Exclusion, terrorism and the Refugee Convention

by Monette Zard

CICR/Till Mayer

In the aftermath of 11 September, governments around the world have turned their attention to combating the threat of global terrorism.

The feeling of vulnerability engendered by the attacks and the perception that the hijackers exploited open and liberal societies to commit their heinous acts have intensified an already restrictive climate for refugees and asylum seekers, justified in the name of security. Although no refugees or asylum seekers were among the 19 hijackers, the attacks have fuelled public perceptions of refugees as criminals and undesirable elements in society. The irony, as Ruud Lubbers has pointed out, is that it is the refugee who is often the first victim of persecution and terror. A difficult challenge lies ahead for both governments and the advocates who monitor them – preserving the rights and values that lie at the heart of democratic societies (of which the principle of asylum is a cornerstone) while at the same time taking measures which are necessary to protect citizens and institutions.

Recent months have seen an increasing tendency to link refugees and asylum seekers with acts of terrorism. UN Security Council Resolution 1373 (adopted on 28 September 2001), the foundation of the international community's response to the terrorism threat in the aftermath of 11 September, twice makes explicit reference to the need to safeguard the system of international refugee protection from abuse by terrorists.[1] While its inclusion of the need to abide by international standards of human rights law is welcome, it nevertheless reinforces the perception that the institution of asylum is somehow a terrorist's refuge. It has in turn generated a wave of new and restrictive laws and regulations at a national level (including, in countries such as the UK and the US, the prospect of indefinite detention of non nationals suspected of terrorist activity which potentially pose a number of problems for refugees and asylum seekers).

The Exclusion Clauses

Far from being a cloak behind which the perpetrators of terror can hide, international refugee law explicitly excludes from protection those who have violated the human rights of others or committed other serious crimes. Nazi genocide and war crimes were fresh in the minds of those governments that drafted the new framework of human rights and refugee law in the immediate post-war years, including the 1951 Convention Relating to the Status of Refugees, and they felt that such 'undeserving' cases should be prevented from claiming refugee status. The Convention thus contains the so-called exclusion clauses – Article 1F – which placed anyone who had com-

mitted such crimes outside the protection of the international refugee regime. The exclusion clauses note that the provisions of the 1951 Refugee Convention "shall not apply to any person with respect to whom there are serious reasons for considering that:

a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
c) he has been guilty of acts contrary to the purposes and principles of the United Nations."

Ignored for many years,[2] the exclusion clauses were catapulted to the forefront of the international agenda when the 1994 Great Lakes crisis illustrated the dire consequences of failing to pay due regard to the application of the exclusion clauses. The perception that international protection was being provided to *genocidaires* and that humanitarian assistance was being manipulated to sustain the war machine of the *interahamwe* (Hutu militia) called into question the integrity of the entire system of refugee protection.

Governments and UNHCR are legitimately concerned to ensure that the international refugee system is not abused by terrorists, a concern which is in the long-term interest of bona fide refugees and asylum seekers. It is important, however, that the exclusion clauses do not become another avenue by which states deny access to international protection by widening the grounds on which refugees may be excluded and narrowing their procedural rights. Exclusion is the most extreme sanction of international refugee law and entails the removal of protection against *refoulement* to a country of persecution.[3] It is thus vital that the exclusion clauses are restrictively interpreted and resorted to only where there is clear and compelling evidence of **individual** responsibility for a serious crime specified under the exclusion clauses. Both the process by which a decision to exclude is taken and the substantive grounds on which refugees may be excluded from international protection need to be addressed in such a way that the rights of refugees are respected.

'one man's terrorist is another man's freedom fighter'.

Expanding the grounds for exclusion: the definition of terrorism

As has often been stated, 'one man's terrorist is another man's freedom fighter'. While the international community was united in its condemnation of the events of 11 September as the worst form of terrorism, its aftermath has seen the re-ignition of the debate as to what precisely constitutes terrorism. There is no internationally accepted definition of this term and it is, not surprisingly, a central sticking point in negotiations on a Comprehensive Convention on International Terrorism. The UN currently has twelve Conventions which address such different forms of terrorist threat as airline and maritime safety, the use of plastic explosives, the safety of diplomatic personnel and the taking of hostages. This international lacuna means that legislation that has been adopted at the national level, particularly in the aftermath of 11 September, has tended to employ broad and far-reaching definitions of terrorism. Such measures create the potential for bona fide refugees to find themselves unable to access international refugee protection.

