

ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL

BETWEEN

YS (EGYPT)

Appellant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

CASE FOR THE INTERVENER
(UNHCR)

A Introduction

1. Under the 1950 Statute of the Office of the United Nations High Commissioner for Refugees ("UNHCR"), annexed to UN General Assembly Resolution 428(V) of 14.12.50 [Intervener's Authorities Bundle ("IAB") Tab 6], the UNHCR has been entrusted with the responsibility of providing international protection under the auspices of the UN to refugees within its mandate and by assisting States in seeking permanent solutions for refugees. As set forth in its Statute, UNHCR fulfils its international protection mandate by, *inter alia*, "[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto."

2. UNHCR has a duty to supervise the implementation by States of the standards and obligations laid down by refugee law, including in the counter-terrorism context. Thus UNHCR's involvement with the issue of counter-terrorism essentially flows from its protection mandate in relation to persons in need of international protection.
3. UNHCR's supervisory responsibility under its Statute is formally recognised in Article 35 of the 1951 Convention relating to the Status of Refugees and Article II of the 1967 Protocol relating to the Status of Refugees (together "the Geneva Convention") [IAB Tab 7]. As such the UNHCR has a responsibility under paragraph 8 of its Statute in conjunction with Article 35 of the Geneva Convention to help States that may require assistance in their exclusion determinations, and to supervise their practice in this regard.
4. In domestic law, the UNHCR has a statutory right to intervene before the Asylum and Immigration Tribunal. In the High Court, the UNHCR seeks, in appropriate cases, permission to intervene to assist the Court through submissions of principle, which permission has always been granted, as here.
5. The Courts on a number of occasions have made reference to the significance of the opinion of the UNHCR in the interpretation of provisions of the Geneva Convention. Most recently in R v Asfaw [2008] UKHL 31, [2008] 2 WLR 1178 [IAB Tab 24], Lord Bingham stated at [13]: "*The opinion of the Office of the UNHCR....is a matter of some significance, since by article 35 of the Convention member states undertake to co-operate with the Office in the exercise of its functions, and are bound to facilitate its duty of supervising the application of the provisions of the Convention.*" The Courts have regularly recognised valuable guidance provided by the UNHCR's materials on the interpretation of the Geneva Convention.¹

¹ See e.g. Januzi v Secretary of State for the Home Department [2006] UKHL 5, 2 AC 456 [IAB Tab 25] (Lord Bingham referring to Guidelines on International Protection of 23 July 2003 on the reasonableness of internal relocation alternatives at [20], Lord Carswell expressly agreeing at [67]); see also AH and others (Sudan) v Secretary of State for the Home Department [2007] UKHL 49, [2007] 3 WLR. 832 [IAB Tab 26] (Lord Brown referring to the same at [39-40] and [41]).

6. The issue in this case concerns the interpretation and application of Article 1F(c) of the Geneva Convention. The UNHCR wishes to comment on certain issues which arise in this appeal as summarised in the appellant's advocates' statement dated 23 May 2008, namely as to:

6.1 The scope of Article 1F(c) and the 'acts' which it applies to; (issues 2-4)

6.2 The interpretation of Article 1F(c) and domestic law provisions which purport to define acts included within the scope of the Article (issue 1).

7. The UNHCR's position on these issues in summary is:

7.1 The UN Charter is a charter between states. Therefore, Article 1F(c) is principally concerned with intra-state relations. As a result it is primarily concerned with individuals who, through their governance or control of states or state-like entities, can lead states to act contrary to UN purposes and principles. However, as is developed further below it may apply to an individual in extreme circumstances;

7.2 It is intended to cover in a general way such acts *against the purposes and principles of the United Nations* that might not be fully covered by the two preceding exclusion clauses;

7.3 The terms of Article 1F(c) (in contrast to Article 1F(a) and (b)) are rather unclear and should be read narrowly and applied with caution;

7.4 It is only triggered in extreme circumstances by activity which attacks the very basis of the international community's existence. Such activity must have an international dimension;

7.5 Crimes capable of affecting international peace, security and peaceful relations between states, as well as serious and sustained violations of human rights, would fall into this category. But not every act which

obstructs the United Nation's broad aims can be interpreted as falling within Art 1F(c);

7.6 In a case involving a 'terrorist' act, a correct application of Article 1F(c) involves an assessment as to the extent to which the act impinges on the international plane - in terms of its gravity, international impact, and implications for peace and security;

7.7 Further, the correct application of Article 1F(c) also requires an individual examination and determination on the basis of cogent evidence that there are serious reasons for considering that the person has incurred individual responsibility that may fall within the scope of the Article and in full compliance with due process safeguards.

