

The United Nations Security Council's Counterterrorism Resolutions and the Resulting Violations of the Refugee Convention and Broader International Law

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ABSTRACT

The United Nations Security Council's ("UNSC") counterterrorism resolutions are overbroad, and have resulted in European Union ("EU") laws and policies that mislabel innocent individuals, particularly refugees, as "terrorists." The 1951 Refugee Convention requires that countries provide refugees—those fleeing persecution—with protection, allowing for only a few narrow exceptions. However, a wave of post-9/11 UNSC counterterrorism resolutions have led to the enactment of a host of new laws and policies by the EU and EU member states that have resulted in the widespread denial of protection to many refugees seeking asylum in Europe. This is due to the fact that these resolutions may label individuals who have had any contact with terrorist organizations as terrorists—including, in some cases, where an individual was held captive by a terrorist group. As many laws make it illegal for countries to grant asylum to terrorists, the implementation of the UNSC's counterterrorism resolutions in EU law has resulted in the widespread denial of protection to many refugees seeking asylum in Europe.

From a legal perspective, these laws and policies are a de facto violation of the Refugee Convention, as well as broader international human rights law and EU law, which require that, save for very rare and prescribed circumstances, those fleeing persecution must be granted protection. From a policy perspective, while European governments' goals of barring terrorists from entering their borders may be in line with their security objectives, these policies must be reevaluated, as the harm that they cause refugees is far greater than the possible security benefits they confer. This is particularly true for Middle Eastern refugees, many of whom are often fleeing the

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violence of UN-labeled terrorist groups in the region, and many of whom are the most likely to be negatively impacted by these counterterrorism policies. It is imperative that the UNSC and the EU shift counterterrorism policies to comply with international law and protect Middle Eastern refugees fleeing persecution.

INTRODUCTION

The 1951 Refugee Convention¹ (“Refugee Convention”) was the global community’s response to the devastating impacts of World War II and the resulting mass displacement of more than 60 million individuals.² The Refugee Convention gave clear, legal definition to the obligations of states to provide protection to asylum seekers fleeing persecution. The Refugee Convention also laid out exceptions to states’ obligations to provide asylum-seekers with protection, particularly for individuals deemed a security threat or who have perpetrated particularly serious crimes prior to seeking protection.³ These exceptions are not legally black-and-white. They require judgment to determine who may fall within their scope, and where terrorism falls within this legal gray space is particularly unclear.

An array of modern counterterrorism laws and policies have taken advantage of this legal gray space as a means to order states to deny protection and asylum to those suspected of terrorism, separate from the obligations conferred by the Refugee Convention.⁴ More often than not, these laws and policies require states to ensure that terrorists do not enter as a security matter, without any reference to the Refugee Convention where these individuals may be claiming asylum.⁵ But even where laws and policies have made reference to the Refugee Convention, they still occasionally call on states to establish domestic laws that would be in violation of the Refugee Convention and other human rights treaties.⁶ As they stand, they are misaligned with the purpose and function of the Refugee Convention. The

1. Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 137 [hereinafter Refugee Convention].

2. Giada Zampano, Liam Moloney, & Jovi Juan, *Migrant Crisis: A History of Displacement*, WALL ST. J. (Sept. 22, 2015), <http://graphics.wsj.com/migrant-crisis-a-history-of-displacement/> [https://perma.cc/Q3CH-EWAW].

3. See Refugee Convention, *supra* note 1, at 16–17.

4. See Parts IV and VI, *infra* (discussing UNSC counterterrorism resolutions, along with EU corresponding laws and policies, that have conflicted with legal obligations conferred by the Refugee Convention).

5. See, e.g., S.C. Res. 2178 (Sept. 24, 2014) (requiring that states “ensure [. . .] that refugee status is not abused by [. . .] foreign terrorist fighters”); S.C. Res. 2322, ¶ 9(d) (Dec. 12, 2016) (reiterating many prior resolutions’ calls to prevent asylum seekers from being granted safe haven where they have been deemed to have engaged in any terrorist activity).

6. See, e.g., S.C. Res. 1624, ¶ 1(c) (Sept. 14, 2005) (calling on states to “deny safe haven to any persons with respect to whom there is credible and relevant information giving serious reasons for considering that they have been guilty of [incitement to commit a terrorist act]” after recalling states’ obligations under the Refugee Convention in the preamble); see also Part V, *infra*.

states promulgating these policies are in violation of their obligations under the Convention and under EU and international law more broadly.

Many of the counterterrorism laws and policies described below have been based on UN Security Council (“UNSC”) resolutions, which UN member states also have an obligation to comply with.⁷ Though the UNSC was established in 1945, it did not begin adopting resolutions related to counterterrorism until the late 1990s.⁸ The resolutions have become far more common and lofty in their demands in the last two decades, particularly in the aftermath of the September 11 terror attacks. In particular, the resolutions have criminalized pre-inchoate offenses, have barred exemptions for individuals and organizations providing humanitarian aid, and have mandated *refoulement* of certain refugees not barred from protection under the Refugee Convention⁹—all of which conflict with human rights law. The resolutions have subsequently laid the foundation for EU countries to adopt a series of restrictive counterterrorism laws that have, either intentionally or unintentionally, severely impacted asylum seekers and refugees.

While these policies have had a resounding impact on communities across the world, refugees from Middle Eastern countries—especially those escaping from territories that have been overtaken by terrorist groups—have been most impacted. Over recent years, the barrage of new legislation has effectively sealed the borders of some European countries to a vast number of Middle Eastern refugees fleeing violence in their countries of origin, where groups bearing the “terrorist” label—a pejorative, highly-politicized term that has become a tool wielded by powerful Western states against Black, Muslim, and Middle Eastern populations—are rampant. The policies have resulted in the collective punishment of refugees, causing refugees to be labeled as “terrorists” if they have had any contact with terrorist groups from whom they are trying to escape. Individuals who had have had any contact with terrorist organizations—including those previously detained by terrorist organizations or those who have been forced to pay taxes to terrorists—risk falling under expanded definitions of “terrorism bars” to asylum. In other words, refugees who have themselves been victims of terrorism can be excluded from applying for asylum on terrorism-related grounds.

This Note will explore the ways in which the UNSC’s counterterrorism resolutions contravene the Refugee Convention, as well as broader international law and human rights law, how these resolutions have been interpreted by the EU to further contravene the Refugee Convention and human rights law, and what the impacts of these resolutions and EU interpreta-

7. U.N. Charter art. 25 (“The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”).

8. U.N. Off. On Drugs and Crime, *Terrorism international framework: General UNSC resolutions on terrorism* (Mar. 2019), <https://www.unodc.org/e4j/en/organized-crime/module-16/key-issues/terrorism-international-framework---general-uns-resolutions-on-terrorism.html> [<https://perma.cc/LR27-R2A3>].

9. See Part IV, *infra*.

tions have been on refugee populations and on states' legal obligations. First, this Note will discuss the history, expansion, and evolution of the Refugee Convention and counterterrorism law and policy, including the UNSC's counterterrorism resolutions, particularly in the years after September 11, 2001. Next, it will explore how this expansion intersects with refugee and asylum law, and particularly how it has expanded the usage of terrorism bars to asylum in Europe. In conclusion, the Note will examine the practical impacts that these shifts have had—whether explicit or not—on Middle Eastern refugees and asylum seekers, as well as the impact these policies have had on EU countries' legal obligations under the Refugee Convention and the 1967 Additional Protocol (“Protocol”),¹⁰ the International Covenant on Civil and Political Rights (“ICCPR”),¹¹ and other human rights instruments.

I. INTERNATIONAL LAW AND THE INTENTION TO PROVIDE PROTECTION TO THOSE FLEEING PERSECUTION

Despite a long history of refugee protection, one of the earlier instances in which an international body developed, defined, and established refugee protection was during the “League of Nations period” from 1921 to 1946.¹² After World War I, the International Committee of the Red Cross (“ICRC”) and the League of Red Cross Societies sought to appoint a “High Commissioner” for refugees in order to “define the status of refugees,” thus beginning the process of legally defining refugee status and protection.¹³ The newly appointed High Commissioner for Refugees went on to help develop the Convention Relating to the International Status of Refugees of 1933, which included the principle of *non-refoulement*: the obligation to not “refuse entry to refugees at the frontier of their countries of origin.”¹⁴ This was the first instance in which “the principle of *non-refoulement* acquired the status of international treaty law.”¹⁵

The foundation of modern refugee law and policy developed almost two decades later, in response to the millions displaced by World War II, largely

10. Protocol Relating to the Status of Refugees, 31 January 1967, 606 U.N.T.S. 267 [hereinafter Protocol]. As the 1951 Refugee Convention was a post-Second World War instrument, it was originally limited in scope to persons fleeing events occurring before January 1, 1951 in Europe. Thus, the Additional Protocol Relating to the Status of Refugees (“Protocol”) was passed in order to remove the geographic and temporal limits of the 1951 Refugee Convention, thereby giving it universal coverage.

11. International Covenant on Civil and Political Rights art. 7, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

12. Gilbert Jaeger, *On the history of the international protection of refugees*, 83 IRRC 727, 727 (Sept. 2001), https://www.icrc.org/ar/doc/assets/files/other/727_738_jaeger.pdf [https://perma.cc/E7RR-MW5U].

13. *Id.* at 728.

14. Convention Relating to the International Status of Refugees of 28 October 1933 art. 3., Oct. 28, 1933, 159 L.N.T.S. 3663.

15. Jaeger, *supra* note 12, at 730.

using the Convention of 1933 as a model. The 1951 Refugee Convention and Protocol, which expanded the definition of refugees to include those beyond Europe, have together been ratified by 148 states.¹⁶ The two instruments provide the definition of a refugee that is used today: a person “who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.”¹⁷

However, the Refugee Convention and Protocol do far more than just provide this definition. They define the obligations states have in providing protection to those who meet the refugee definition, most importantly asserting that states may not turn away those who do meet the definition. This is the “core principle” of the Refugee Convention: the principle of non-refoulement. Adapted from the 1933 Convention, this principle is established under Article 33(1) of the Refugee Convention, providing that: “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where [the refugee’s] life or freedom would be threatened on account of [the refugee’s] race, religion, nationality, membership of a particular social group or political opinion.”¹⁸

The principle of non-refoulement has also become a part of customary international law¹⁹ and is a tenet of both the ICCPR²⁰ and the Convention Against Torture (“CAT”).²¹ Both the ICCPR and CAT provide clear rules for when an individual *cannot* be returned to a country of persecution. Article 3, Section 1 of CAT provides that “[n]o State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”²² This suggests that even where someone may fall under one of the exclusions to refugee protection outlined under Article 1F (discussed in Section III.A, *infra*), CAT provides an exception to these exclusions in cases where the individual might be in danger of being tortured if returned to

16. U.N. High Comm’r for Refugees, *States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol* (Apr. 2015), <https://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf> [<https://perma.cc/G8RY-EE3D>] (showing that there are 145 states party to the 1951 Convention, 146 states party to the Additional Protocol, 142 states that are party to both the Convention and Protocol, and 148 states that are party to one or both instruments).

17. Refugee Convention, *supra* note 1, at art. 1(2) (discussing that initially, the Refugee Convention defined refugees as individuals unable or unwilling to return to their country of origin, for the reasons listed, specifically “[a]s a result of events occurring before 1 January 1951,” but this requirement that refugee status be linked to the events of World War II has since been removed).

18. Refugee Convention, *supra* note 1, at art. 33(1).

19. U.N. High Comm’r for Refugees, *The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93* (Jan. 31, 1994), <https://www.refworld.org/docid/437b6db4.html> [<https://perma.cc/33VT-KMJN>].

20. ICCPR, art. 7.

21. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3.1, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture].

22. *Id.*

their home country. The ICCPR's non-refoulement provision, on the other hand, pulls its language directly from the Refugee Convention.²³

The inclusion of the non-refoulement principle in several international legal instruments speaks to some of the broader purposes of the Refugee Convention and the call for refugee protection. While the primary purpose of the Refugee Convention is the protection of refugees from persecution, that is not its *sole* purpose. The historical foundations and development of the Refugee Convention, as well as *post facto* commentary by the UNHCR,²⁴ suggest that it has several ancillary purposes, including international cooperation amongst states and re-establishing stability in the lives of refugees.²⁵ To pursue these purposes, the United Nations General Assembly ("UNGA") endowed the UNHCR with a uniquely broad mandate that "was universal and general, unconstrained by geographical or temporal limitations."²⁶

These subsidiary purposes highlight that refugee protection—and non-refoulement as part of that protection—extends beyond the protection of individuals from persecution. Instead, it is a means to ensure broader stability and cohesion in an increasingly globalized world. The UNSC resolutions, therefore, are not only infringing upon states' obligations to provide refugees with asylum, but are also disrupting a wider international order that was developed by the Refugee Convention. As states must comply with both the Refugee Convention and with binding UNSC Resolutions, the conflicting mandates of the two international bodies makes the simultaneous fulfilment of these obligations challenging and, in some cases, impossible.

II. THE REFUGEE CONVENTION'S EXCEPTIONS TO PROTECTION

While the primary purpose of the Refugee Convention is to lay out states' obligations for granting protection to those who meet the refugee definition, it also includes certain exclusions and exceptions to states' obligations to provide refugees with protection, primarily in Articles 1F, 32,

23. ICCPR, art. 7.

24. Press Release, U.N. High Comm'r for Refugees, Ten Refugee Protection Concerns in the Aftermath of Sept. 11, Press Release (Oct. 23, 2001); U.N. High Comm'r for Refugees, Statement on Article 1F of the 1951 Convention (July 2009), <https://www.unhcr.org/protection/operations/4a5edac09/unhcr-statement-article-1f-1951-convention.html>, [<https://perma.cc/5D6G-AEP9>]; U.N. High Comm'r for Refugees, *UNHCR Comments on the European Commission's Amended Proposal for a Directive of the European Parliament and of the Council on Common Procedures for Granting and Withdrawing International Protection Status* (2011), <https://www.unhcr.org/4f35256c9.pdf> [<https://perma.cc/28FZ-3E3R>].