The UK Anti-Terrorism, Crime and Security Act of 2001 for instance, extends the definition of terrorist to all those who have "links" with an international terrorist group (section 21(2)(c)). Links are defined as existing if such a person "supports or assists" such a group (s 21(4)). The ambiguity of such terminology holds open the possibility that asylum seekers may find themselves labelled as terrorist on account of their political, ethnic or religious affiliations or ties. As one commentator has noted, "… the contemporary definition of terrorism or threat to national security can mean everything or nothing… it may mean that a Kurd is sympathetic to the PKK in Turkey: many if not most Kurds are, similarly Tamils and the LTTE, Kashmiris and the struggle against Indian Occupation, etc."[4]

In the US, the Uniting and Strengthening America By Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (otherwise known at the USA-PATRIOT Act) (H.R. 3162) similarly expands the scope of terrorism-related activity and includes material support for humanitarian projects of groups that are listed on the Secretary of State's list of designated terrorist organisations. More troubling still, the USA-PATRIOT Act also allows for the detention and deportation of non citizens who provide lawful assistance to groups that are not officially designated as terrorist organisations. The onus is then rather perversely placed on the immigrant to prove that he did not know and should not have known that his assistance would further terrorist activity. The latter is particularly problematic given the breadth of the definition of terrorist activity that is employed by the Act. As advocates have cautioned, such activity can now include the use of a weapon, or "other dangerous device", to cause "substantial damage to property",[5] thus potentially including acts of civil disobedience which are a hallmark of activist organisations such as Greenpeace and anti-globalisation protestors.

Terrorism within the Refugee Convention

Terrorism as such is also not explicitly mentioned in the Refugee Convention. Nevertheless, under article 1F(a), terrorists could find themselves excluded because there are serious reasons to consider that a "crime against humanity" has been committed (certainly the acts of 11 September rise to that level). They may also fall foul of article 1F(c) which excludes the granting of international protection to those who may have committed acts contrary to the purposes and principles of the UN. Given the potential breadth of this provision (which mentions "acts" and not "crimes"), UNHCR has consistently advised that it be restrictively interpreted. The adoption in November 2002 of Security Council Resolution 1377, which notes that acts of international terrorism are contrary to the purposes and principles of the UN Charter, is likely to lead to a

significant expansion in the use of this clause to exclude refugees accused of terrorism.

The exclusion clause which has traditionally been of most relevance in the battle against terrorism is Article 1F(b) which bars from the protection of international refugee law those who have committed serious non-political crimes outside the country of asylum. This provision mirrors one in Article 14 (2) of the Universal Declaration of Human Rights and is intended to ensure that extraditable criminals do not escape prosecution by claiming refugee status. Interpreting and applying this provision is one of the most complex challenges facing decision makers today. A central objective of the Refugee Convention after all is to provide protection to those persecuted on account of their political activities and terrorists frequently assert a political motivation for their crimes. In determining whether an offence is 'political' and therefore exempt from exclusion, or a crime which renders its author undeserving of protection as a refugee, decision makers are asked to walk a fine – but critical – line. Central to their ability to do so fairly and effectively is that they consider all the elements of a case – including the grounds for inclusion as well the grounds for exclusion. A comprehensive examination of all the circumstances of an asylum claim allows the decision maker to place any allegations of criminal conduct and accusations of terrorism in full context. This approach was most recently reaffirmed by the Global Consultations process, which asserted the need for a holistic approach to the application of the exclusion clauses.[6]