8. These propositions are examined in further detail in sections C and D below.² For the avoidance of doubt the UNHCR wish to make it clear that the fact that they do not comment on all issues in relation to this case should not be taken to mean that they agree with the Tribunal's determination. Rather, partly in view of the relatively short amount of time available to submit their case, the UNHCR has decided to focus upon the fundamental principles of interpretation of Article 1F(c) relating to its scope and application. In particular, the UNHCR does not agree with the Tribunal's approach to the burden and standard of proof (issues 5 and 6), and would have comments on the question of individual responsibility. It may be appropriate to address these should this case go further. UNHCR is additionally concerned with the reliance of the Tribunal at [38] of the determination as to the findings of the Grand Jury of the United States District Court for the Southern District of New York.³

B Interpretation of the Refugee Convention

² Save in respect to paragraph 7.7 for the reasons outlined in paragraph 8.

³ See "The useful and, dangerous fiction of Grand Jury Independence", Niki Kunkes, *American Criminal Law Review* rev. 1, 2004, 41 *Am. Crim. L. Rev.* 1 2004 [IAB Tab 38], p. 2, 33 and 53. See also "Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction without Adjudication", Peter Arenella, 78 *Mich. L. Rev.* 1979-198 [IAB Tab 39], p. 485 and 493.

9. The Refugee Convention is an international law instrument and its provisions must be interpreted in the context of the Convention as a whole, taking into account its historical setting and its objects and purposes. It must be interpreted as an international instrument, not a domestic statute, in accordance with the rules prescribed in the Vienna Convention on the Law of Treaties: see Januzi v Secretary of State for the Home Department [2006] UKHL 5, 2 AC 456 [IAB Tab 25] at [4] (Lord Bingham). The Convention has to be interpreted in accordance with Articles 31 and 32 of the Vienna Convention [IAB Tab 8].⁴ The references to the “context” and “purpose” in Article 31 are of particular relevance to a case which involves a provision of the Geneva Convention which is not particularly clear on its face.
10. As Lord Bingham recognised in Januzi at [4]:
- “[T]he starting point of the construction exercise must be the text of the Convention itself (*Adan v Secretary of State for the Home Department* [1999] 1 AC 293, 305; *Roma Rights* case, above, para 18), because it expresses what the parties to it have agreed. The parties to an international convention are not to be treated as having agreed something they did not agree, unless it is clear by necessary implication from the text or from uniform acceptance by states that they would have agreed or have subsequently done so. The court has “no warrant to give effect to what [states parties] might, or in an ideal world would, have agreed”: *Roma Rights* case, above, para 18.”
11. The Geneva Convention falls to be interpreted by the Courts on the language which it contains and as a matter of law, being given its autonomous meaning and with recognition that it is a living instrument. It must be given a purposive construction consistent with its humanitarian aims: see R v Asfaw [2008] UKHL 31 [2008] 2 WLR 1178 [IAB Tab 24] at [11] (Lord Bingham).

⁴ See also Preamble to the Vienna Convention.