25. Yuval Livnat, *Compulsory Secondary Movement and Article 32 of the Refugee Convention*, REFLAW (Aug. 28, 2019), <http://www.reflaw.org/compulsory-secondary-movement-and-article-32-of-the-refugee-convention/> [<https://perma.cc/FR69-EQJ3>].

26. Guy S. Goodwin-Gill, *Introductory Note: Convention Relating to the Status of Refugees Protocol Relating to the Status of Refugees*, U.N. AUDIOVISUAL LIBR. INT'L LAW (Aug. 2008), <https://legal.un.org/avl/hal/prsr/prsr.html> [<https://perma.cc/KEC8-R5NK>].

and 33(2).²⁷ While none of these articles explicitly reference terrorism as a cause for exclusion, there are ways in which each may be used as a means to exclude or expel those who have committed terrorist actions that reach the levels necessitated by these articles. However, there is no single legal definition of terrorism accepted by international law,²⁸ making determinations for how acts of terrorism may interact with the Refugee Convention more complex. These exceptions are critical to understanding the ways in which modern counterterrorism policies, treaties, other international law, and domestic law have overstepped that which was already set out in the Refugee Convention, and thus may be encroaching upon the protections set out in the Convention.

A. Article 1F: Exceptions to Refugee Protection

First, Article 1F of the Refugee Convention 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, 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.²⁹

Article 1F(a) is unlikely to be applicable or be utilized in cases of suspected terrorists, unless a terrorist offense were to be considered a crime against humanity, which has not yet occurred.³⁰ Crimes against peace must generally “be committed by State organs, agents, or officials,”³¹ but state actors generally do not fall into the category of terrorists,³² though there is reason to believe that this may be changing.³³ Terrorism may constitute a war crime under international humanitarian law (“IHL”) if committed

27. Refugee Convention, *supra* note 1, at arts. 1F, 32, 33(2).

28. Rene Bruin and Kees Wouters, *Terrorism and the Non-derogability of Non-refoulement*, 15 INT’L J. OF REFUGEE LAW 9 (2003); see also Ben Saul, *Exclusion of Suspected Terrorists from Asylum: Trends in International and European Refugee Law*, University of Oxford IIIS Discussion Paper No. 26, 7 (2004) (discussing different international courts’ definitions of terrorism).

29. Refugee Convention, *supra* note 1, at art. 1F.

30. See Saul, *supra* note 28.

31. *Id.* at 5.

32. ERICA CHENOWETH & PAULINE L. MOORE, *THE POLITICS OF TERROR* (2018).

33. Edward Wong and Erica Schmitt, *Trump Designates Iran’s Revolutionary Guards a Foreign Terrorist Group*, N.Y. TIMES (Apr. 8, 2019), <https://www.nytimes.com/2019/04/08/world/middleeast/trump-iran-revolutionary-guard-corps.html> [<https://perma.cc/E9HM-7RED>].

within the context of armed conflict,³⁴ but this would require first trying an individual in court in order to determine whether or not they have violated the laws of armed conflict—something that has yet to occur for a terrorism offense.³⁵

Though acts of terrorism could also fall within the scope of Article 1F(b), they have increasingly fallen under Article 1F(c) over the last two decades.³⁶ This may be in part because of the difficulties in defining what Article 1F(b) covers,³⁷ and in part because terrorism usually requires a political motivation.³⁸ Article 1F(c) is no less complex.

The “acts contrary to the purposes and principles of the United Nations” discussed in Article 1F(c) are laid out in Articles 1 and 2 of the UN Charter.³⁹ Though these purposes and principles are directed toward the actions of the United Nations and its member states, it includes such things as the “principle of equal rights and self-determination of peoples”⁴⁰ and “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”⁴¹ Article 1F(c) is thus a highly subjective, “catch-all” category under which states could deny asylum to refugees, and as such, the UNHCR has generally discouraged the use of Article 1F(c), preferring states rely on (a) or (b) instead.⁴² States previously complied, using 1F(c) only to supplement cases under 1F(a) or (b),⁴³ but in the last two decades, states have increasingly used 1F(c), particularly in cases involving claims of terrorism.⁴⁴

One reason for the increasing inclusion of terrorist acts under 1F(c) rather than under 1F(b) (under which terrorist offenses were more likely to be

34. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 33(1) Aug. 12, 1949, 75 U.N.T.S. 287 (“No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited. Pillage is prohibited.”); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51(2), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I] (“The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 4(2)(d), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II] (“Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever: . . . (d) acts of terrorism.”).

35. Interview with Professor Ben Saul, Challis Chair of International Law at the University of Sydney (Oct. 4, 2019).

36. Sandesh Sivakumaran, *Exclusion from Refugee Status: The Purposes and Principles of the United Nations and Article 1F(c) of the Refugee Convention*, 26 INT’L J. REFUGEE LAW 350, 351 (2014).

37. See Saul, *supra* note 28 at 6 (“Is terrorism serious, criminal, and non-political?”).

38. CHENOWETH & MOORE, *supra* note 32.

39. U.N. Charter arts. 1, 2.

40. U.N. Charter art. 1, ¶2.

41. U.N. Charter art. 1, ¶3.

42. Interview with Professor Ben Saul, Challis Chair of International Law at the University of Sydney (Oct. 4, 2019).

43. *Id.*

44. Sivakumaran, *supra* note 36, at 351.

included previously) may firstly be related to the fact that terrorism is often defined as being a political act,⁴⁵ and 1F(b) specifically references “serious *non-political* crimes” (emphasis added) so as to leave the political offense exception to extradition undisturbed.⁴⁶ The increasing use of 1F(c) may also be related to the rapid expansion of actions (or non-actions) that fall under the scope of what constitutes terrorism that could be considered “contrary to the purposes and principles of the United Nations.”⁴⁷

Engagement with the first possibility poses several challenges due to the lack of international consensus over what constitutes terrorism,⁴⁸ the question of whether terrorism is a political act that would or should fall under the political offense exception, and the subjective meaning of a “serious non-political crime.”⁴⁹ Considering that the Refugee Convention specifically sought to uphold the political offense exception, including the arguably political crime of terrorism, under the Article 1F exclusions may demonstrate that the inclusion of terrorism as an exception to protection contradicts the purposes of the Refugee Convention. On the other hand, as there is no agreed upon international legal definition of terrorism,⁵⁰ and given the limited scope of the political offense exception, acts of terrorism that otherwise would constitute a “serious non-political crime” could likely still fall under the scope of Article 1F of the Refugee Convention as intended.⁵¹

The second possibility—that the increasing use of 1F(c) may be linked to the expansion of what may be deemed terrorism—is particularly relevant to this Article’s discussion of how UNSC resolutions have significantly transformed, and in many ways distorted, the intentions of the Refugee Convention. In *Pushpanathan v. Canada*, the Supreme Court of Canada laid out the test for determining what acts may fall under Article 1F(c) of the Refugee Convention.⁵² Applying this test, the Court included terrorism as an act that has been “explicitly recognized as contrary to the purposes and principles of the United Nations (including in international decisions and resolutions).”⁵³ That the UNSC has “explicitly recognized” terrorism (though with different definitions as to which acts of terrorism should be included)

45. CHENOWETH & MOORE, *supra* note 32.

46. Ben Saul, *Defining Terrorism: A Conceptual Minefield*, in *THE OXFORD HANDBOOK OF TERRORISM* (Chenoweth et al., eds., 2019).

47. Refugee Convention, *supra* note 1, at art. 1F(c); *see also* UN Charter arts. 1, 2.

48. Refugee Convention, *supra* note 1, at art. 1F(c).

49. *Id.*

50. *Id.*

51. *Id.*

52. *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* [1998] 1 S.C.R. 982 (Can.).

53. *See* Saul, *supra* note 28, at 7 (citing *Pushpanathan v. Canada*, *supra* note 52) (“In the Canadian case of *Pushpanathan*, the test for acts contrary to UN purposes and principles was as follows: (1) a consensus in international [law] that acts constitute sufficiently serious and sustained violations of fundamental human rights as to amount to persecution, or (2) are explicitly recognized as contrary to the purposes and principles of the United Nations (including in international decisions and resolutions).

to be such an act is undoubtedly true, as seen through several of its resolutions.⁵⁴ This, however, raises the question of whether these resolutions align with the intended purposes of the Refugee Convention.⁵⁵

Several resolutions have widely expanded what may be cause for blocking an individual from receiving protection under the Refugee Convention.⁵⁶ As a result, wide swaths of the refugee population may be barred from receiving protection, even if casting such a wide net was not necessarily the intention of these resolutions. Articles 1F(a) and (b) are somewhat limited in their scope due to the seriousness of the crimes that may be considered under them, yet the UNSC resolutions may be able to harness Article 1F(c)'s vagueness to include a greater range of actions limiting protection under the Refugee Convention. This weaponization of Article 1F(c), however, severely curtails the protection the Convention was and is intended to offer to those fleeing persecution.

B. Article 32: *Refoulement on National Security Grounds*

In addition to the Article 1F exceptions to protection, Article 32 provides that refugees may be expelled “on grounds of national security or public order.”⁵⁷ However, Article 32 requires that those individuals being expelled on these grounds must be afforded “due process of law,” meaning refugees must be allowed to “submit evidence to clear themselves,” and “to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.”⁵⁸ As will be described in later sections, where UNSC resolutions and states have demanded the expulsion of certain classes of refugees on the basis of national security, they have not referenced Article 32,⁵⁹ nor have they have given refugees access to due process as demanded by Article 32.⁶⁰

Acts found to be contrary to UN purposes and principles under these tests included torture, terrorism, hostage taking, apartheid, but not drug trafficking.”)

54. See, e.g., S.C. Res. 1337, ¶ 5 (2001); S.C. Res. 1377, preamble (2001); S.C. Res. 1624, ¶ 8 (Sept. 14, 2005); but see U.N. High Comm’r for Refugees, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, ¶ 49 (Jun. 3, 2002), <https://www.refworld.org/docid/3f5857d24.html> [<https://perma.cc/5E8W-TAUE>] (“Rather than focus on the ‘terrorism’ label, a more reliable guide to the correct application of Article 1F(c) in cases involving a terrorist act is the extent to which the act impinges on the international plane – in terms of its gravity, international impact, and implications for international peace and security. In UNHCR’s view, only terrorist acts that are distinguished by these larger characteristics, as set out by the aforementioned Security Council Resolutions, should qualify for exclusion under Article 1F(c).”)

55. See Saul, *supra* note 28, at 7.

56. Part III, *infra*. See also S.C. Res. 1267 (Oct. 15, 1999); S.C. Res. 1373 (Sept. 28, 2001); S.C. Res. 1377 (Nov. 12, 2001); S.C. Res. 1390 (Jan. 16, 2002); S.C. Res. 1624 (Sept. 14, 2005); S.C. Res. 2322 (Dec. 12, 2016).

57. Refugee Convention, *supra* note 1, at art. 32(1).

58. *Id.*

59. See Livnat, *supra* note 25.

60. See, e.g., Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v. Council of the European Union and European Commission*, ECLI:EU:C:2008:461 (Sept. 3, 2008).

C. Article 33(2): Exception to Non-Refoulement

Finally, Article 33 provides an exception to the principle of non-refoulement,⁶¹ stating that countries may deny protection and return individuals “if there are reasonable grounds for regarding a refugee as a danger to the security of the country in which [that person] is or if, having been convicted of a particularly serious crime, that person constitutes a danger to the community of the host State.”⁶² This provision essentially created a national security loophole to the general rule that refugees must never be returned to persecution—a loophole that would presumably cover the threat of terrorism.

There are a few exceptions to this loophole, including under Article 3 of CAT, which prohibits refoulement when “there are substantial grounds for believing that he would be in danger of being subjected to torture.”⁶³ Article 3 would apply with particular force in cases in which there is a high likelihood that an individual will be tortured upon return.⁶⁴

The combination of Article 1F, Article 32, and Article 33(2) makes clear that the Refugee Convention is a legal instrument that provides protection for refugees whilst still ensuring the security of the countries that have signed onto it against terrorism.⁶⁵ However, the Refugee Convention alone no longer dictates who may or may not be granted asylum. Many of the sectoral treaties⁶⁶ and UNSC resolutions related to terrorism passed over the

61. Refugee Convention, *supra* note 1, at art. 33(1) (“No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where [the refugee’s] life or freedom would be threatened on account of [the refugee’s] race, religion, nationality, membership of a particular social group or political opinion.”).

62. Refugee Convention, *supra* note 1, at art. 33(2).

63. Convention Against Torture, *supra* note 21 at art. 3(1) (“No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that [the refugee] would be in danger of being subjected to torture.”).

64. See Off. of the High Comm’r for Hum. Rts., *Human Rights, Terrorism and Counter-terrorism Fact Sheet No. 32*, <https://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf> [<https://perma.cc/ZU66-GTDA>] (“It is crucial to emphasize, however, that the application of either limitation contained in articles 32 or 33 (2) of the 1951 Convention is subject to the other human rights obligations of the State, specifically article 3 of the Convention against Torture and article 7 of the International Covenant on Civil and Political Rights, whose protection is absolute.”).

65. Terrorism as an act excluded by Article 1F is not, however, without controversy. The lack of an international definition for terrorism has made it difficult for courts to determine whether Article 1F applies to acts of terrorism. See Saul, *supra* note 28, at 7 (quoting *Gurung v. Secretary of State for the Home Department*, UK Immigration Appeal Tribunal, Appeal No. [2002]UKIAT04870 HX34452-2001 (Oct. 15, 2002) (“[U]ntil such a time as we have accepted international definition of terrorism and one which clearly matches up with definitions contained within subclauses of Art 1F, it remains important to note material differences between Art 1F offences and terrorist offences. Regular use of the concept of terrorism as a tool for identifying crimes contrary to Art 1F must await definitive codification by the international community.”).

66. There are twenty sectoral treaties, established from 1963 and 2019, that either protect certain targets deemed to be common to terrorism, or prohibit specific means and/or methods of terrorism (e.g., the Chicago Convention on Civil Aviation; the Montreal Convention 1971; and the 1988 Airport Protocol).

last two decades have included specific provisions relating to states' obligations to deny asylum and protection to terrorists.⁶⁷

Rather than reasserting Articles 1F and 33(2), these provisions have separately defined when states are obligated to deny protection to individuals. They have also increasingly conflicted with the Refugee Convention's core mandate.

