of the Court of Appeal and tribunal in Article 1F(a) cases.[63] It has also been approved by the Supreme Court and Court of Appeal in relation to Article 1F(c), where it has been held that 'the *JS* (Sri Lanka) criteria 'inevitably apply when it is article 1F(c) which is under consideration'.[64] The Home Office's APG has similarly been amended to include the Supreme Court's jurisprudence:

> membership of, or employment in, an organisation which uses violence, or the threat of violence, as a means to achieve its political or criminal objectives is not enough on its own to make a person guilty of an international crime, and is not sufficient to justify exclusion from refugee status…the exclusion clauses will apply if there are serious reasons for considering that the individual has voluntarily contributed in a significant way to the organisation's ability to pursue its purpose of committing war crimes, aware that the assistance will in fact further that purpose. If the person was aware that in the ordinary course of events a particular consequence would follow from his actions, he would be taken to have acted with both knowledge and intent.[65]

The guidance also include Lord Brown's 'factors' which must be taken in to account in every case, and acknowledges that although the 'judgment related to Article 1F(a) cases, the test articulated on this issue by the Supreme Court extends to Article 1F generally (i.e. crimes and acts other than war crimes)'.[66]

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62 Ibid. [30].

63 *CM* (*Article 1F(a) – superior orders*) *Zimbabwe* [2012] UKUT 236 (IAC); *MT* (*Article 1F (a) – aiding and abetting*) (n 185); *Azimi-Rad* (n 210); *AA-R* (*Iran*) (n 69); *AS* (*S.55*) (n 210).

64 AH (*Algeria*) (n 69) [13]; DD (*Afghanistan*) (n 69) [47]; see also *Al- Sirri* [2012] (n 148).

65 Home Office Exclusion APG, s 3.3. The Home Office guidance previously provided that: 'On the Gurung test, however, where the organisation concerned is one whose aims, methods and activities are predominantly terrorist in character, it may be sufficient for little more than simple membership of and support for such organisations to be taken as acquiescence amounting to complicity in their terrorist acts'. UK Border Agency, Asylum Policy Instructions: Exclusion: Articles 1F and 33(2) of the Refugee Convention (2008), s 2.4.3.

66 Ibid. s 3.3.

The approach to Article 1F responsibility laid down by the Supreme Court in *JS Sri Lanka* has also been followed by the New Zealand Supreme Court and most recently the Supreme Court of Canada, in which the *JS* approach to responsibility was elaborated on to a large extent.[67] There therefore appears to be an emerging trend among some states parties to the 1951 Convention to determine Article 1F responsibility by focusing on the level of participation of the individual in the commission of an Article 1F crime, rather than simply looking to the nature of the organisation of which they are a member. This move appears to have been influenced to some degree by the jurisprudence of courts in the UK. The following sections will discuss these approaches to Article 1F responsibility, and their relationship with the standards of criminal liability employed in international criminal law.

4 International Criminal Law and the *Gurung* Doctrine

In the *JS* (*Sri Lanka*) cases, both the Supreme Court and Court of Appeal chose to depart from the 'personal and knowing participation' approach of the tribunal in *Gurung*, and rather draw on the standards of responsibility employed in international criminal law. This may be seen as a positive development in the jurisprudence surrounding Article 1F, as it would appear that international criminal instruments are a more appropriate source for determining the standards of responsibility in the context of the provision. In *Gurung* itself the tribunal noted that '[i]n deciding such issues as complicity we will need to look more and more to international criminal law definitions'.[68] Indeed, at least in the context of Article 1F(a) it would appear that resort to international criminal law sources is warranted.

The ordinary meaning of the phrase 'has committed' in Article 1F indicates that, in order to be excluded from refugee status, an asylum applicant must have been *individually* involved in the commission (or attempted commission) of the act, i.e. that some form of individual responsibility be established. The context of this term in Article 1F(a)'s reference to international crimes 'as defined in the international instruments drawn up to make provision in respect of such crimes' suggests that the standard of individual responsibility that

67 The New Zealand Supreme Court in *Attorney General v Tamil X* [2010] (n 172) [68], noted with approval the UK Supreme Court decision in *JS* (*Sri Lanka*), as did the Canadian Supreme Court *in Ezokola v. Canada* (n 172) 40.