12. In this area, the provisions of the Geneva Convention itself, properly interpreted by the Courts, should be the determinative 'driver' of the rights and obligations which arise in relation to refugees. In recognition of this section 2 of the Asylum and Immigration Appeals Act 1993 [IAB Tab 1] provides: "*Nothing in the immigration rules (within the meaning of the 1971 Act) shall lay down any practice which would be contrary to the Convention.*" The current Immigration Rules HC 395 [IAB Tab 2] themselves reinforce the Convention's primacy (by paragraph 328): "*All asylum applications will be determined by the Secretary of State in accordance with the Geneva Convention*". Section 2 of the 1993 Act is important in avoiding protection gaps, and securing that the United Kingdom does not breach its international law obligations, in relation to refugee status. Compliance with international refugee law entails the proper application of exclusion clauses just as much as inclusion provisions.
13. As is clear from the authorities cited above at paragraph 5, the opinion of the UNHCR expressed through a variety of sources provides valuable guidance as to the interpretation of the Convention. The UNHCR has been concerned in the materials it has put into the public domain to promote a common approach to the interpretation of the exclusion clauses, thus reducing the possibility of conflict between decisions made by different States and/or the UNHCR.⁵

C Issues 2-4: Scope of Article 1F(c)

14. Ensuring compliance with international refugee law encompasses the proper and diligent application of the exclusion clauses of Article 1F, including as a means to prevent the abuse of refugee status by persons involved in terrorist crimes which are properly caught by that Article. At the same time, States have an obligation to interpret the Geneva Convention in the light of the subject and purposes of the Convention. This is of particular relevance in the context of Article 1F in view of the severe consequences of exclusion for the

⁵ *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, Geneva, 4 September 2003, para. 19 [IAB Tab 40].

individual. As stated in the Preamble to the Geneva Convention, the object of the Convention is to endeavour “to assure refugees the widest possible exercise of [the] fundamental rights and freedoms”. Thus, as with any exception to human rights guarantees, Article 1F must be interpreted in line with its humanitarian character, in a holistic manner, and restrictively so as not to frustrate its fundamental purpose.

15. The definition of a refugee is set out in Article 1 of the Geneva Convention. Article 1A sets out the positive characteristics which a refugee must have. Article 1C-1F set out circumstances in which a person is not or cannot be recognised as a refugee. Articles 2-34 of the Convention provide various rights for refugees. One of the most fundamental is the right of non refoulement enshrined in Article 33. This is qualified in Article 33(2) where there are reasonable grounds for regarding the refugee as a danger to the security of the country of refuge or if he has been convicted of a particularly serious crime. Article 33 is linked to Article 32 which provides for non expulsion of a refugee save on grounds of national security or public order.

16. It is important to read Article 1F as a whole. It provides:

“The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

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

17. It will be immediately noted that whereas Articles 1F(a) and (b) are directed at individuals who have committed crimes in prescribed circumstances, Article 1F(c) has a different focus. It refers not to the committing of a crime but rather to “acts contrary to the purposes and principles of the United Nations”.

18. The “*purposes and principles of the United Nations*” are to be found in the Charter of the United Nations and in particular in its Preamble and Articles 1 and 2 [IAB Tab 9]. A cursory examination of the purposes and principles begs the question of what acts are covered by Article 1F(c). In order to elucidate on its meaning, it is necessary to examine the relevant sources.

UNHCR Materials

19. The UNHCR’s views on Article 1F(c) are set out in the propositions at paragraph 7 above. These propositions are not repeated here. In so far as the interpretation of Article 1F(c) itself is concerned, support for these propositions is derived from the following UNHCR materials:

- 19.1 *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*⁶, paras. 162-163; para 163 states:

“The purposes and principles of the United Nations are set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations. They enumerate fundamental principles that should govern the conduct of their members in relation to each other and in relation to the international community as a whole. From this it could be inferred that an individual, in order to have committed an act contrary to these principles, must have been in a position of power in a member State and instrumental to his State’s infringing these principles. However, there are hardly any precedents on record for the application of this clause, which, due to its very general character, should be applied with caution.”

- 19.2 *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*⁷, Geneva, 4 September 2003, in particular paras. 2, 17-36; para 17 states:

⁶ HCR/IP/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979 [IAB Tab 41]. The authoritativeness of the Handbook stems principally from its role in setting standards of state practice, as a result of state’s duty to cooperate with the Office of UNHCR; as Lord Clyde noted in *Horvath v Secretary of State for the Home Department* [2000] UKHL 37, [2001] 1 AC 489 at 515 [IAB Tab 28], the Handbook has “*the weight of accumulated practice behind it*”.