III. THE INTERSECTION OF UNSC COUNTERTERRORISM RESOLUTIONS AND REFUGEE PROTECTION

The UNSC held its first session in 1946 in the aftermath of World War II. It has since passed over two thousand resolutions, an increasing number of which have focused on the prevention and criminalization of terrorism. Whereas previously only a small proportion of UNSC resolutions were adopted under Chapter VII of the UN Charter—making them legally binding upon member states⁶⁸—that proportion dramatically increased in the aftermath of September 11.⁶⁹ Many of the key resolutions related to terrorism—such as Resolutions 1267⁷⁰ and 1373⁷¹—have been adopted under Chapter VII. Others—such as Resolutions 1377⁷² and 1624⁷³—while likely considered non-binding,⁷⁴ nonetheless have still been highly influential in the development of counterterrorism policy.

Regardless of their binding force, these resolutions impact which refugees and asylum seekers may be granted protection upon arrival in a new

67. See, e.g., S.C. Res. 1373, ¶ 2(c) (Sept. 28, 2001) (providing that all states shall “deny safe haven to those who finance, plan, support or commit terrorist acts, or provide safe havens”); S.C. Res. 1624, ¶ 1(c) (Sept. 14, 2005) (“The Council further calls upon States to deny safe haven to any persons with respect to whom there is credible and relevant information giving serious reasons for considering that they have been guilty of incitement to commit a terrorist act.”); S.C. Res. 2178 (Sept. 24, 2014) (“All States should establish, in consultation with the Office of the United Nations High Commissioner for Refugees (UNHCR), an effective procedure to grant refugee status to eligible asylum seekers and exclude persons who are not considered to be deserving of international protection in accordance with the 1951 Convention relating to the Status of Refugees.”); S.C. Res. 2322, ¶ 9(d) (Dec. 12, 2016) (“Calls upon all States to . . . [e]nhance cooperation to deny safe haven to those who finance, plan, support, commit terrorist acts, or provide safe havens.”).

68. Dag Hammarskjöld Library, *Ave UN Resolutions Binding*, U.N. (Apr. 26, 2018), <http://ask.un.org/faq/15010> [<https://perma.cc/K3S5-QDEE>] (“In general, resolutions adopted by the Security Council acting under Chapter VII of the Charter, are considered binding, in accordance with Article 25 of the Charter.”). See Section V.A, *infra*, for further discussion.

69. U.N. Security Council, *Chapter VII Resolutions and Resolutions by Year (1995-2021)*, https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/chapter_vii_resolutions.pdf [<https://perma.cc/4XRB-BM9H>].

70. S.C. Res. 1267 (Oct. 15, 1999).

71. S.C. Res. 1373 (Sept. 28, 2001).

72. S.C. Res. 1377 (Nov. 12, 2001).

73. S.C. Res. 1624 (Sept. 14, 2005).

74. Marko Divac Öberg, *The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ*, 16 EUR. J. INT'L LAW 879 (2005), <http://www.ejil.org/pdfs/16/5/329.pdf> [<https://perma.cc/5KZ7-TNQZ>]; but see *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia*, Advisory Opinion, 1971 I.C.J. 53, ¶¶ 108–14 (June 21).

country. As none of these resolutions specifically references the Refugee Convention, much less the text of Articles 1F or 33(2), their impacts on refugees at times may be at odds with the stipulations and intentions of the Convention. Though there are certainly other sources of international legal obligations and pressures contributing to the formation of the EU's modern counterterrorism policies, UNSC resolutions have been especially significant.⁷⁵

Terrorism was first included in a UNSC resolution in 1970.⁷⁶ Each subsequent resolution has further expanded the range of acts that may be considered terrorism, often building upon previous resolutions. Whereas some resolutions—namely Resolution 1373—explicitly call on states to ensure that individuals who have engaged in terrorism do not receive asylum,⁷⁷ others expand the definition of terrorist acts, with the effect of implicating more individuals as terrorists, and thus barring these individuals from receiving protection.⁷⁸ A brief overview of resolutions integral in the formation of counterterrorism policy and their relationship with the Refugee Convention follows below.

A. *Before September 11: Resolution 1267 and the Terrorist Financing Convention*

One of the most foundational UNSC terrorism-related resolutions was UNSC Resolution 1267.⁷⁹ Passed in 1999, the resolution first established a Sanctions Committee, criminalizing the funding and financing of the Taliban.⁸⁰ The resolution was far more expansive than a convention passed in the same year—the International Convention for the Suppression of the

75. Sivakumaran, *supra* note 36, at 351.

76. S.C. Res. 286 (Sept. 9, 1970) (“[A]ppealed for an end to hijacking of commercial aircraft and for release of passengers and crew currently held.”).

77. S.C. Res. 1373, ¶2 (c) (Sept. 28, 2001) (stating that all states shall “deny safe haven to those who finance, plan, support or commit terrorist acts, or provide safe havens”); *id.* at ¶ 3(f) (calling for states to make this assessment “before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts”).

78. *See, e.g., id.* (criminalizing terrorist financing, not restricted to specific terrorist groups, and granting no humanitarian exceptions—meaning that even those who may be indirectly providing support to terrorist organizations in the process of doing humanitarian work may be sanctioned); S.C. Res. 1377 (Nov. 12, 2001) (criminalizing the “preparation” of acts that would constitute terrorism); S.C. Res. 1390 (Jan. 16, 2002) (making it so that terrorist financing sanctions had no temporal and geographic limits, thus creating a larger basis for criminalization and in effect expanding upon Resolution 1267).

79. S.C. Res. 1267 (Oct. 15, 1999).

80. *Id.* at ¶ 6 (describing how the committee expanded and was split into two committees: one committee covering the Taliban (*see* Security Council Committee established pursuant to Resolution 1988 (2011)), and another committee covering the Islamic State in Iraq and the Levant, Al Qaeda, and associated groups and entities (*see* Security Council Committee pursuant to Resolutions 1267 (1999), 1989 (2011), and 2253 (2015) concerning the Islamic State in Iraq and the Levant (Da’esh), Al-Qaida, and associated individuals, groups, undertakings, and entities)).

Financing of Terrorism (“Terrorism Financing Convention”)⁸¹—which criminalizes instances where a person “directly or indirectly, unlawfully and willfully, provides or collects funds, with the intention that they should be used or in the knowledge that they are to be used” to carry out a terrorist act.⁸² Though not a UNSC resolution, the Terrorist Financing Convention has been foundational to modern UNSC counterterrorism resolutions. The Terrorist Financing Convention also requires state parties to hold those who finance terrorism criminally, civilly, or administratively liable for such acts.⁸³ Unlike UNSC Resolution 1267, the Terrorist Financing Convention requires the funding to have actually, and intentionally, contributed to a terrorist act.

Resolution 1267, however, requires states to both freeze the Taliban’s funds and other financial resources, and to ensure that no funds or financial resources “are made available, by their nationals or by any persons within their territory, to or for the benefit of the Taliban or any undertaking owned or controlled, directly or indirectly.”⁸⁴ Thus, Resolution 1267 set forth a blanket policy on the barring of terrorist financing, with no distinction for financing specifically linked to terrorist actions.⁸⁵ This set the foundation for later resolutions to criminalize the provision of funds to terrorist organizations, even in cases where the intention was not to finance a terrorist act.

B. *After September 11: Resolutions 1373, 1377, and 1390*

Just two years after Resolution 1267 was passed, the September 11 attacks occurred, ushering in a new legal and policy regime related to the prevention of terrorism. At the outset of this new era, the UNSC passed Resolution 1373 on September 28, 2001.⁸⁶ Like Resolution 1267, Resolution 1373 requires the criminalization, rather than just the prevention, of terrorist financing.⁸⁷ However, Resolution 1373 reaches beyond the scope of Resolution 1267, as it is not restricted to specific terrorist groups and does not require a link to Al Qaeda or the Taliban. Moreover, Resolution 1373 grants no humanitarian exceptions for the support or financing of

81. The Terrorist Financing Convention is a United Nations treaty that was drafted in 1999 to criminalize acts related to the financing of terrorism. As of November 2021, there are 189 parties to the Convention and 132 signatories. See International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 2178 U.N.T.S. 197, [hereinafter *Terrorism Financing Convention*] <https://treaties.un.org/doc/db/terrorism/english-18-11.pdf> [<https://perma.cc/P3PG-5ABE>].

82. *Terrorism Financing Convention*, *supra* note 81, at art. 2.

83. *Id.* at art. 5.

84. S.C. Res 1267, ¶ 4(b) (Oct. 15, 1999).

85. *Id.* (making an exception for humanitarian need, but only on a “case-by-case basis” as determined by the UNSC Sanctions Committee).

86. S.C. Res. 1373 (Sept. 28, 2001).

87. *Id.* at ¶ 2(e) (“[The UNSC] [*d*]ecides that all States shall . . . [e]nsure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts.”).

terrorism, raising the possibility of sanction for even those who may be indirectly providing support to terrorist organizations in the process of doing humanitarian work.⁸⁸ Specifically, the resolution requires that states:

Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or *other related services* available, *directly or indirectly*, for the benefit of persons [involved in] terrorist acts [and also to] *refrain from providing any form of support, active or passive*, to entities or persons involved in terrorist acts.⁸⁹

Uniquely, Resolution 1373 specifically references tenets of the Refugee Convention, including the Article 1F exceptions, though it does not explicitly mention the Convention. The Resolution specifically states 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*.”⁹⁰

On its face, the resolution’s text may suggest a deference to the Refugee Convention and to international law more broadly, but the UNHCR has clarified that its effect is to contravene international law. Referring specifically to the interpretations of Article 1F(c) in UNSC Resolution 1373 and 1377, the UNHCR stated:

Yet the assertion—even in a UN instrument—that an act is “terrorist” in nature would not by itself suffice to warrant the application of Article 1F(c), not least because “terrorism” is without clear or universally agreed definition. Rather than focus on the “terrorism” label, a more reliable guide to the correct application of Article 1F(c) in cases involving a terrorist act is the extent to which the act impinges on the international plane—in terms of its gravity, international impact, and implications for international peace and security. In UNHCR’s view, only terrorist acts that are distinguished by these larger characteristics, as set out by the aforementioned Security Council Resolutions, should qualify for exclusion under Article 1F(c). Given the general approach to Article 1F(c) described above, egregious acts of international terrorism affecting global security may indeed fall within the scope of Article 1F(c), although only the leaders of groups responsible for such atrocities would in principle be liable to exclusion under this provision.⁹¹

88. *Id.* at ¶ 2.

89. *Id.* at ¶¶ 1, 2 (emphasis added).

90. *Id.* at ¶ 5 (emphasis added).

91. U.N. High Comm’r for Refugees, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, ¶ 49 (June 3, 2002) [hereinafter *Appli-*

Thus, the UNSC contravenes the Refugee Convention where it declares such a wide swath of actions to be “contrary to the purposes and principles of the United Nations,” in Resolution 1373, indicating that even where resolutions may be referencing the Convention, they may still contravene it.

Just weeks after adopting Resolution 1373, the UNSC adopted a non-binding resolution: Resolution 1377.⁹² Resolution 1377 reiterated the provisions of Resolution 1373, but expanded what may be criminalized under counterterrorism provisions to include the “planning and preparation” of acts of terrorism.⁹³ To include preparatory actions that intentionally or unintentionally provide support to terrorism as something that must be criminalized is largely unprecedented. Pre-inchoate offenses, and the potential they present to criminalize “basic conduct” without intent,⁹⁴ would seem to be contrary to both human rights principles and criminal law principles more broadly.⁹⁵ While the criminalization of pre-inchoate offenses may not be specifically directed at refugees and asylum seekers, the expansiveness of criminalization of otherwise innocuous actions could make it significantly easier to deny protection to asylum seekers if there are any indications that an action they have taken could fall within the extraordinarily wide scope of one of these resolutions.

Finally, Resolution 1390⁹⁶ expanded upon Resolution 1267 and made it so that terrorist financing sanctions were not only broad in definition, but also “indefinite in both space and time.”⁹⁷ This lack of temporal and geographic limits has been a controversial aspect of the “war on terror,” broadly speaking, in that it allows for an expansiveness that generally has not been justified or legalized in other contexts.⁹⁸ As characterized by Lisa Ginsborg, “Resolution 1390 provided a new open-ended power to the Security Council, with the result of remaining in force indefinitely and creating a permanent sanctions regime.”⁹⁹

cation of Exclusion Clauses], <https://www.refworld.org/docid/3f5857d24.html> [https://perma.cc/UTT8-THFG].

92. S.C. Res. 1377, ¶ 2 (Nov. 12, 2001).

93. *Id.*; see Sivakumaran, *supra* note 36, at 354.

94. Int’l Comm. of Jurists, *Counter-Terrorism and Human Rights in the Courts: Guidance for Judges, Prosecutors and Lawyers on Application of EU Directive 2017/541 on Combatting Terrorism*, 5 (Nov. 2020) (“In practice, however, a number of terrorism offences in national law raise concerns as they are based on simple conduct, absent proof that the conduct had any effect or created even a foreseeable danger of harm, and may not require intent to contribute to acts of terrorism.”).

95. See Section V.A, *infra* (discussing how pre-inchoate offenses may be in violation of the ECHR and ICCPR).

96. S.C. Res. 1390, ¶ 2 (Jan. 16, 2002).

97. Lisa Ginsborg, *The United Nations Security Council’s counter-terrorism Al-Qaida sanctions regime: Resolution 1267 and the 1267 Committee*, in RESEARCH HANDBOOK ON INTERNATIONAL LAW AND TERRORISM 506, 610 (Ben Saul ed., 2014).

98. HELEN DUFFY, *THE ‘WAR ON TERROR’ AND THE FRAMEWORK OF INTERNATIONAL LAW* 399–401 (Cambridge Univ. Press, 2d ed. 2015).