68 *Gurung* (*Exclusion, Risk, Maoists*) (n 85) [35].

must be established for the purpose of Article 1F(a) should similarly be drawn from the international instruments employed to define such crimes.[69] This conclusion is reinforced when the term is viewed in its context: since the object and purpose of Article 1F(a) is to deny suspected international criminals the protection of the 1951 Convention, excluding those who would not be considered criminally responsible for the acts in question would run counter to the rationale of the provision, and indeed the protective purpose of the 1951 Convention as a whole.

Similarly, Article 1F(c) makes reference to acts which are necessarily international in nature. As such, it would appear that the standard of individual responsibility for Article 1F(c) should be interpreted by reference to the international criminal sources employed in the interpretation of responsibility for the purpose of Article 1F(a). Whilst the acts referred to in Article 1F(c) may not necessarily be defined as international crimes, acts 'contrary to the purposes and principles of the United Nations' must meet a threshold of international condemnation approaching that of international crime.[70] Responsibility for these acts may therefore be considered to fall to be governed by the rules and principles of responsibility for that exist as a matter of international law.[71] Furthermore, applying well established rules of individual responsibility to Article 1F(c) maintains the protective objective of the 1951 Convention by ensuring a level of certainty in the application of what is an inherently vague ground of exclusion. Although Article 1F(c) employs the terminology 'been guilty of' rather than 'committed', it does not appear that this wording should be read as introducing a higher threshold of responsibility, such as actual conviction for the act in question, as Article 1F's reference to 'serious reasons for

69 Indeed, as the 1951 Convention is silent on the meaning of the term 'committed', international legal instruments may be relevant to the interpretation of the term since '[t]he parties are taken to refer to customary international law and general principles of law for all questions which the treaty does not itself resolve in express terms', and furthermore may be presumed not to intend to act inconsistently with generally recognised principles of international law. ILC Fragmentation Report, Summary Conclusions, para 19. Since the concept of individual responsibility is a well established principle of international criminal law, recourse to international criminal law instruments to determine the meaning of 'committed' gives effect to the principle of harmonisation, by which norms of international law should be interpreted to as to give rise to a single set of compatible obligations.

70 *Al- Sirri* [2012] (n 148).

71 In the absence of a definition of 'been guilty of' in the 1951 Convention, states parties may be presumed to refer to the standards of individual responsibility that exist as a matter of international criminal law.

considering' clearly mandates that a lower standard of proof is required than a criminal conviction.[72]

In contrast to sub-paragraphs (a) and (c) of Article 1F, Article 1F(b) does not necessarily concern the exclusion of the perpetrators of crimes of an international nature, but rather those that have committed 'serious non-political crimes'. It may therefore be thought inappropriate to apply standards of individual responsibility that concern international crimes to a provision that generally covers those of a lesser character. However, it has been suggested that the international sources concerning individual responsibility for international crimes should also be considered the appropriate standard in respect of Article 1F(b).[73] The absence of clear international standards defining individual responsibility for serious non-political crimes means that any other approach would result in the fragmented application of individual responsibility in Article 1F(b) cases, depending on the criminal law of the domestic regime in which the asylum application fell to be considered. The principle that the 1951 Convention be interpreted so as to have one true autonomous meaning mandates an interpretive approach that applies internationally agreed rules and principles of individual responsibility to the application of the provision.

It may therefore be concluded that resort to international criminal law standards of responsibility is warranted for Article 1F(a) crimes, and, in the absence of clear international standards defining individual responsibility for serious non-political crimes and acts contrary to the purposes and principles of the United Nations, may also be appropriate sources for determining responsibility in the context of Articles 1F(a) and (c).[74]

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72 See Chapter 7 for interpretation of 'serious reasons for considering' and standard of proof required in Article 1F cases. The wording 'has been guilty of' contained in Article 1F(c), as opposed to the 'has committed' contained in the previous two paragraphs of Article 1F, cannot be interpreted as inserting a different threshold for individual responsibility in the context of Article 1F(c). Zimmermann and Wennholz (n 68) 603.