Short-circuiting refugee law

Nevertheless, even prior to 11 September, UNHCR found itself having to warn states looking for a fast track to curtail the consideration of asylum claims against the practice of "employing exclusion as a test of admissibility". It noted that this was inconsistent with the exceptional nature of exclusion clauses and risked "prejudicing the careful weighing of all relevant factors which should be integral to any exclusion decision". In the aftermath of 11 September, this trend (bypassing status determination once exclusion is alleged) is likely to intensify. Recent legislation in the UK precludes substantive consideration of asylum claims where the Secretary of State certifies that the removal of the appellant would be conducive to the 'public good' and that either Article 1F or Article 33(2) (the expulsion provisions of the 1951 Convention) are applicable. The removal of someone without ever having considered their asylum claim is contrary to both the letter and the spirit of the 1951 Convention. In the US, there are similar concerns regarding the practice of utilising statutory bars to prevent persons suspected of membership in organisations designated as terrorist organisations from even applying for protection as a refugee. The process of designating groups as terrorist organisations is more often driven by political and foreign policy considerations than by concern with the humanitarian issues that should underpin any asylum claim.

Fifty years of refugee law and a proud tradition of providing asylum to those in need should not be bypassed.

Such measures come dangerously close to attributing guilt purely on the basis of association and are clearly at odds with the necessarily individual character of the exclusion procedure. A proper application of the exclusion clauses calls for an examination of an asylum seeker's activities within an organisation and his/her objective role in the commission of excludable acts. As the UK House of Lords stated, a person may not be excluded from the Convention merely because s/he or his or her acts, have been labelled "terrorist"; it is required that there be serious reasons for considering that he or she has committed an excludable crime under Article 1F.

In conclusion, while it is important to acknowledge that States have a legitimate security interest in ensuring that terrorists and other criminals do not take advantage of the system of international protection, it is vital that any measures taken do not undermine the very system itself. The 1951 Convention provides States with the tools through which to ensure that their security interests are reconciled with the interests of those fleeing persecution and terror. Fifty years of refugee law and a proud tradition of providing asylum to those in need should not be bypassed or short circuited by responses to the events of 11 September.

Monette Zard is a Policy Analyst at the Migration Policy Institute, Washington.
Email: mzard@migrationpolicy.org

1 This follows a line of earlier resolutions, most notably a 1996 Resolution by the General Assembly on Measures to Eliminate International Terrorism and its annex, a Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism A/Res/51/210 of 17 December 1996 found at www.un.org/documents/ga/res/51/a51r210.htm.

2 UNHCR first issued public guidelines on the application of the exclusion clauses in 1996 (*The Exclusion Clauses: Guidelines on their Application*, UNHCR, Geneva, December 1996).

3 It is important to note, however, that the prohibition on *refoulement* contained in the Convention Against Torture applies without exception.

4 Memorandum Submitted by Nicholas Blake QC to the Select Committee on Home Affairs of the House of Commons, 15 November 2001 at para 13. www.parliament.the-stationary-office.co.uk/pa/cm/200102/cmselect/cmh../351ap04.ht

5 Of particular relevance in this discussion is Section 411 of USA-PATRIOT Act, amending section 212(a)(3)(B) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3))

6 See Summary Conclusions of Lisbon Expert Roundtable of 3-4 May 2001, 30 May 2001 EC/GC/01/2track/1.

7 Report on Article 1F Exclusion Clauses, Standing Committee of the UNHCR Executive Committee, June 1998, Section C, para 15(i).

8 The Anti-Terrorism, Crime and Security Act 2001, 14 December 2001 - Article 33(1) www.hmso.gov.uk/acts/acts2001/10024--e.htm.

9 T v SSDH, (1996) 2 All ER 865, (1996) 2 WLR 766, House of Lords, 22 May 1996.

10 Interpretations of the Article 1F by UNHCR, commentators and the practice of most States indicate that mere membership of a group or organisation will not be sufficient basis on which to exclude a person except in exceptional circumstances. However UNHCR does hold open the possibility that in a small number of cases where "the purposes, activities and methods of some groups or terrorist organisations are of a particularly violent and notorious nature," membership – where it is voluntary – may be sufficient. UNHCR *Guidelines* (December 1996), at para 47.