99. Ginsborg, *supra* note 97, at 610.

C. *Further Expansion: Resolutions 1624, 2178, and 2322*

Since the adoption of 1373, 1377, and 1390, the UNSC has continued to pass more terrorism-related resolutions,¹⁰⁰ three of which have specifically addressed the issue of asylum seekers: Resolution 1624,¹⁰¹ Resolution 2178,¹⁰² and Resolution 2322.¹⁰³ In passing Resolution 1624 in 2005, the UNSC called on states to “deny safe haven to any persons with respect to whom there is credible and relevant information giving serious reasons for considering that they have been guilty of such conduct.”¹⁰⁴ Resolution 2178, adopted in 2014 under Chapter VII of the UN Charter with particular focus on foreign terrorist fighters, requires that states “ensure . . . that refugee status is not abused by . . . foreign terrorist fighters” (“FTFs”).¹⁰⁵ And finally, Resolution 2322, passed in 2016, reiterated many prior resolutions’ calls to prevent asylum seekers from being granted safe haven where they have been deemed to have engaged in any terrorist activity.¹⁰⁶

In reference to Resolution 2178, the UNSC warned member states that “the massive flow of refugees and asylum seekers from conflict zones also raises the risk that foreign terrorist fighters will attempt to use the refugee system to escape prosecution.”¹⁰⁷ Though this commentary also includes that states should act upon the resolution “in consultation with” the UNHCR and “consistent with” Article 1F of the Refugee Convention,¹⁰⁸ it does not provide instruction detailing how exactly the resolution should interact with either entity. The direction the UNSC’s resolutions have taken highlights the tenuous link between refugee law and counterterrorism law: the reality that those fleeing terrorism and war must undergo scrutiny far more strenuous than required by the Refugee Convention.

As in Resolution 1373, this over-expansive approach may indicate that even where the UNSC has incorporated some mention of the Refugee Convention or human rights law within their counterterrorism resolutions, the resolutions may still contravene both the Convention and human rights and international law. The resolutions have established bars to asylum seekers that have gone far beyond the limited exceptions to asylum protection laid

100. U.N. Security Council, *Chapter VII Resolutions and Resolutions by Year (1995-2021)*, https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/chapter_vii_resolutions.pdf [<https://perma.cc/4XRB-BM9H>].

101. S.C. Res. 1624 (Sept. 14, 2005).

102. S.C. Res. 2178 (Sept. 24, 2014).

103. S.C. Res. 2322 (Dec. 12, 2016).

104. S.C. Res. 1624, ¶ 1(c) (Sept. 14, 2005).

105. S.C. Res. 2178, ¶ 3 (Sept. 24, 2014).

106. S.C. Res. 2322, ¶ 9(d) (Dec. 12, 2016).

107. Raimonda Murmokaite (Chair of the Security Council Committee Established Pursuant to Resolution 1373 (2001) Concerning Counter-Terrorism), *Implementation of Security Council Resolution 2178 (2014) by States Affected by Foreign Terrorist Fighters: Third Report*, S.C. Res. 975, ¶ 8 at 16 (Dec. 29, 2015), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/459/87/PDF/N1545987.pdf?OpenElement> [<https://perma.cc/87F8-J9AF>].

108. *Id.*

out in the Convention. Further, the resolutions' criminalization of pre-inchoate offenses, their lack of humanitarian exemptions, and their mandated refoulement of certain refugees not barred from protection under the Refugee Convention create clear conflicts with human rights law—which, as discussed further in Part IV, *infra*, has been held by some courts to take precedence over UNSC resolutions under the UN Charter.

IV. CONFLICTING LEGAL OBLIGATIONS

Several bodies of law relating to refugees bind EU states, including UNSC resolutions, the UN Charter, EU law, individual states' domestic laws, the Refugee Convention, and broader human rights and international law. Where these obligations may conflict, guidance for which law takes precedence is not always clear. The UNSC has in some cases specifically referenced the Refugee Convention and other human rights principles within the text of counterterrorism resolutions (or in related guidance),¹⁰⁹ but there are many instances in which the resolutions themselves conflict with obligations under the Convention and under human rights law.¹¹⁰ This Part will first outline states' legal obligations to comply with the UNSC resolutions and the Refugee Convention. Second, it will lay out how international law and EU courts have addressed conflicts that have arisen or may arise between states' obligations.

A. *The Obligation to Comply with UNSC Resolutions*

UN member states have an obligation to comply with UNSC decisions per Article 25 of the UN Charter, which states that “[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”¹¹¹ Though the UN is formally composed of states, the EU has had observer status in the UNGA since 1974, and has enjoyed “enhanced status” since 2011, granting it the right to speak in UNGA sessions.¹¹² Unlike EU member states, the EU as an entity in and of itself does not have any status in the UNSC. However, it bears certain obligations to comply with UNSC resolutions for two reasons. First, it and its member states are interrelated—where member states may have legal obligations under the UNSC, the EU as a whole may also adopt laws and policies in line with such obligations to maintain consistency.¹¹³ Second, Article 48(2) of the UN Charter states that decisions made under

109. See S.C. Res. 1373, ¶ 3(f) (Sept. 28, 2001).

110. See, e.g., Application of Exclusion Clauses, *supra* note 91, ¶ 49.

111. U.N. Charter, art. 25.

112. Ionel Zamfir & Tessa Fardel, *European Union Involvement in the United Nations System*, EUROPEAN PARLIAMENTARY RESEARCH SERVICE, 9 (Sept. 2020), [https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/652081/EPRS_IDA\(2020\)652081_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/652081/EPRS_IDA(2020)652081_EN.pdf) [<https://perma.cc/VQK4-M54W>].

113. See *FAQ EU competences and Commission powers*, Eur. Union Eur. Citizens' Initiative, https://europa.eu/citizens-initiative/faq-eu-competences-and-commission-powers_en [<https://perma.cc/6YP4->

Chapter VII of the Charter “shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.”¹¹⁴ Because the EU constitutes an international agency within the meaning of the Charter provision, it may be obligated to comply with UNSC resolutions.

UNSC resolutions that have been adopted under Chapter VII of the Charter are generally considered binding under Article 25.¹¹⁵ Further, Article 103 of the UN Charter contains a “supremacy clause,” stating that states’ obligations under the Charter prevail over their other international legal obligations, in the event of a conflict between the obligations.¹¹⁶ Though this would seem to be a straightforward directive, the application of Article 103 and the prioritization of EU states’ legal obligations have been the subject of several cases in the EU.¹¹⁷ To date, there is no clear guidance regarding how EU states should navigate conflicting obligations under the UN Charter, the Charter of Fundamental Rights of the European Union (“EU Charter”), and international law and treaties more broadly.

B. *The Obligation to Comply with the Refugee Convention*

Each individual EU member state is also a signatory to the Refugee Convention and Protocol.¹¹⁸ Under the Vienna Convention’s Article 26,¹¹⁹ treaties—in this case, the Convention and the Protocol—are “binding upon the parties to it and must be performed by them in good faith.”¹²⁰ As the Refugee Convention and Protocol are not self-executing, states should implement them by incorporating the obligations listed therein into their domestic legislation,¹²¹ and must generally ensure that their domestic law is consistent with their treaty obligations.¹²² Further, though the EU as an entity is not itself a signatory to the Refugee Convention or Protocol, efforts

MLHB] (showing that the EU also has competence to “define and implement a common foreign and security policy” under the Treaty on European Union).

114. U.N. Charter, art. 48(2).

115. See Dag Hammarskjöld Library, *supra* note 68.

116. U.N. Charter, art. 103.

117. See, e.g., Case T-315/01, *Kadi v. Council and Comm’n*, 2005 E.C.R. II-3717-18, ¶ 156; *Joined Cases C-402 & C-415/05P, Kadi & Al Barakaat Int’l Found. v. Comm’n (Kadi I)*, 2008 E.C.R. I-6352, ¶ 74; *Al-Jedda v. the United Kingdom*, App. No. 27021/08 (7 July 2011); *Nada v. Switzerland*, App. No. 10593/08, ¶ 197 (12 September 2012).

118. See U.N. High Comm’r for Refugees, *States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol*, <https://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf> [<https://perma.cc/MX7K-A8UA>].

119. Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S., 331.

120. See Livnat, *supra* note 25.

121. Refugee Convention, *supra* note 1, at art. 43; Protocol, *supra* note 10, at art. 3.

122. U.N. Dep’t of Economic and Social Aff.’s, *Chapter 5: National legislation and the Convention – Incorporating the Convention into domestic law* (last accessed Mar. 5, 2022) <https://www.un.org/development/desa/disabilities/resources/handbook-for-parliamentarians-on-the-convention-on-the-rights-of-persons-with-disabilities/chapter-five-national-legislation-and-the-convention.html> [<https://perma.cc/YQ2V-XXML>].

to effectuate these treaty obligations are coordinated across the EU.¹²³ EU law also mandates that EU member states should develop a coordinated policy on asylum that complies with the Refugee Convention and Protocol.¹²⁴ The Common European Asylum System (“CEAS”) was established in 1999 with the purpose of developing these policies and ensuring that obligations are met uniformly across EU member states.¹²⁵

EU states are therefore obligated to both comply with the provisions of the Refugee Convention and to incorporate their obligations into their domestic law, meaning that individual states’ laws must provide individuals fleeing persecution with protection, save for the select circumstances that fall within the exceptions described in Part III. If states present barriers to refugees’ ability to enjoy their full rights under the Convention, they would fail to perform their duties under the Refugee Convention.¹²⁶ In addition to their obligations under the Refugee Convention and under the UN Charter, EU states also have obligations to EU-wide legal regimes, including the EU Charter.

C. *The EU’s Refugee Protection Policies*

In spite of their implementation of modern counterterrorism laws and policies, EU states have a long history of recognizing and enforcing protections for asylum seekers. In addition to the various conventions and treaties the EU and EU member states have signed on to, the European Convention of Human Rights (“ECHR”), adopted in 1953, and the Treaty on the Functioning of the EU, adopted in 1958, both provide for the protection of asylum seekers and reaffirm the principle of non-refoulement.¹²⁷ The refugee protection obligations deriving from these two foundational pieces of EU law “do not allow for any derogation, exception or limitation,” and have been affirmed by the European Court of Human Rights (“ECtHR”).¹²⁸

123. *At a glance: The EU and the UN refugee agency (UNHCR)*, Eur. Parliamentary Res. Serv. (May 2015), <https://www.europarl.europa.eu/EPRS/EPRS-AaG-557004-EU-and-UNHCR-FINAL.pdf> [<https://perma.cc/F5XQ-KVTM>].

124. Treaty on the Functioning of the European Union, art. 78, 2012 O.J. (C326) 49 (“The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.”).

125. *Common European Asylum System*, Eur. Comm’n Migration and Home Aff.’s (last accessed Mar. 5, 2022), https://ec.europa.eu/home-affairs/policies/migration-and-asylum/common-european-asylum-system_en [<https://perma.cc/CGG7-ZJ6S>].

126. See Livnat, *supra* note 25.

127. See Treaty on the Functioning of the European Union art. 78 (1), 2012 O.J. (326) 49; Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, 1950, 213 U.N.T.S., 221.

128. *Fundamental rights of refugees, asylum applicants and migrants at the European borders*, Eur. Union Agency for Fundamental Rts. (2020), https://fra.europa.eu/sites/default/files/fra_uploads/fra-coe-2020-european-law-land-borders_en.pdf [<https://perma.cc/BS8N-HSHJ>] (citing Executive Committee of the

The EU has reinforced refugee protections in recent years with the establishment of the EU Charter.¹²⁹ Though based on the ECHR, the EU Charter was written into law in 2000—prior to many of the UNSC counterterrorism resolutions that have been adopted—and became legally binding upon all EU member states on December 1, 2009.¹³⁰ Despite the implementation of several counterterrorism resolutions, the EU still effectuated the Charter, demonstrating the EU's affirmation of its commitment and obligation to protect refugees' right to protection.

D. *Non-Refoulement and Conflicting Obligations*

Non-refoulement is one legal obligation for which the EU drew on guidance from the Refugee Convention and from human rights law to harmonize their directives with various pieces of international law. In establishing non-refoulement in EU law, the EU had to navigate possibly conflicting but long-established extradition laws, which impose obligations upon states to extradite certain individuals who are sought by their home countries. While the laws of extradition are generally formed through bilateral treaties, the UNHCR's Guidance Note on extradition ("Guidance Note") provides that "[a] number of international human rights treaties, anti-terrorism conventions and other instruments dealing with transnational crime contain provisions which establish a duty to extradite those suspected of being responsible for certain crimes."¹³¹ In emphasizing that "*non-refoulement* obligations deriving from international human rights law impose bars to extradition under certain circumstances, in addition to those based in international refugee law,"¹³² the Guidance Note called upon states "to ensure that the principle of *non-refoulement* is duly taken into account in treaties relating to extradition and as appropriate in national legislation."¹³³

E. *Addressing Broader Conflicts Between EU Law and Policy and UNSC Legal Obligations*

Though the principle of non-refoulement provides an example of EU states successfully navigating intersecting obligations from different legal bodies, other conflicting obligations having to do with refugee protection

High Commissioner's Programme, Conclusion No. 6 (XXVIII) – 1977 [NonRefoulement], (Oct. 12, 1977), ¶ (c)).

129. Charter of Fundamental Rights of the European Union, Arts. 18–19, 2010 O.J. (C83) 389 (showing how articles 18 and 19 codify the principle of non-refoulement, and the second of seven "titles" of substantive rights, "freedoms," includes asylum as one of its primary tenets) [hereinafter EU Charter].

130. *What are Fundamental Rights?*, Eur. Union Agency for Fundamental Rts, <https://fra.europa.eu/en/about-fundamental-rights#charter> [<https://perma.cc/99DU-2U3S>].

131. U.N. High Comm'r for Refugees, *Guidance Note on Extradition and International Refugee Protection*, p. 4, ¶ 4 (Apr. 2008), <https://www.refworld.org/docid/481ec7d92.html> [<https://perma.cc/SG8B-25AE>].

132. *Id.* at 5.

133. *Id.*

have not been so clearly addressed, especially where UNSC resolutions conflict with states' other legal obligations. Article 103 of the UN Charter directs that "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."¹³⁴ Article 103 is considered customary international law, with wide acceptance by states and courts.¹³⁵ However, the implications of Article 103 have proven to be complex in various decisions by European courts over the last two decades. Three cases in particular highlight these complexities.