73 ECRE, 'Position on Exclusion' (n 84) para 37.

74 However, some caution must be exercised when incorporating criminal law standards into the refugee status determination procedure. See for example Jennifer Bond's critique of the UNHCR's reliance on international criminal standards when applying Article 1F in relation to situations of mass influx. In particular, the UNHCR's practice of not taking into account mitigating circumstances while simultaneously relying on criminal law standards that presume such factors form part of the analysis. Bond J, 'Excluding Justice: The Dangerous Intersection between Refugee Claims, Criminal Law, and 'Guilty' Asylum Seekers' (2012) 24(1) International Journal of Refugee Law 37–59. The Michigan Guidelines similarly point out that, in contrast with criminal trials, decisions on refugee exclusion are binary – an individual either is or is not excluded from refugee status and as such this

If international criminal law standards are seen as the appropriate sources for determining Article 1F responsibility, then the problems with the *Gurung* approach to Article 1F exclusion appear even more pronounced. It will be recalled that under the *Gurung* doctrine, responsibility for the commission of Article 1F crimes could be incurred where an individual was a voluntary member of an organisation that is 'predominantly terrorist in character'. This approach to Article 1F responsibility based on simple membership of an organisation grounds individual responsibility in the *nature* of the organisation. However, this appears inconsistent with the standards of responsibility in international criminal law.

Whilst the various forms of participation which give rise to individual responsibility in international criminal law have different requirements regarding the *actus reus* and *mens rea*, they all share a common characteristic: under international criminal law, an individual cannot be held responsible for the criminal acts of an organisation as a result of their simple membership of that group. Although the London Charter contained provisions which effectively attributed individual responsibility on the basis of membership of a criminal organisation,[75] criminal responsibility on the basis of group membership has been consistently rejected by the ICTY.[76] As noted by the ICTY Trial Chamber in *Kvocka*:

> mere membership in a criminal organisation would not amount to co-perpetrating or aiding and abetting in the criminal endeavour implemented by that organization, despite knowledge of its criminal purpose. For liability to attach, it must be shown that either (1) the accused participated in some significant way, or (2) the accused held such a position of responsibility – for example commander of a sub-unit – that participation could be presumed.[77]

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determination is not tempered by the sentencing process. Michigan Guidelines on the Exclusion of International Criminals, Sixth Colloquium on Challenges in Refugee Law, University of Michigan, 22–24 March 2013, para 3.

75 London Charter, arts 9 and 10. The IMT applied these provisions in criminalising several organisations including the Leadership Corps of the Nazi Party, the Gestapo, the SD, and the SS. Noted in Rikhof J, 'Complicity in International Criminal Law and Canadian Refugee Law' (2006) 4 Journal of International Criminal Justice 720.

76 *Prosecutor v Kvocka et al.* (Trial Judgment) ICTY-98-30/1-T (2 November 2001) [281]; *Prosecutor v Milutinovic et al.* (Appeal Judgment) ICTY-99-37-AR72, (21 May 2003) [24]-[26], [31]; *Prosecutor v. Milomir Stakic* (Trial Judgment) ICTY-97-24-T, (31 July 2003) [433]; *Prosecutor v. Blagoje Simic et al.* (Trial Judgment) ICTY-95-9-T, (17 October 2003) [153].

77 *Prosecutor v Kvocka et al.* (n 531) [281].

International criminal law does not focus on the nature of the group or organisation of which the individual is part when determining criminal responsibility, but rather whether the individual knowingly made a 'substantial' or 'significant' contribution to the commission of a crime, be this through committing the crime; participating in a 'joint criminal enterprise'; planning, instigating, ordering or aiding and abetting the planning, preparation or execution of the crime.[78]

Furthermore, it is not clear that the reversal of the burden of proof implied in the *Gurung* presumption of exclusion where the applicant is a voluntary member of an 'extremist terrorist organisation' is warranted in the context of Article 1F. Indeed, reversing the burden of proof appears to contravene one of the fundamental principles of international criminal law: the presumption of innocence.[79] Whilst the refugee status determination is an administrative decision, and therefore not subject to the right to fair trial contained in many human rights instruments,[80] it is generally recognised that the process is