⁷ HCR/GIP/03/05 4 September 2003 [IAB Tab 42]. In *R v Uxbridge MC ex p Adimi* [2001] QB 667 [IAB Tab 29] at 678, the Court of Appeal recognised that these Guidelines “*should be*

“Given the broad, general terms of the purposes and principles of the United Nations, the scope of this category is rather unclear and should therefore be read narrowly. Indeed it is rarely applied and, in many cases, Article 1F(a) or 1F(b) are anyway likely to apply. Article 1F(c) is only triggered in extreme circumstances by activity which attacks the very basis of the international community’s coexistence. Such activity must have an international dimension. Crimes capable of affecting international peace, security and peaceful relations between States, as well as serious and sustained violations of human rights, would fall under this category. Given that Articles 1 and 2 of the United Nations Charter essentially set out the fundamental principles States must uphold in their mutual relations, it would appear that in principle only persons who have been in positions of power in a State or State-like entity would appear capable of committing such acts. In cases involving a terrorist act, a correct interpretation of Article 1F(c) involves an assessment as to 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.”

19.3 *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, Geneva, 4 September 2003,⁸ paras. 1-22, 46-90. In particular paras. 46-48 state:

“46. Article 1F(c) excludes from international protection as refugees persons who have been ‘guilty of acts contrary to the purposes and principles of the United Nations’. The purposes and principles of the United Nations are spelt out in Articles 1 and 2 of the UN Charter, although their broad general terms offer little guidance as to the types of acts that would deprive a person of the benefits of refugee status. The travaux préparatoires are also of limited assistance, reflecting a lack of clarity in the formulation of this provision, but there is some indication that the intention was to cover violations of human rights which, although falling short of crimes against humanity, were nevertheless of a fairly exceptional nature. Indeed, as apparently foreseen by the drafters of the 1951 Convention, this provision has rarely been invoked. In many cases, Article 1F(a) or Article 1F(b) are likely to be applicable to the conduct in question. Given the vagueness of this provision, the lack of coherent State practice and the dangers of abuse, Article 1F(c) must be read narrowly.

47. The principles and purposes of the United Nations are reflected in myriad way, for example by multilateral conventions adopted under

accorded considerable weight”, in light of Article 35(1) of the Convention and the duty it imposes on Contracting States to cooperate with the UNHCR in the exercise of its functions and its supervision of the application of the Convention.

⁸ The Note forms an integral part of UNHCR’s Guidelines of 4 September 2003 [IAB Tab 40].

the aegis of the UN General Assembly and in Security Council resolutions. Equating any action contrary to such instruments as falling within Article 1F(c) would, however, be inconsistent with the object and purpose of this provision. Rather, it appears that Article 1F(c) only applies to acts that offend the principles and purposes of the United Nations in a fundamental manner. Article 1F(c) is thus triggered only in extreme circumstances by activity which attacks the very basis of the international community's coexistence under the auspices of the United Nations. The key words in Article 1F(c) - 'acts contrary to the purposes and principles of the United Nations' - should therefore be construed restrictively and its application reserved for situations where an act and the consequences thereof meet a high threshold. This threshold should be defined in terms of the gravity of the act in question, the manner in which the act is organised, its international impact and long-term objectives, and the implications for international peace and security. Thus, crimes capable of affecting international peace, security and peaceful relations between States would fall within this clause, as would serious and sustained violations of human rights.

48. Furthermore, given that Articles 1 and 2 of the UN Charter essentially set out the fundamental principles States must uphold in their mutual relations, in principle only persons who have been in a position of power in their countries or in State-like entities would appear capable of violating these provisions (in the context of Article 1F(c)). In this context, the delegate at the Conference of Plenipotentiaries, who pressed for the inclusion of this clause, specified that it was not aimed at the 'man in the street'....Indications in some jurisdictions that this provision can apply to individuals not associated with a State or State-like entity do not reflect this general understanding. Moves to apply this provision more broadly, for example to activities such as drug trafficking or smuggling/trafficking of migrants, are also misguided.