In a landmark decision, the European Court of Justice ("ECJ") in *Kadi I*¹³⁶ rejected the Court of First Instance's earlier finding¹³⁷ that EU regulations that implemented ECJ UNSC resolutions were immune from judicial review.¹³⁸ Instead, the ECJ took a novel "detachment" or "dualist" approach, finding that the EU regulations—and their compliance with and respect for fundamental rights—could be addressed on their own without considering the UNSC resolutions that they stem from.¹³⁹ The ECJ stated that although "it is not for the [ECJ] to review indirectly whether the Security Council's resolutions in question are themselves compatible with fundamental rights as protected by the Community legal order,"¹⁴⁰ it was well within the ECJ's jurisdiction to review the lawfulness of EU regulations, particularly where their respect of fundamental rights was in question.¹⁴¹ This departs from the traditional understanding of Article 103 in EU case law, wherein "constitutional and conventional fundamental rights are trumped when in conflict with the [Security Council] resolutions."¹⁴²

In *Al-Jedda v. The United Kingdom*,¹⁴³ however, the ECtHR took on a new approach to interpreting Article 103 in instances where fundamental rights may be in conflict with UNSC decisions.¹⁴⁴ While restating that Article 103 requires the UN Charter to prevail over other legal obligations, the

134. U.N. Charter, art. 103.

135. Kushtrim Istrefi, *The Application of Article 103 of the United Nations Charter in the European Courts: The Quest for Regime Compatibility on Fundamental Rights*, 5 EUR. J. LEGAL STUD. 81, 82 (2012/13) (citing Benedetto Conforti, *Consistency among Treaty Obligations*, in *THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION* 189–90 (Enzo Cannizzaro ed., 2011)).

136. Joined Cases C-402 & C-415/05P, *Kadi & Al Barakaat Int'l Found. v. Comm'n (Kadi I)*, 2008 E.C.R. I-6352.

137. See Joined Cases C-402/05 P & C-415/05 P, *Kadi v. Council*, 2008 E.C.R. I-6351.

138. *Kadi & Al Barakaat Int'l Found. v. Comm'n (Kadi I)* at ¶ 330, 2008 E.C.R. I-6352.

139. See Istrefi, *supra* note 135, at 83–84. This approach is considered by Istrefi to be "a reverse approach of the 'subordination,' generated also by a narrow understanding of art 103," in which the court considers "the EU law as a 'supreme law of the land', and developed a dualist or strong pluralist approach that led to detachment from the UN supremacy." *Id.*

140. *Kadi & Al Barakaat Int'l Found. v. Comm'n (Kadi I)* at ¶ 283, 2008 E.C.R. I-6352.

141. *Id.* at ¶ 282.

142. Istrefi, *supra* note 135, at 83.

143. 2011-IV Eur. Ct. H.R. 305.

144. *Id.*

ECtHR advanced Article 24(2) of the UN Charter,¹⁴⁵ which requires the UNSC to “act in accordance with the Purposes and Principles of the United Nations.”¹⁴⁶ The ECtHR interpreted Article 24(2)’s obligations to mean that “there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights.”¹⁴⁷ In the case of the UNSC counterterrorism resolutions, the ECtHR’s interpretation would require that the UNSC respect human rights obligations—including the protection of refugees from persecution—unless the UNSC has explicitly stated that they “intend States to take particular measures which would conflict with their obligations under international human rights law.”¹⁴⁸ As this was not the case for the UNSC counterterrorism resolutions discussed in Part III, *supra*, *Al-Jedda* suggests that these resolutions should be read in compliance with human rights law.

Most recently, the ECtHR in *Nada v. Switzerland*¹⁴⁹ took a similar approach to interpreting Article 103, finding that states should work to “harmoniz[e]” their obligations under the UN Charter with their other legal obligations.¹⁵⁰ However, the ECtHR did not explicitly state how this harmonization should occur.¹⁵¹ In a concurring opinion, Judge Malinverni took a different approach, distinguishing between the Charter and the resolutions, and finding that UNSC resolutions “may be regarded more as *secondary* or *subordinate* United Nations legislation” even where binding.¹⁵² Judge Malinverni further emphasized his point that fundamental rights established in the Charter must always prevail,¹⁵³ stating that “[i]t cannot be claimed nowadays that the human rights obligations of States vanish in the event that, instead of acting individually, they decide to cooperate by entrusting certain powers to international organi[s]ations that they themselves have set up.”¹⁵⁴

Additionally, the UN and other key governmental and non-governmental bodies have offered unclear guidance regarding how to address conflicting legal obligations. The UNSC has specifically referred to obligations to comply with human rights law and refugee law, including in Resolutions

145. U.N. Charter art. 24(2).

146. *Al-Jedda v. the United Kingdom*, App. No. 27021/08 at ¶ 102 (July 7, 2011) (citing U.N. Charter art. 24(2)).

147. *Id.*

148. *Id.*

149. 2012-V Eur. Ct. H.R. 276.

150. *Id.* at ¶ 197.

151. See Marko Milanovic, *European Court Decides Nada v. Switzerland*, EJIL:TALK! (Sept. 14, 2012), <https://www.ejiltalk.org/european-court-decides-nada-v-switzerland/> [https://perma.cc/9EHC-3E5U].

152. *Nada v. Switzerland*, 2012 App. No. 10593/08, ¶ 22 (Sept. 12, 2012) (Malinverni, J., concurring).

153. *Id.* at ¶¶ 15, 22–26.

154. *Id.* at ¶ 25.

1373¹⁵⁵ and in their commentary on Resolution 2178.¹⁵⁶ However, these references have not been accompanied by guidance on exactly how conflicting obligations should be addressed, and the resolutions themselves—as discussed above—may inherently conflict with the human rights law they ask states to abide by.

With respect to the provision of humanitarian aid, the UNGA and the ICRC have both expressed concern regarding state legislation and practice in the area.¹⁵⁷ In a 2016 Resolution, the UNGA “[u]rge[d] states to ensure . . . that counter-terrorism legislation and measures do not impede humanitarian and medical activities or engagement with all relevant actors as foreseen by international humanitarian law.”¹⁵⁸ The ICRC has also commented on the need for UNSC resolutions to specifically make exemptions for humanitarian aid in their criminalization of material support.¹⁵⁹ However, prior to 2019, the UNSC had not established exemptions for humanitarian aid in their string of counterterrorism resolutions,¹⁶⁰ and EU states have implemented policies that have resulted in the criminalization of such aid.¹⁶¹ Despite calls for caution from the UNGA and ICRC, some states may still interpret the resolutions to include some forms of medical care and supplies as “impermissible support to al-Qaeda and its associates.”¹⁶²

Without clear guidance regarding how to navigate conflicting obligations presented by the Refugee Convention, broader human rights, and the UNSC counterterrorism resolutions, states are left in limbo, and have consequently promulgated legislation in violation of their obligations under the Refugee Convention.

155. S.C. Res. 1373 (Sept. 28, 2001) (referencing tenets of the Refugee Convention, including the Article 1F exceptions, though it does not explicitly mention the Convention at ¶ 5).

156. S.C. Res. 2322, ¶ 13(b) (Dec. 12, 2016).

157. See Dustin A. Lewis, *Humanitarian Exemptions from Counter-Terrorism Measures: A Brief Introduction*, 47 PROCEEDINGS BRUGES COLLOQUIUM 141, 144–45 (2017). See also G.A. Res. 70/291, The United Nations Global Counter-Terrorism Strategy Review, ¶ 22 (July 1, 2016); Int’l Comm. of the Red Cross [hereinafter ICRC], *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, at 53, 31IC/11/5.1.2 (Oct. 2011).

158. G.A. Res. 70/291, *supra* note 157, at ¶ 22.

159. See ICRC, *supra* note 157, at 53.

160. See Lewis, *supra* note 157, at 147. UNSC promulgated two resolutions in 2019 that did have exemptions for humanitarian aid, Resolutions 2462 and 2482, which specifically urged states to “take into account the potential effect of [counter-terrorism] measures on exclusively humanitarian activities.” S.C. Res. 2462, ¶ 24 (Mar. 28, 2019); S/RES/2482, ¶ 16 (July 19, 2019).

161. See *Counterterrorism and Humanitarian Action in Syria*, DIAKONIA INT’L HUMANITARIAN L. CTR. (Sept. 7, 2021), <https://www.diakonia.se/ihl/news/syria-region-publication/fact-sheet-counterterrorism-humanitarian-action-syria/> [<https://perma.cc/U6AP-WHVP>].

162. Dustin A. Lewis, Naz K. Modirzadeh, & Gabriella Blum, *Medical Care in Armed Conflict: International Humanitarian Law and State Responses to Terrorism*, 2015 HARV. L. SCH. PROGRAM ON INT’L LAW AND ARMED CONFLICT 111 (Sept. 2015).

V. EU IMPLEMENTATION OF UNSC RESOLUTIONS: A VIOLATION OF INTERNATIONAL LAW AND REFUGEE RIGHTS

In several cases the EU and its member states have implemented the UNSC counterterrorism resolutions in such a way as to violate the Refugee Convention and broader international law. The UNSC's counterterrorism resolutions provided the EU and its member states with a set of stipulations and guidelines to implement their own domestic counterterrorism laws and policies. Where the UNSC's resolutions were over-expansive with respect to Articles 1F and 33(2) or otherwise exceeded the bounds of the Refugee Convention, the resulting EU measures have implemented these legal gray areas of law into policies with far-reaching implications for Middle Eastern refugees and the broader population. As a result, EU counterterrorism policies—including the criminalization of inchoate and pre-inchoate offenses, the inclusion of humanitarian aid under material support provisions, and most importantly, sweeping claims as to which groups of asylum seekers should be excluded from protection—go far beyond the scope of the Refugee Convention's grounds for exclusion from protection.

The EU first developed a comprehensive counterterrorism strategy in November 2005,¹⁶³ in response to the 2004 Madrid train bombings and the July 7, 2005 London Bombings.¹⁶⁴ The strategy contained four pillars—“prevent,” “protect” from, “pursue,” and “respond” to terrorism—and urged international cooperation in pursuing these goals.¹⁶⁵ The strategy has since undergone several iterations and additions, including the 2008 EU strategy for combating radicalization and recruitment to terrorism.¹⁶⁶ Most relevant today, however, is the 2017 EU Directive on Combating Terrorism (“2017 Directive”).¹⁶⁷

The 2017 Directive remains the foundational piece of EU policy directing member states in their own counterterrorism policies. The Directive required member states to adopt laws and regulations “necessary to comply

163. The European Union Counter-Terrorism Strategy (EC No. 14469/4/05 of 30 Nov. 2005, Rev 4, <https://data.consilium.europa.eu/doc/document/ST%2014469%202005%20REV%204/EN/pdf> [<https://perma.cc/UA2F-AQV2>].

164. See Wim Wensink et al., *The European Union's Policies on Counter-Terrorism: Relevance, Coherence and Effectiveness* 33, EUR. DIRECTORATE GENERAL FOR INTERNAL POLICIES (Jan. 2017), [https://www.europarl.europa.eu/RegData/etudes/STUD/2017/583124/IPOL_STU\(2017\)583124_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2017/583124/IPOL_STU(2017)583124_EN.pdf) [<https://perma.cc/2MQ5-395U>].

165. The European Union Counter-Terrorism Strategy, *supra* note 163, at 3.

166. Wensink et al., *supra* note 164, at 33.

167. Council Directive 2017/541, Directive 2017/541 of the European Parliament and of the Council of 15 March 2017 on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA and Amending Council Decision 2005/671/JHA, 2017 O.J. (L 88) (EU). The European Commission's Directorate-General for Migration and Home Affairs described the Directive as “reinforc[ing] the legal framework to more comprehensively cover conducts related to terrorism,” including by ensuring that “[a]ll EU countries . . . criminalise conduct such as training and travelling for terrorism, as well as terrorist financing.” *Counter Terrorism and Radicalisation*, EUR. COMM'N DIRECTORATE-GENERAL FOR MIGRATION AND HOME AFFAIRS, https://ec.europa.eu/home-affairs/what-we-do/policies/counter-terrorism-and-radicalisation_en [<https://perma.cc/Q2RQ-G4EG>].

with” the Directive by September of 2018, about a year and a half after the Directive was initially adopted.¹⁶⁸ The 2017 Directive lists new “offences related to terrorist activities” to be criminalized by EU states, often going beyond the scope of the UNSC resolutions in what acts related to terrorism may or must be criminalized.¹⁶⁹ Specifically, the 2017 Directive builds upon earlier EU policies¹⁷⁰ and further criminalizes several forms of pre-inchoate and preparatory crimes and directs states to take such actions as “the removal of online content” that might constitute “provocation to commit a terrorist offense” as a means of combatting the threat of terrorism.¹⁷¹

A. Criminalization of Pre-Inchoate Offenses

The 2017 Directive’s criminalization of pre-inchoate offenses builds on an earlier EU-wide counterterrorism convention that also criminalized pre-inchoate offenses: the 2005 Council of Europe’s Convention on the Prevention of Terrorism (“2005 Convention”).¹⁷² Both the 2005 Convention’s and the 2017 Directive’s criminalization of pre-inchoate offenses likely stem from UNSC Resolutions 1373 and 1377.¹⁷³ This criminalization is a particularly critical expansion of counterterrorism law that goes far beyond the bounds of international law, as well as most domestic criminal laws.¹⁷⁴ The Directive criminalizes two pre-inchoate offenses: “the public provocation to commit a terrorist offense”¹⁷⁵ and the “receiving of training for terrorism,” the latter of which includes “self-study . . . through the internet or consulting other teaching material.”¹⁷⁶ In addition, the Directive not only

168. Council Directive 2017/541 art. 28(1).

169. *Id.* at ¶ 6.

170. This includes the 2005 Council of Europe’s Convention on the Prevention of Terrorism, which under Articles 5–7 criminalized “Public provocation to commit a terrorist offence” (Article 5), “Recruitment for terrorism” (Article 6), and “Training for terrorism” (Article 7). Council of Europe, Convention on the Prevention of Terrorism, May 16, 2005, C.E.T.S. No. 196 arts. 5–7.