78 For joint criminal enterprise (JCE) I: *Prosecutor v. Radoslav Brdjanin* (Appeal Judgment) ICTY-99-36-A, (3 April 2007) [430]; For JCE II: *Prosecutor v Kvocka et al.* (n 531) [97]; *Prosecutor v Tadic* (Appeal Judgment) (n 460). JCE III requires a lower standard of contribution, but the status of JCE II and III as a matter of customary international law are not clear. A person who 'solicits', 'induces' or 'orders' the commission of a crime must have been 'substantially contributing' to the conduct of the perpetrator. *Prosecutor v Kordic and Cerkez* (Appeal Judgment) ICTY-95-14/2-A, (17 December 2004) [27], [42]; *Sylvestre Gacumbitsi v. The Prosecutor* (Appeal Judgment) ICTR-2001-64-A, (7 July 2006) [129]. Aiding, abetting or otherwise assisting the principal to a crime can also suffice as a basis for criminal responsibility. Although the assistance need not be essential, it must have had a 'substantial effect' on the commission of the crime. *Prosecutor v Aleksovski* (Appeal Judgment) ICTY-95-14/1-A (24 March 2000) [162]; *Prosecutor v Blaskic* (Appeal Judgment) ICTY-95-14-A (29 July 2004) [46]; *Prosecutor v Vasiljevic* (Appeal Judgment) ICTY-98-32-A (25 February 2004) [102]; *Prosecutor v Tadic* (Appeal Judgment) (n 460). [229]. Subjectively, the individual must have been aware that they were supporting the commission of the crime and wished to provoke the commission of the crime, or be aware that there was a 'substantial likelihood' the commission of the crime would result from their actions.

79 The principle of the presumption of innocence, recognised in Art. 66 of the Rome Statute, provides: 'Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law'. To this end, '[t]he onus is on the Prosecutor to prove the guilt of the accused'.

80 For example, Council of Europe (CoE) European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) ETS 5, Art. 6; UNGA International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171, Art. 14. See Maaouia v France [2000] ECHR, application 39652/98.

subject to basic requirements for a fair procedure.[81] Indeed, it is well established in UK jurisprudence that in Article 1F decisions the burden of proof lies upon the Secretary of State to establish that Article 1F applies.[82] Bearing in mind the serious consequences of exclusion from refugee status, an approach that reverses the burden of proof has the potential to seriously compromise the protective object and purpose of the 1951 Convention.[83] Perhaps for these reasons, the UNHCR warns that caution must be exercised where such a presumption of responsibility arises, 'to consider issues including the actual activities of the group, its organisational structure, the individual's position in it, and his or her ability to influence significantly its activities, as well as the possible fragmentation of the group'.[84] However, these factors advocated by the UNHCR still focus primarily on determining the nature of the organisation, an aspect of the refugee status determination procedure that has presented considerable problems in practice and does not appear to be in line with the standards of individual responsibility employed in international criminal law.[85]

81 MacDonald Toal (n 365) 820; Gilbert, 'Current Issues' (n 188) 439, 461. The UNHCR Executive Committee formulated basic requirements for a fair procedure in 28th session in 1977. The ECRE recommend that safeguards of procedural fairness such as the presumption of innocence are entailed in Article 1F cases. ECRE, 'Position on Exclusion' (n 84) para 9.

82 As was recognised in the *Gurung* decision itself. *Gurung* (*Exclusion, Risk, Maoists*) (n 85) [93]-[94]. MT (*Article 1F (a) – aiding and abetting*) (n 185) [74]; *Azimi-Rad* (n 210) [15].

83 The Lawyers Committee for Human Rights also argues that it is contrary to the principle of procedural fairness to require an asylum applicant to demonstrate they are not implicated in excludable crimes. Lawyers Committee for Human Rights, 'Safeguarding the Rights of Refugees under the Exclusion Clauses: Summary Findings of the Project and a Lawyers Committee for Human Rights Perspective' (2000) 12 (Special Supplement) International Journal of Refugee Law 325. Saul also argues there is a real danger that the application of the presumption will lead to automatic and peremptory exclusion without affording a fair procedure. Saul B, 'Protecting Refugees in the Global "War on Terror"' (n 5).