171. Council Directive 2017/541, at ¶¶ 22–23.

172. C.E.T.S. No. 196 arts. 5–7.

173. S.C. Res. 1373 (Sept. 28, 2001) (“Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts.”); S.C. Res. 1377 (Nov. 12, 2001) (“Stresses that acts of international terrorism are contrary to the purposes and principles of the Charter of the United Nations, and 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.”).

174. Ben Saul, *Precursor Crimes of International Terrorism*, in *PRECURSOR CRIMES OF TERRORISM: THE CRIMINALISATION OF TERRORISM RISK IN COMPARATIVE PERSPECTIVE* 196 (Mariona Llobet Angli et al., eds., 2022) (“Criminal law has, however, traditionally recognized limits on the extension of liability, namely that liability is personal and must involve fault-based conduct which causes a resultant harm. The newer pre-inchoate terrorism offences extend liability in multiple directions, by capturing conduct that is more temporally, personally, and causally distant from any resulting harm.”).

175. Council Directive 2017/541 art. 5.

176. *Id.* at ¶ 11.

criminalizes “travelling for the purpose of terrorism,”¹⁷⁷ but reaches further to also criminalize “organising or otherwise facilitating travelling for the purpose of terrorism.”¹⁷⁸

Further, the Directive specifically states that EU states “may also decide” to criminalize “preparatory acts, which may include planning or conspiracy” thus making the call for criminalization of pre-inchoate offenses more explicit.¹⁷⁹ Though the 2017 Directive mentions that it “should not have the effect of altering the rights, obligations and responsibilities of the Member States under international law,”¹⁸⁰ this seems to be incompatible with many of the Directive’s stipulations related to pre-inchoate offenses, as described above, which would likely be in violation of the ECHR,¹⁸¹ as well as the ICCPR.¹⁸²

Some EU member states have also adopted a more expansive *mens rea* requirement in their promulgation of terrorism-related laws. In a Danish case described in Section VI.B, *infra*, an individual was prosecuted for furthering or contributing to a terrorist act by providing financial support, even where they did not have knowledge that that support would be contributing to terrorist activity.¹⁸³ The United Kingdom (“UK”)¹⁸⁴ has also expanded its terrorism definitions to include actions that do not require one to have knowledge that the support will contribute to terrorist activity.¹⁸⁵ The UK’s Terrorism Act of 2000 provided that police had the power to arrest, without a warrant, “a person whom [they] reasonably [suspect] to be a terrorist.”¹⁸⁶ Under this law, the officer can arrest a person without a warrant so long as the officer has “reasonable suspicion that [the suspect]

177. *Id.* at art. 9.

178. *Id.* at art. 10.

179. Council Directive 2017/541, Directive 2017/541 of the European Parliament and of the Council of 15 March 2017 on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA and Amending Council Decision 2005/671/JHA, 2017 O.J. (L 88) ¶ 12 (EU).

180. *Id.* at ¶ 37.

181. Rory Kelly, *The right to a fair trial and the problem of pre-inchoate offences*, 6 EUR. HUM. RTS. L. REV. 596 (2017) (stating that pre-inchoate offences may be in violation of the ECHR’s art. 6(2) and (3) (“Right to a Fair Trial”), which “are meant to be a protection against unfair state punishment.”).

182. Article 15(1) of the ICCPR states that “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.” Pre-inchoate offenses may be in violation of this article, as they may be too broad or vague in order to render liability with a sufficient degree of certainty. *see* ICCPR, art. 15(1).

183. Kate Mackintosh & Patrick Duplat, *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action*, U.N. OFF. FOR THE COORDINATION OF HUMANITARIAN AFF.’S 1, 28 (July 2013) (citing U 2009.1435 H, where the defendants had tried to transfer money to two organizations designated as terrorist groups and “the court accepted the defendants’ assertion that the money was intended only to be used by the two organisations for humanitarian purposes (schools and hospitals)”).

184. The UK was still a member of the EU at the time the described laws were passed.

185. Clare Feikert & Charles Doyle, *Anti-Terrorism Authority Under the Laws of the United Kingdom and the United States*, CRS REPORT FOR CONGRESS (Sept. 7, 2006), <https://fas.org/sgp/crs/intel/RL33726.pdf> [<https://perma.cc/T8ZK-7HQE>].

186. Terrorism Act of 2000, c. 11, § 43 (Gr. Brit.).

[has] been involved in the preparation, instigation, or commission of acts of terrorism, regardless of whether police believe the suspect is committing or has committed a crime.”¹⁸⁷

Relatedly, the UK also implemented a law under their 2006 Immigration, Asylum and Nationality Act that specifically expanded upon Article 1F(c) of the Refugee Convention to include pre-inchoate acts as a basis for excluding individuals from asylum.¹⁸⁸ This particular law has been a central issue in several UK cases.¹⁸⁹ In one such case, *MH (Syria) v. Secretary of State for the Home Department*,¹⁹⁰ the UK Court of Appeals applied Article 1F(c) of the Refugee Convention and allowed for a nurse to appeal a previous judgement denying her asylum because of her role providing medical care to members of the Kurdistan Workers’ Party (“PKK”), which was designated a terrorist organization by the EU and the United States, in a camp run by the group.¹⁹¹ The court stated that the nurse’s actions did “not add up to a sufficient case to bring [the nurse] within Article 1F(c), even if one leaves out of account, as the tribunal did, the effect of s.54 [of the Immigration, Asylum and Nationality Act] and the special position of nurses under international humanitarian law.”¹⁹² However, the court still affirmed the legality of § 54’s interpretation of Article 1F(c) to include pre-inchoate liability for terrorism offenses.¹⁹³

B. Impacts on the Provision of Humanitarian Aid

Another area in which the EU has implemented the UNSC resolutions in contravention of international law and human rights principles is through the inclusion of humanitarian aid in material support provisions, the effect being that an individual or organization providing humanitarian aid may be charged with providing material support to a terrorist organization. The protection of humanitarian aid provisions is a foundational principle of

187. Feikert & Doyle, *supra* note 185.

188. Immigration, Asylum and Nationality Act 2006, § 54 (Gr. Brit.) (“In 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, in particular—(a) acts of committing, preparing or instigating terrorism (whether or not the acts amount to an actual or inchoate offence), and (b) acts of encouraging or inducing others to commit, prepare or instigate terrorism (whether or not the acts amount to an actual or inchoate offence).”).

189. *See, e.g.*, *Gurung v. Secretary of State for the Home Department* [2002] UK Immigration Appeal Tribunal, Appeal No. [2002]UKIAT04870 HX34452-2001; *MH (Syria) v. Secretary of State for the Home Department and DS (Afghanistan) v. Secretary of State for the Home Department* [2009] EWCA Civ 226, United Kingdom: Court of Appeal (England and Wales).

190. *MH (Syria) v. Secretary of State for the Home Department and DS (Afghanistan) v. Secretary of State for the Home Department*, [2009] EWCA Civ 226, United Kingdom: Court of Appeal (England and Wales).

191. *Id.*

192. *Id.* at ¶ 34.

193. *Id.* at ¶ 30.

IHL.¹⁹⁴ However, as discussed in Part III, *supra*, Resolution 1373 criminalized the provision of *any* funding that may be used to commit terrorist acts, even where the funding is intended for humanitarian aid.¹⁹⁵ Resolution 1373 has since been built upon by later resolutions, providing the basis for the EU and its member states to promulgate domestic laws that severely impact humanitarian aid workers and the provision of humanitarian aid in areas where designated terrorist organizations are located.¹⁹⁶

The EU has implemented this criminalization of humanitarian aid in its own counterterrorism legislation, as have individual member states. Soon after the passage of Resolution 1373, the EU responded by adopting the Council Common Position of 27 December 2001 on the Application of Specific Measures to Combat Terrorism,¹⁹⁷ which requires the European Community to “ensure that funds, financial assets or economic resources or financial or other related services will not be made available, directly or indirectly, for the benefit of persons, groups and entities listed in the Annex.”¹⁹⁸ Later, the EU Council’s Framework Decision on Combatting Terrorism from June 2002 (“Framework Decision”), a binding directive for all member states, criminalized “participating in the activities of a terrorist group,” including “supplying information or material resources, or . . . funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group.”¹⁹⁹ These two EU instruments set the stage for blanket counterterrorism policies that leave no exceptions for the provision of humanitarian aid.²⁰⁰

Denmark followed suit, introducing counterterrorism legislation into their penal code “in compliance with Resolution 1373 and the European Framework Decision,” which included the provision of financial support

194. ICRC Customary International Humanitarian Law Data Base, *Rule 55: Access for Humanitarian Relief to Civilians in Need*, INT’L COMM. RED CROSS, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule55 [https://perma.cc/R8SW-DMZG]; see also Ruth Abril Stoffels, *Legal regulation of humanitarian assistance in armed conflict: Achievements and gaps*, INT’L REV. RED CROSS (Sept. 2004) (“The enshrinement of the right to humanitarian assistance in IHL is grounded in two of the principles on which this entire body of law is based: the duty to distinguish between the civilian population and combatants and the duty to ensure respect, protection and humane treatment for people not or no longer participating in the hostilities. The broad concept of protection established under this principle clearly encompasses assistance for people in need and, as such, is established in conventions and protocols.”).

195. S.C. Res. 1373 (Sept. 28, 2001).

196. Nathalie Weizmann, *Respecting International Humanitarian Law and Safeguarding Humanitarian Action in Counterterrorism Measures: United Nations Security Council Resolutions 2462 and 2482 Point the Way*, INT’L REV. RED CROSS 6–7 (2021).

197. Council Common Position of 27 December 2001 on the Application of Specific Measures to Combat Terrorism 2001/931/CFSP of Dec. 27, 2011, 2011 O.J. (L 344/93), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001E0931&from=EN> [https://perma.cc/VNR2-DG4X].

198. Weizmann, *supra* note 196, at 6 (citing 2001/931/CFSP, art. 3).

199. Council Framework Decision of 13 June 2002 on combating terrorism, Council of the European Union, 2002/475/JHA, art 2, § 2(b), 2002 O.J. (L 164).

200. See *Counterterrorism and Humanitarian Action in Syria*, *supra* note 161.

“directly or indirectly” to individuals or groups that have committed or intend to commit acts of terrorism without providing any exceptions for humanitarian aid.²⁰¹ In 2009, six individuals were convicted under this law, even though the court accepted the defendants’ contention that they only intended for the funding to be used for schools and hospitals, both of which are humanitarian purposes.²⁰²

The Supreme Court of the Netherlands previously also determined that their criminalization of “participation in a terrorist organization”²⁰³ included “contribut[ing] [to] or support[ing] acts that further or are related to the realisation of the organization’s criminal objective,”²⁰⁴ and neither the court nor the Dutch Criminal Code provided any exceptions for humanitarian aid.²⁰⁵ However, in May 2021, the Dutch Minister of Justice and Security introduced a bill to provide an exception from criminal liability for aid workers and journalists who are “staying in areas controlled by terrorist organisations.”²⁰⁶

And the 2017 Directive explicitly stated that the provision of humanitarian aid does “not fall within the scope” of the Directive,²⁰⁷ possibly signaling a shift in the laws and policies related to humanitarian aid provision. It is also unclear what impacts Resolutions 2462 and 2482 will have on future EU regulations, as both resolutions specifically urge states to “take into account the potential effect of [counter-terrorism] measures on exclusively humanitarian activities.”²⁰⁸

C. Denial of Due Process

In addition to the violation of due process rights that may occur with the criminalization of pre-inchoate offenses, as described above in Section VI.A, *infra*, the EU has also developed counterterrorism laws based on UNSC Resolution 1267 that do not afford an opportunity to challenge one’s design-

201. Mackintosh & Duplat, *supra* note 183, at 28 (citing Strfl § 114b).

202. *Id.* at 28 (citing U 2009.1435 H).

203. Art. 140.2 and 140a, SR (Neth.).

204. Mackintosh & Duplat, *supra* note 183, at 32 (citing Judgement of 18 November 1997, NJ 1998, 225, unofficial translation).

205. *Id.*

206. *Exemption from Criminal Liability for Aid Workers and Journalists for Staying in Areas Controlled by Terrorist Organizations*, GOV’T OF NETH. (May 12, 2021), <https://www.government.nl/latest/news/2021/05/12/exemption-from-criminal-liability-for-aid-workers-and-journalists-for-staying-in-areas-controlled-by-terrorist-organisations> [<https://perma.cc/AAK5-P8A9>] (as of November 2021, the bill is still pending approval).

207. Council Directive 2017/541 ¶ 38, 2017 O.J. (L 88.6) (EC).

208. S.C. Res. 2462, ¶ 24 (Mar. 28, 2019); S.C. Res 2482, ¶ 16 (2019). In 2019, the UK passed the UK Counter-Terrorism and Border Security Act 2019 which includes an exception to the criminalization of being in specific designated areas if the person is in such an area for the reason of “providing aid of a humanitarian nature.” As of September 2021, a Dutch law has been amended to include a humanitarian exception and is currently before Parliament. *See also Counterterrorism and Humanitarian Action in Syria*, *supra* note 161.

nation as a terrorist, conflicting with international human rights law and EU law that establish due process as a fundamental human right.²⁰⁹

The ECJ addressed this in *Kadi and Al Barakaat v. EU Council and EC Commission*, wherein the court ordered the annulment of an EU regulation that was based on Resolution 1267 as it violated EU human rights law by denying due process rights to individuals accused of terrorism.²¹⁰ However, in its decision, the court made clear that it was not deciding on the lawfulness of the UNSC resolutions upon which the laws were based.²¹¹ As such, the court reviewed the EU regulations promulgated as a response to Resolution 1267 as a matter separate from the resolution itself, and stated that regardless of the UNSC's decisions, the EU could not interpret UNSC resolutions in such a way that would result in the overriding of fundamental human rights.²¹² In so deciding, the court asserted its belief that EU law must respect fundamental human rights, even where it is implementing UNSC resolutions.

However, in order for states to respect fundamental human rights in their implementation of UNSC resolutions, the ECJ's assertion must assume that the UNSC resolutions themselves comply with human rights law, save for interpretations that are radically skewed from what the UNSC intended. For the reasons stated in both this Part and in Part IV, *supra*, however, the resolutions' overly broad text alone demonstrates that they are not in line with the intent of human rights law, and in particular the Refugee Convention.