84 UNHCR Guidelines (n 65) para 19. Also noted by the tribunal in *Gurung* (*Exclusion, Risk, Maoists*) (n 85) [110].

85 Indeed it appears the UNHCR is revising this position. In her update on the UNHCR Guidelines on Exclusion, Kapferer notes that '[t]he notion of a "presumption" should not be understood to suggest that it could be justified to apply exclusion in the absence of sufficient factual basis supporting a finding of individual responsibility'. She further provides that 'denial of international refugee protection flowing from membership alone or otherwise based on criteria that are not in line with the requirements for establishing individual responsibility under international law would not be in keeping with the 1951 Convention'. Sibylle Kapferer, 'Revision of UNHCR's Guidelines' (n 7) 6.

The departure of the Supreme Court and the Court of Appeal from the *Gurung* approach to Article 1F responsibility in the *JS* (*Sri Lanka*) case may therefore be seen as a positive development in the jurisprudence on Article 1F responsibility. As was noted above, the *Gurung* approach to responsibility where an asylum applicant is a member of an organisation that is 'predominantly terrorist in character' is not in line with the standards of individual responsibility employed in international criminal law, which rather mandates an approach that focuses on the contribution to the commission of the crime made by an individual, rather than their membership of a particular organisation or group. However, the Supreme Court's decision in *JS* (*Sri Lanka*) is not without its difficulties, as will be considered below.

5 International Criminal Law and Lord Brown's Formulation of Article 1F Responsibility

In formulating the test of Article 1F responsibility in *JS* (*Sri Lanka*), Lord Brown based his approach on the ICTY's doctrine of joint criminal enterprise.[86] The doctrine of joint criminal enterprise can be traced back to the seminal case of *Tadic*, in which the ICTY Appeals Chamber held this mode of participation was grounded in post-World War II jurisprudence that had become part of customary international law, and was implicitly contained in Article 7(1) of the ICTY Statute.[87] This concept has subsequently also been adopted by the ICTR and hybrid criminal courts.[88]

Under the doctrine of joint criminal enterprise, a participator in a criminal act will be deemed individually responsible as a perpetrator of the act where there exists a 'common plan, design or purpose' among a plurality of persons

86 *JS* (*Sri Lanka*), *R* UKSC (n 69) [15]-[20].

87 *Prosecutor v Tadic* (Appeal Judgment) (n 460) [188] and subsequent. Participation in a joint criminal enterprise is a form of 'commission' under ICTY Statute Article 7(1). *Prosecutor v Krnojelac* (Appeal Judgment) ICTY-97-25-A (17 September 2003) [73].

88 *Prosecutor v Simba* (Trial Judgment) ICTR-01-76-T (13 December 2005) [385] et seq; *Prosecutor v Brima* (Appeal Judgment) SCSL-2004-16-A (20 June 2007) (Special Court for Sierra Leone) [61] et seq; *Prosecutor v Perriera*, Special Panels for Serious Crimes East Timor (27 April 2005) [19] et seq. According to the jurisprudence of the ICTY, the notion of joint criminal enterprise encompasses three different categories: the 'basic form', the 'systematic form' and the 'extended form', and each of these categories create different requirements regarding the respective *actus reus* and *mens rea*. However Lord Brown limited himself to the basic form of JCE, finding the other categories unhelpful. *JS* (*Sri Lanka*), *R* UKSC (n 69) [19].

which amounts to or involves the commission of a crime against international law, and the accused participates in this common design.[89] Whilst the individual need not have physically perpetrated the crime, they must have contributed to the common plan. The ICTY's joint criminal enterprise therefore has at its core: (i) a common plan, (ii) a significant contribution to that plan, and (iii) knowledge and criminal intent. However, in formulating the test for Article 1F responsibility Lord Brown curiously only mentions in passing the very aspect which makes joint criminal enterprise a unique form of liability in international criminal law: a common plan or design. Although Lord Brown's formula is couched in joint criminal enterprise language, it has been pointed out that the lack of reference to a common design makes it resemble another form of criminal liability, namely, aiding and abetting.[90]

Aiding or abetting can suffice as a basis for criminal responsibility in international law, as provided in Article 25(3)(c) Rome Statute and recognised under customary international law.[91] Although the assistance need not be essential, it must have had a 'substantial effect' on the commission of the crime.[92] The assistance can include encouraging the perpetrator, providing the means for the crimes commission or granting other moral support.[93] The person granting the assistance must be aware that his or her contribution is supporting the commission of the crime, however, it is not necessary that the aider and abettor knows the precise crime that was intended and that was committed, but he must be aware of the essential elements of the crime.[94] Crucially, in order for an individual to be found liable under this secondary mode of participation there is no requirement that they be part of or contribute to a 'common plan or design'.

Lord Brown's lack of reference to the crucial 'common plan' element of joint criminal enterprise means that either he has provided an incomplete definition of joint criminal enterprise, or he has collapsed all aspects of complicity into one type of criminal liability: aiding and abetting.[95] It has been suggested that in reality the judgment only seems to represent one type of extended liability, and that in practice this may lead the immigration tribunal to try and fit

89 *Prosecutor v Tadic* (Appeal Judgment) (n 460) [188].

90 As noted by Rikhof in *The Criminal Refugee* (n 72) 254–255.

91 *Prosecutor v Furundzija* (Trial Judgment) ICTY-95-17/1-T (10 December 1998) [192] et seq.

92 *Prosecutor v Aleksovski* (n 533) [46]; *Prosecutor v Vasiljevic* (n 533) [102]; *Prosecutor v Tadic* (Appeal Judgment) (n 460) [229].

93 *Prosecutor v Furundzija* (n 546) [231] et seq.; *Prosecutor v Tihomir Blaskic* (n 533) [48].

94 *Prosecutor v Aleksovski* (n 533) [162]; *Prosecutor v Vasiljevic* (n 533) [102].

95 Rikhof, *The Criminal Refugee* (n 72) 254–255.

all forms of participation into the 'straightjacket' of joint criminal enterprise, rather than other easier and often more appropriate forms of extended liability.[96] Perhaps for this reason more recent decisions of the immigration tribunal have preferred to focus on the aiding and abetting form of liability in the context of Article 1F.[97]

Furthermore, attention must be drawn to the list of 'factors' outlined by Lord Brown in the Supreme Court, which he advised should be taken into account by a decision maker when determining Article 1F responsibility, and which 'ultimately must prove to be the determining factors in any case'.[98] It will be recalled that these factors included (i) the nature and the size of the organisation (ii) whether and, if so, by whom the organisation was proscribed, (iii) how the asylum-seeker came to be recruited, (iv) the length of time he remained in the organisation and what, if any, opportunities he had to leave it, (v) his position, rank, standing and influence in the organisation, (vi) his knowledge of the organisation's war crimes activities, and (vii) his own personal involvement and role in the organisation.[99]

Although an individual's standing an rank in an organisation may be relevant to an assessment of whether an individual is responsible for the commission of crimes under international criminal law,[100] factors such as the nature and size of the organisation and whether or not it is proscribed appear to tend

96 Ibid. 254–255. Gilbert similarly notes that domestic courts are increasingly referring to decisions of the international courts and tribunals when determining Article 1F responsibility, although the simpler inchoate crimes of aiding and abetting would usually suffice. Gilbert G, 'Exclusion under Article 1F since 2001: two steps backwards, one step forward' (n 6).

97 *MT* (*Article 1F(a) – aiding and abetting*) (n 185) [131]; *AS* (*S.55*) (n 210) [99].

98 *JS* (*Sri Lanka*), *R* UKSC (n 69) [30].