209. ICCPR art. 9 (“No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.”), arts. 14 and 15 (ensuring the right to a fair and impartial trial), art. 15 (“No one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense, under national or international law, at the time when it was committed.”); EU Charter, art. 47 (“Right to an effective remedy and to a fair trial”).

210. Joined Cases C-402 & C-415/05P, *Kadi & Al Barakaat Int'l Found. v. Comm'n (Kadi I)*, 2008 E.C.R. I-6352 at ¶¶ 334, 338–339, 341–342, 345, 348.

211. “In this regard it must be emphasized that, in circumstances such as those of these cases, the review of lawfulness thus to be ensured by the Community judicature applies to the Community act intended to give effect to the international agreement at issue, and not to the latter as such . . . it is not, therefore, for the Community judicature . . . to review the lawfulness of such a resolution adopted by an international body, even if that review were to be limited to examination of the compatibility of that resolution with *jus cogens*. However, any judgment given by the Community judicature deciding that a Community measure intended to give effect to such a resolution is contrary to a higher rule of law in the Community legal order would not entail any challenge to the primacy of that resolution in international law.” *Id.* at ¶¶ 268–86.

212. “It follows from all those considerations that the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty.” *Id.* at ¶¶ 283–85.

VI. THE PRACTICAL IMPACTS OF THE UNSC COUNTERTERRORISM RESOLUTIONS

Though it is hard to fully assess the true extent of the impact that the UNSC resolutions and the subsequent implementation and expansion of counterterrorism measures in the EU have had, there is no denying that there have been widespread costs imposed by the resolutions. First and foremost, the resolutions have had a large-scale negative impact on Middle Eastern refugee populations seeking asylum in European countries.²¹³ The resolutions and their EU legal counterparts have also caused critical blocks in the provision of humanitarian aid to some countries²¹⁴ and have shifted the burden of refugee protection onto non-EU countries.²¹⁵ At a higher level, the resolutions may set a negative precedent in the field of international law, demonstrating that security needs may be placed above all other legal obligations—including the obligations to respect and protect fundamental human rights. While a lack of data and analytics regarding these impacts poses a challenge in demonstrating the costs of the resolutions, this Part will describe, more broadly, the ways in which the UNSC resolutions have resulted in harms to refugee populations and to the implementation of and respect for international law.

A. Impacts on Middle Eastern Refugees

While the UNSC's counterterrorism resolutions and the resulting EU counterterrorism policies have impacted refugees globally, they have had a significant impact on Middle Eastern refugees. For one, there is a higher prevalence of the terrorist groups designated by the UNSC's resolutions in many of the countries Middle Eastern refugees are fleeing from.²¹⁶ These resolutions and policies also disproportionately impact Middle Eastern refugees because of more generalized Islamophobia and racism facing Middle Eastern refugees, particularly since the attacks of September 11 and the subsequent rise of Islamist terrorist attacks in Europe, as well as the influx of refugees into the EU over the last decade.²¹⁷ In the years since September

213. Information based on extensive personal experience working with a variety of organizations providing refugee legal services from 2012 to 2020.

214. See, e.g., Mackintosh & Duplat, *supra* note 183; *Counterterrorism and Humanitarian Action in Syria*, *supra* note 161.

215. *EU Policies Put Refugees At Risk*, HUM. RTS. WATCH, Section 1 (Nov. 23, 2016), <https://www.hrw.org/news/2016/11/23/eu-policies-put-refugees-risk> [<https://perma.cc/6HQ9-PSNM>].

216. The UN Security Council has included groups like Al Qaeda (as well as Al Qaeda in the Arabian Peninsula and Al Qaeda in Iraq), the Islamic State in Iraq and the Levant, in their sanctions list and has specifically addressed these groups in their resolutions, including in S.C. Res. 1373 (Sept. 28, 2001).

217. See, e.g., Patrycja Sasnal & Yasemin El Menouar, *There's a Social Pandemic Poisoning Europe: Hatred of Muslims*, THE GUARDIAN (Sept. 28, 2020), <https://www.theguardian.com/commentisfree/2020/sep/28/europe-social-pandemic-hatred-muslims-blm> [<https://perma.cc/R3TP-UDRM>]; Bichara Khader, *Muslims in Europe: The Construction of a "Problem,"* in THE SEARCH FOR EUROPE, CONTRASTING

11, the “War on Terror”²¹⁸ has sparked a simultaneous “war on asylum,” as the categories of “asylum seekers” and “terrorists” have become synonymous in public discourse.²¹⁹ Often, refugees who are seeking protection in Europe are amongst the most vulnerable refugees,²²⁰ and therefore are the most in need of protection. The implementation of laws and policies that bar them from such protection have caused significant harms to these individuals and communities.

The UNHCR maintains that there are three overarching “durable solutions”: local integration, voluntary repatriation, and resettlement.²²¹ Resettlement remains a very limited option for refugees across the world—only around 1% of refugees are actually resettled to third countries each year.²²² Given the limited available slots, resettlement has been reserved for only those refugees who are considered to be at risk in their country of first asylum, including refugees who identify as LGBTQ, single women, religious minorities, and others.²²³ Thus, the most vulnerable refugees are most impacted by additional barriers erected against refugees.

To be considered for an offer of resettlement to a European country, refugees must undergo several rounds of interviews and screenings, and submit a vast collection of personal data.²²⁴ Gathering security-focused information constitutes a large portion of this process,²²⁵ and, in theory, is in line with the Refugee Convention’s Article 1F and 33(2)’s security-related exclusions

APPROACHES (2015); *Germany Hate Crime: Nearly 10 Attacks a Day on Migrants in 2016*, BBC (Feb. 26, 2017), <https://www.bbc.com/news/world-europe-39096833> [<https://perma.cc/2Q3M-6RXT>]; Danielle Lee Tomson, *The Rise of Sweden Democrats: Islam, Populism, and the End of Swedish Exceptionalism*, BROOKINGS INST. (Mar. 25, 2020), <https://www.brookings.edu/research/the-rise-of-sweden-democrats-and-the-end-of-swedish-exceptionalism/> [<https://perma.cc/BW3F-FKGX>].

218. *The Global War on Terrorism: The First 100 Days*, U.S. DEP’T STATE ARCHIVE, <https://2001-2009.state.gov/sct/rls/wh/6947.htm> [<https://perma.cc/72UD-BWBD>]; *A Timeline of the U.S.-Led War on Terror*, HISTORY.COM (Feb. 1, 2019), <https://www.history.com/topics/21st-century/war-on-terror-timeline> [<https://perma.cc/234A-VELM>].

219. Madeline-Sophie Abbas, *Conflating the Muslim Refugee and the Terror Suspect: Responses to the Syrian Refugee “Crisis” in Brexit Britain*, 42 ETHNIC & RACIAL STUD. 2450, 2469 (2019) (citing Sivandan, 2006, at 2).

220. The UNHCR has defined the “most vulnerable” refugees to be those who are still considered to be at risk in their country of first asylum. This includes refugees who identify as LGBTQ, single women, religious minorities, and others. 1.3.5 *Resettlement*, UNHCR Resettlement Handbook, pp. 36–37; see also María-Teresa Gil-Bazo, *The Safe Third Country Concept in International Agreements on Refugee Protection: Assessing State Practice*, 33. NETH. Q. HUM. RTS., 42, 42–77 (2015), <https://www.unhcr.org/59c4be077.pdf> [<https://perma.cc/X2Q8-CYWT>] (explaining the relationship between “country of first asylum” and “safe third country” concepts stemming from the Dublin III Regulation of the European Union).

221. U.N. High Comm’r for Refugees, *Durable Solutions: Preliminary Operational Guide* (Jan. 2016), <http://www.refworld.org/docid/57441d774.html> [<https://perma.cc/9QZH-F2MZ>].

222. U.N. High Comm’r for Refugees, *Resettlement*, <http://www.unhcr.org/resettlement.html> [<https://perma.cc/93FR-L5B5>].

223. *Id.*

224. UNHCR Resettlement Handbook, *supra* note 220.

225. U.N. High Comm’r for Refugees, *Addressing Security Concerns without Undermining Refugee Protection* (Dec. 17, 2015), <https://www.refworld.org/docid/5672aed34.html> [<https://perma.cc/46RR-LGPT>].

to protection. However, EU counterterrorism laws and policies are “significantly wider in personal and material scope, purporting to allow greater numbers of persons to be excluded from international protection” than the Convention’s exclusions to protection.²²⁶ To the extent that today’s refugee exclusions are based on security questioning relating to definitions of terrorism promulgated by the UNSC’s overly broad counterterrorism resolutions,²²⁷ the result is that a wide swath of refugees who would otherwise have legitimate claims for asylum and resettlement may be excluded from refugee protection.²²⁸

Further, and more generally, often refugees who are fleeing areas held by terrorist groups are the most likely to be implicated by material support laws, as they are the most likely to have interacted with such groups. Where domestic laws have defined material support to criminalize such actions as providing “support,” “services,” and/or “assistance” to “entities or persons involved in terrorist acts,”²²⁹ these provisions of counterterrorism laws result in the wholesale exclusion of refugees who otherwise have legitimate asylum claims under the Refugee Convention. When an individual has at any point lived in an area that was controlled or seized by a terrorist organization, it is nearly impossible for them to have avoided providing some form of “support” to the organization under the over-expansive definitions of support found in the counterterrorism resolutions. In the same way that humanitarian organizations and medical personnel may be caught in the crosshairs of counterterrorism laws for providing care or needing to “make incidental payments (such as tolls, taxes, permits and other fees) to designated groups,”²³⁰ individuals living in these territories may also be criminalized by these laws for similar incidental interactions with and “support” to terrorist organizations.

However, one of the greatest barriers in addressing the challenges these resolutions and measures have presented to refugee communities is that there is very little available data or analysis regarding their impacts.²³¹ In particular, it is nearly impossible to know the full extent of those who have been affected by terrorism bars, as most asylum seekers affected are never told the reason they’ve been denied asylum or refugee status.²³² But what is clear is that this phenomenon has gone far beyond the original intent of the exceptions to refugee protection (Part III, *supra*).²³³ Although a focus on

226. Elspeth Guild & Madeline Garlick, *Refugee Protection, Counter-Terrorism, and Exclusion in the European Union*, 29 REFUGEE SURV. Q. 81 (2010).

227. Part IV, *supra*.

228. See, e.g., Guild & Garlick, *supra* note 226, at Section 3.

229. See S.C. Res. 1373, ¶¶ 1, 2 (Sept. 28, 2001).

230. Weizmann, *supra* note 196, at 6–7.

231. Guild & Garlick, *supra* note 226, at 76.

232. Information based on extensive personal experience working with a variety of organizations providing refugee legal services from 2012 to 2020.

233. Interview with Professor Ben Saul, Challis Chair of International Law at the University of Sydney (Oct. 4, 2019). See also Part III, *supra*.

security in the resettlement process is reasonable and tracks the Refugee Convention's security-based exceptions to the granting of asylum under Articles 1F and 33(2), the degree to which security has been prioritized over the protection of refugees has overreached the bounds of the Convention.

B. Impacts on the Provision of Humanitarian Aid

The UNSC resolutions and EU counterterrorism policies have also resulted in the blocking of humanitarian aid to vulnerable communities and states.²³⁴ In January 2021, the ICRC estimated that “over 60 million people live in areas where non-state actors exercise control,” wherein the combination of “counter-terrorism measures and Covid-19 restrictions” made it more challenging to provide humanitarian aid to these populations.²³⁵

Countries across the EU have applied counterterrorism laws and policies that contravene international legal protections on the provision of humanitarian aid.²³⁶ Beyond its impact on refugees seeking resettlement in EU countries, the criminalization of humanitarian aid as material support has also had a “chilling effect” on NGOs’ ability to provide assistance to high-needs areas, causing them to “become more risk averse.”²³⁷ This chilling effect is especially visible in countries like Somalia, Iraq, and Syria where organizations designated as terrorists by the UN control vast swaths of territory in which NGOs have provided aid. In Somalia, for example, both governmental and non-governmental organizations struggled to provide assistance to southern Somalia during the 2009 to 2011 famine because of Al Shabaab’s control over parts of the area.²³⁸ NGOs with any ties to Islam “face greater scrutiny,” and may face additional barriers to providing humanitarian assistance as “there still exists a general climate of suspicion towards Muslim charities.”²³⁹

Humanitarian organizations have called out the “stark and difficult choices” they must face “as a result of counter-terrorism rules, legislation and sanctions” and have stated that they are “at risk of civil and criminal

234. Mackintosh & Duplat, *supra* note 183.

235. *Counter-Terrorism Measures Must Not Restrict Impartial Humanitarian Organizations from Delivering Aid*, INT’L COMMITTEE RED CROSS (Jan. 12, 2021), <https://www.icrc.org/en/document/counter-terrorism-measures-must-not-restrict-impartial-humanitarian-organizations> [https://perma.cc/CH2F-VMSF].

236. See *Counterterrorism and Humanitarian Action in Syria*, DIAKONIA INT’L HUMANITARIAN L. CTR. (Sept. 7, 2021); Mackintosh & Duplat, *supra* note 183.

237. Bruges Colloquium, *Terrorism, Counter-Terrorism and International Humanitarian Law*, ICRC Delegation to the EU, NATO, and the Kingdom of Belgium, 138–40 (Oct. 20–21, 2016), https://www.coleurope.eu/sites/default/files/uploads/page/collegium_47_v7.pdf [https://perma.cc/3SVB-GRS7].

238. See *Terrorism, Counter-Terrorism and International Humanitarian Law*, *supra* note 237, at 138–39. Al-Shabaab is an armed group in Somalia that was sanctioned pursuant to UNSC Resolution 1844 (which imposed sanctions on “individuals, groups, undertakings, and entities . . . engaging in or providing support for acts that threaten the peace, security or stability of Somalia,” S.C. Res. 1844 ¶ 8 (Nov. 20, 2008)) on April 12, 2010. *Al-Shabaab*, U.N. SECURITY COUNCIL, <https://www.un.org/securitycouncil/sanctions/751/materials/summaries/entity/al-shabaab> [https://perma.cc/S2LD-US83].