99 Ibid., [30].

100 Anyone that orders the commission of a crime under international law is criminally liable. An order assumes the existence of a hierarchal relationship, typically military in nature. The perpetrator uses his or her authority to cause another person to commit a crime. *Prosecutor v Kordic and Cerkez* (n 533) [28]; *The Prosecutor v Nahimana, Barayagwiza, Ngeze* (Appeal Judgment) ICTR-99-52-A (28 November 2007) [481]. Article 28 Rome Statute furthermore provides that commanders and superiors are responsible for crimes committed by forces under their effective command and control, because of their failure to exercise proper control over such forces. The Statutes of the ICTY and ICTR provides that the fact that a crime was committed by a subordinate: 'does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof'. ICTY Statute Article 7(3); ICTR Statute Article 6(3).

back towards the *Gurung* and *Ramirez* focus on the nature of an organisation when determining Article 1F responsibility. This may make it possible for tribunals to engage in an assessment of whether the organisation is 'predominantly terrorist in character'.[101] As noted above, criminal liability in international criminal law focuses on the contribution of the individual to the commission of an international crime, rather than details of an individual's membership of a particular organisation. Indeed, in his separate opinion in the *JS* (*Sri Lanka*) case, Lord Kerr cautioned:

> While the six factors that counsel identified will frequently be relevant to that evaluation, it seems to me that they are not necessarily exhaustive of the matters to be taken into account, nor will each of the factors be inevitably significant in every case. One needs, I believe, to concentrate on the actual role played by the particular person, taking all material aspects of that role into account so as to decide whether the required degree of participation is established.[102]

It appears that Lord Brown's reliance on these factors is a move back towards the *Gurung* and *Ramirez* approach to responsibility and away from than that of the international criminal tribunals. While examination of these factors might prove practically useful to decision makers unfamiliar with the standards of individual responsibility employed in international criminal law, this approach may import factors into an assessment of Article 1F responsibility that are not strictly relevant.[103]

6 Conclusions

Terrorism has featured to a large extent in the UK's interpretation of responsibility for the purpose of Article 1F. This has arisen primarily in relation to the extent to which an asylum applicant can be held responsible for the commission of the activities of a terrorist group or organisation of which they are a

101 Rikhof, *The Criminal Refugee* (n 72) 254.

102 *JS* (*Sri Lanka*), *R* UKSC (n 69) [55].

103 Indeed, this factor approach was developed in Canadian jurisprudence and therefore Lord Brown's endorsement of this approach might be seen as a step back towards the *Ramirez* approach to exclusion. Simeon J C, 'Complicity and Culpability' (n 72) 130. See also Rikhof J, 'War criminals not welcome' (n 479) 465 for development of the 'factor approach' in Canada.

member. The leading case on Article 1F responsibility in the UK for a number of years was the *Gurung* decision of the immigration tribunal, in which responsibility for the commission of an Article 1F act could be presumed where the individual was a voluntary member of an organisation that is 'predominantly terrorist in character'. However, a number of practical difficulties emerge when trying to characterise an organisation in this way. An approach which is based on the inclusion of an organisation in a proscribed terrorist list has been cautioned against, and in many cases such groups may be fractured and pursue their political objectives in part through acts of terrorism, but also engage in legitimate acts of political persuasion. Indeed, the Supreme Court and Court of Appeal recently disapproved the *Gurung* approach to exclusion, preferring to approach the question of Article 1F responsibility through recourse to standards of criminal liability employed in international criminal law rather than focus on the 'terrorist' nature of an organisation.

The Supreme Court's approach to determining Article 1F responsibility appears to be a positive development in the jurisprudence surrounding Article 1F, as it would appear that international criminal standards are a more appropriate source for determining the standards of responsibility in the context of the provision. However, the Supreme Court's formulation of Article 1F responsibility is not without its difficulties. Lord Brown's formulation of Article 1F responsibility seems to collapse all aspects of criminal complicity into one type of criminal liability, an approach that may in practice prove difficult for immigration tribunals to apply in practice and lead them away from applying other easier and often more appropriate forms of extended liability. Furthermore, Lord Brown's reliance on a number of 'factors' when determining whether an individual may be considered responsible for the commission of an Article 1F act may import considerations that are not strictly relevant to such an assessment, and indeed seems to tend back towards the *Gurung* focus on the 'terrorist' nature of an organisation of which an individual is a member.