239. *Id.*

charges simply for doing [their] jobs.”²⁴⁰ Both the UNGA and the ICRC have recognized that state legislation and practice in this area have been concerning²⁴¹—the UNGA in particular has called on states to ensure “that counterterrorism legislation and measures do not impede humanitarian and medical activities.”²⁴²

UNSC resolutions 2462²⁴³ and 2482,²⁴⁴ both passed in 2019, hopefully signal a shift in the impact of counterterrorism policies on humanitarian aid provision moving forward.²⁴⁵ However, the full impacts of these resolutions and their protections of humanitarian aid have yet to be seen.

C. Impacts on International Law

The UNHCR has commented several times on the need for UNSC resolutions and EU policies to comply with international human rights standards. One month after the passage of Resolution 1373, the UNHCR commented that the resolution should be interpreted “to ensure that bona fide asylum seekers and refugees are not denied their basic rights under cover of the need to take anti-terrorism measures.”²⁴⁶ In 2011, the UNHCR again provided commentary on amendments made to an EU Directive, concluding that “[i]t remains apparent that gaps and inclarities in the existing Directive, as well as its numerous problematic applications, must be addressed through principled and practically implementable amendments.”²⁴⁷ And in a broad statement responding to a ruling reference to the ECJ, the UNHCR commented on possible issues arising from “recent developments in international law and in the practice of the United Nations Security Council, including the Resolutions which have designated

240. Press Release, CARE, *Counter-Terrorism Frameworks and Safeguarding Humanitarian Space: Humanitarian Recommendations ahead of the UNGA High Level Side Event* (Sept. 23, 2019), <https://www.care-international.org/news/press-releases/counter-terrorism-frameworks-and-safeguarding-humanitarian-space-humanitarian-recommendations-ahead-of-the-unga-high-level-side-event> [https://perma.cc/6YNR-4XTN] (a press release signed by Action Against Hunger, Care, Concern Worldwide, Norwegian Refugee Council, Save the Children, and Oxfam, which are all international humanitarian aid organizations); see also *Anti-Terrorism Laws Threaten to Paralyze Humanitarian Ngos*, PREMIERE URGENGE INTERNATIONALE (Jan. 28, 2020), <https://www.premiere-urgence.org/en/anti-terrorism-laws-threaten-to-paralyze-humanitarian-ngos/> [https://perma.cc/GU3G-5FBG].

241. See Lewis, *supra* note 162.

242. G.A. Res. 70/291, *The United Nations Global Counter-Terrorism Strategy Review*, ¶ 22, (July 1, 2016).

243. S.C. Res. 2462 (Mar. 28, 2019).

244. S.C. Res. 2482 (July 19, 2019).

245. Weizmann, *supra* note 196.

246. Press Release, U.N. High Comm’r for Refugees, *Ten Refugee Protection Concerns in the Aftermath of Sept. 11*, U.N. Press Release (Oct. 23, 2001).

247. U.N. High Comm’r for Refugees, *UNHCR Comments on the European Commission’s Amended Proposal for a Directive of the European Parliament and of the Council on Common Procedures for Granting and Withdrawing International Protection Status* (2011), <https://www.unhcr.org/4f35256c9.pdf> [https://perma.cc/28FZ-3E3R]; see also U.N. High Comm’r for Refugees, *UNCHR Statement on Article 1F of the 1951 Convention*, 14–15 (July 2009), <https://www.unhcr.org/protection/operations/4a5edac09/unhcr-statement-article-1f-1951-convention.html> [https://perma.cc/RL3A-FW89].

terrorist acts as violating the purposes and principles of the UN,” specifically with respect to their compliance with the Refugee Convention’s Article 1F(c) of the Refugee Convention.²⁴⁸

And while some resolutions have specifically referenced the need to comply with international law and human rights principles in their texts,²⁴⁹ these resolutions still have not ensured that their demands on states will result in policies that are compliant with international law. More importantly, states’ interpretations of such resolutions have sometimes resulted in both policies *and* results that violate international law.²⁵⁰

In the immediate aftermath of September 11, the European Commission released a Working Document titled “The relationship between safeguarding internal security and complying with international protection obligations and instruments.”²⁵¹ In that document, the Commission openly asserted their intent to question and possibly reinterpret non-derogable obligations under Article 3 of the ECHR.²⁵² The Commission wrote that while the ECtHR has “repeatedly affirmed” the Convention, events like September 11 may mean that in the future the ECtHR may “have to rule on questions relating to Article 3, in particular on the question in how far there can be a ‘balancing act’ between the protection needs of the individual and the security interests of the state.”²⁵³ The Working Document went on to describe the circumstances under which extradition “must be consid-

248. See UNHCR Statement, *supra* note 24, at 24–25 (“However, more recent developments in international law and in the practice of the United Nations Security Council, including the Resolutions which have designated terrorist acts as violating the purposes and principles of the UN, suggest that acts contrary to the purposes and principles of the UN could also be committed by an individual who is a member of an organization designated as “terrorist,” irrespective of his/her position in the organization, which may therefore lead to his/her exclusion under Article 1F(c) without limitations as to the nature and seriousness of the act. However, references to United Nations General Assembly and UNSC Resolutions pertaining to measures for combating terrorism which declare that acts of terrorism are contrary to the purposes and principles of the UN should not suggest an automatic application of Article 1F(c). For the application of Article 1F(c), an individual assessment in each case should be undertaken to determine whether the acts in question meet the threshold required, in terms of their gravity, international impact, and implications for the maintenance of international peace and security.”).

249. See, e.g., S.C. Res. 1373, ¶ 3(f) (Sept. 28, 2001); S.C. Res. 2322, ¶ Preamble (Dec. 12, 2016).

250. See, e.g., Alice Debarre, *Safeguarding Medical Care and Humanitarian Action in the UN Counterterrorism Framework*, INT’L PEACE INST. (Sept. 2018), <https://www.ipinst.org/2018/09/safeguarding-humanitarian-action-in-un-counterterrorism-framework> [<https://perma.cc/8C6V-VR6L>]; Emanuela-Chiara Gillard, *IHL and the Humanitarian Impact of Counterterrorism Measures and Sanctions*, INT’L LAW PROGRAMME (Sept. 2021), <https://www.chathamhouse.org/2021/09/ihl-and-humanitarian-impact-counterterrorism-measures-and-sanctions> [<https://perma.cc/X4LH-VK2U>]; Marine Buissonniere, Sarah Woznick, & Leonard Rubenstein, *The Criminalization of Healthcare*, SAFEGUARDING HEALTH IN CONFLICT, JOHN HOPKINS BLOOMBERG SCH. PUB. HEALTH, U. ESSEX (June 2018), <https://www1.essex.ac.uk/hrc/documents/54198-criminalization-of-healthcare-web.pdf> [<https://perma.cc/ZWQ2-M9H4>].

251. *The Relationship Between Safeguarding Internal Security and Complying with International Protection Obligations and Instruments* (EC), COM (2001) 743 final (May 12, 2001).

252. Bruin & Wouters, *supra* note 28.

253. *Id.* at 9 (citing COM (2001) 743 final, ¶ 2.3.1, p.16).

ered legal.”²⁵⁴ However, it did not include the obligations under the ECHR, the Refugee Convention, CAT, and the ICCPR to ensure that the individual being extradited is not at risk of torture, inhumane, or degrading treatment or punishment,²⁵⁵ protection from which is considered a non-derogable right.²⁵⁶

The ECtHR has also held in several cases that national security concerns may not outweigh non-derogable rights, such as the right against non-refoulement in cases where an individual faces the threat of torture. In *Chahal v. United Kingdom*,²⁵⁷ for example, the ECtHR unambiguously held that EU member states could not balance security objectives—even where significant—“against a non-derogable norm such as the prohibition of torture where real risks of ill-treatment exist following a person’s return to another State.”²⁵⁸ The court went on to restate this holding in several subsequent cases, including *N v Finland*,²⁵⁹ *Saadi v Italy*,²⁶⁰ and *Shamayev v Georgia and Russia*,²⁶¹ creating clear precedent for the non-derogability of the principle of non-refoulement.²⁶²

In addition to legal conflicts with the obligation to protect refugees, the laws that have been promulgated in response to the UNSC resolutions have also violated a myriad of other core legal rights that are enshrined in customary international law. For example, the criminalization of pre-inchoate offenses cuts against legal norms that require an individual to have taken a specific action toward committing a crime, and instead takes the unprecedented approach of criminalizing actions that have not yet occurred.²⁶³ The

254. *The Relationship Between Safeguarding Internal Security and Complying with International Protection Obligations and Instruments*, *supra* note 251, ¶ 2.3.2 (stating “[e]xtradition must be considered legal when it is possible to obtain legal guarantees from the State that is going to trial the person, addressing the concerns connected to the potential violations of the European Convention of Human Rights”).

255. See Bruin & Wouters, *supra* note 28, at 9–10.

256. *The Relationship Between Safeguarding Internal Security and Complying with International Protection Obligations and Instruments*, *supra* note 251, ¶ 2.3.1 (stating “[t]he protection against refoulement as a consequence of the prohibition of certain treatments or punishments, provided for in human rights instruments such as the United Nations Convention against Torture, the International Covenant on Civil and Political Rights and the European Convention on Human Rights (ECHR) is namely absolute in nature, that is to say, admits no exceptions”).

257. *Chahal v United Kingdom*, App. No. 22414.93 (Nov. 15, 1996).

258. U.N. Off. on Drugs and Crime (UNODC), *International Refugee Law*, in MODULE 3: OVERVIEW OF THE INTERNATIONAL COUNTER-TERRORISM LEGAL FRAMEWORK, <https://www.unodc.org/e4j/en/terrorism/module-3/key-issues/international-refugee-law.html> [<https://perma.cc/UL9T-CJ7T>] (citing *Chahal v. The United Kingdom* at ¶ 80).

259. *N. v. Finland*, App. No. 38885/02, ¶ 159 (July 26, 2005), <https://hudoc.echr.coe.int/eng?i=001-69908>.

260. *Saadi v. Italy*, Appl. No. 37201/06, ¶ 138 (Feb. 28, 2008), <https://hudoc.echr.coe.int/eng?i=001-85276/>

261. *Shamayev v. Georgia and Russia*, App. No. 36378/02, ¶ 368 (Apr. 12, 2005).

262. UNODC, *supra* note 258.

263. See Won Kidane, *The Terrorism Exception to Asylum: Managing the Uncertainty in Status Determination*, 41 U. MICH. J. L. REFORM (Aug. 5, 2008) (“[T]he terrorism bar focuses not only on past conduct but also the future likelihood of involvement in terrorist activity . . . [and unlike in persecution in other cases,] the judge in a terrorism case only has to be concerned about the future likelihood of engagement in terrorist activity.”).

criminalization of incitement is another example of how counterterrorism law infringes on well-established legal norms—in this case, the freedom of expression.²⁶⁴

That the UNSC has continued to promulgate resolutions in defiance of these ECtHR decisions and commentaries by the UN and European Commission—and that the EU and individual member states have continued to implement laws and policies that directly conflict with international law—demonstrates a worrisome trend of security concerns overshadowing compliance with international law. The UNSC's counterterrorism resolutions, and their impacts on refugees, do not exist within a silo. The international community must take steps to ensure that UNSC resolutions do not contribute to an erosion of core human rights principles.

CONCLUSION

While preventing and punishing terrorism is an objective shared by governments and international institutions, the UNSC's counterterrorism resolutions' reach is so over-expansive that they result in the punishment of victims of terrorism themselves. The Refugee Convention was formed in the wake of a refugee crisis spawned from the devastation of WWII, and was intended to protect those fleeing violence and persecution.²⁶⁵ The fears of today should not—and legally must not—unravel the protections the Refugee Convention put in place to ensure that legitimate asylum seekers are given protection.

As they stand, the UNSC's counterterrorism resolutions contravene the Refugee Convention, as well as the numerous other protections and rights given to refugees under broader international law and human rights law.²⁶⁶ The Refugee Convention had considered the need for state security and built-in exceptions to protection under Articles 1F and 33(2) of the Convention.²⁶⁷ These exceptions already work to strike a balance between states needing to protect themselves and the need to grant protection to those fleeing persecution.

Laws that exceed the limits of these exceptions go beyond the scope of the Refugee Convention, and in some cases are in direct violation of the Convention where they bar legitimate asylum seekers from protection. And while it remains unclear whether states' obligations to UNSC resolutions rise above their obligations to the Refugee Convention, the European pro-

264. Yaël Ronen, *Terrorism and Freedom of Expression in International Law*, RESEARCH HANDBOOK ON INTERNATIONAL LAW AND TERRORISM (Ben Saul ed., 2014) (“As a remote state in the development of criminal conduct, prohibiting incitement is a severe encroachment on the freedom of expression.”).

265. *A Guide to International Refugee Protection and Building State Asylum Systems*, INTER-PARLIAMENTARY UNION AND U.N. HIGH COMMISSIONER FOR REFUGEES 16 (2017), <https://www.unhcr.org/3d4aba564.pdf> [<https://perma.cc/G263-7VJX>].

266. See, e.g., Part II, *supra*.

267. Refugee Convention, *supra* note 1, at arts. 1F; 33(2); see Part III, *supra*.

tection of individuals fleeing persecution constitutes a fundamental right and should thus be respected at all times.

Beyond the possible violations of international law that the UNSC resolutions have prompted, the practical impacts of the resolutions cannot be ignored. First and foremost, the resolutions have resulted in EU counterterrorism policies that have barred large swaths of legitimate refugees from the Middle East from pursuing asylum in Europe. Because of the resolutions' over-expansive definitions of terrorism, entire groups of individuals may be deemed terrorists, and therefore will be barred from protection that they should be given by law. Under the material support provisions and the lack of exception made for humanitarian assistance, the resolutions also have impacts on the ability of NGOs to provide vulnerable communities and areas with humanitarian aid. Finally, the resolutions pose greater questions for the respect for international law and human rights law: where security may override even the most fundamental of rights, the strength of human rights principles has an uncertain future.

The UNSC's counterterrorism resolutions must be reevaluated. The consequences facing refugees, and the broader legal implications of these resolutions, demonstrate that the harm they cause may be far greater than the security benefits they purportedly confer.