49. The question of whether acts of international terrorism fall within the ambit of Article 1F(c) has nevertheless become of increasing concern, including not least since the Security Council determined in Resolutions 1373 (2001) and 1377 (2001) that acts of international terrorism are a threat to international peace and security and are contrary to the purposes and principles of the United Nations. 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....” [footnotes omitted]

19.4 *Summary Conclusions – Exclusion from Refugee Status*, Lisbon Expert Roundtable Global Consultations on International Protection 3-4 May 2001⁹, in particular paras. (1)-(4) and (13)-(21). As regards Article 1F(c) paras 13-14 state:

“(13) Article 1F(c) is not redundant, although most exclusion clauses can be covered by the other provisions. Some States have used it as a residual category, for instance, in relation to certain terrorist acts of trafficking in narcotics. The exclusion of terrorists under article 1F(c) attracted considerable debate. There was, however, no agreement on the types of crimes article 1F(c) would usefully cover.

(14) In view of its vague and imprecise language, it should be interpreted restrictively and with caution. It should be limited to acts contrary to the purposes and principles of the United Nations, as defined by the UN.”

19.5 *UNHCR’s Comments on the Implementation of Council Directive 2004/83/EC of 29 April 2004*¹⁰, August 2006 on Article 12 (pp. 16-18). In particular:

“The question of whether acts of terrorism fall within the application of Article 1F(c) has become of increasing concern to the international community. UNHCR acknowledges that the UN Security Council has stated in resolutions 1371 (2001), 1377 (2001) and 1624 (2005) that acts of international terrorism are ‘contrary to the purposes and principles of the United Nations’. However, in the absence of a universally accepted definition of terrorism at the international level, it is UNHCR’s position that a proper determination of the applicability of Article 1F(c) requires an examination of the acts in question.

Crimes commonly considered to be of a ‘terrorist’ nature may fall within any of the clauses of Article 1F (as war crimes, crimes against

⁹ EC/GC/01/2Track/1, 30 May 2001 [IAB Tab 43]. The Expert Roundtable was organised by the UNHCR and based on a background paper by Professor Geoff Gilbert, University of Essex, Current Issues in the Application of the Exclusion Clauses: see para. 25.3 below.

¹⁰ On minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [IAB Tab 44].

humanity, serious non-political crimes or acts contrary to the purposes and principles of the UN) if the criteria of the relevant clauses are met. There is no automatic correlation between the term ‘terrorist act’ and Article 1F(c). Rather, the assessment must focus on the actual crime committed, its nature and gravity, and its impact on international peace and security in order to determine whether it falls within the material scope of Article 1F(c).

Similarly, while a State has the prerogative to define terrorist acts more broadly to encompass acts which may not have an international dimension, not all acts defined as ‘terrorist’ under national law would fall under Article 1F(c).

As to the personal scope of the exclusion clause under Article 1F(c) as noted above and in principle, only persons who are in positions of power in their countries or in State-like entities would appear capable of violating these provisions. UNHCR accepts, however, that, in exceptional circumstances, the leaders of organisations carrying out particularly heinous acts of international terrorism which involve serious threats to international peace and security may be considered to fall within the scope of Article 1F(c).¹¹

Travaux Préparatoires

20. The *travaux préparatoires* themselves shed some limited light on the interpretation and application of Article 1F(c).¹² The principle of exclusion from the Geneva Convention appears in embryonic form in the International Refugee Organisation Constitution, which excluded those, who since the end of the Second World War, had participated in any organisation seeking the overthrow by armed force of a government of a UN member State, or in any terrorist organization; or who were leaders of movement hostile to their government or sponsors of movements encouraging refugees not to return to their country of origin.¹³
21. The precursor of the final version of Article 1F stated: “D. No contracting State shall apply the benefits of this Convention to any person who in its

¹¹ See also UNHCR Note on the Impact of Security Council Resolution 1624 (2005) on the Application of Exclusion Under Article 1F of the 1951 Convention relating to the Status of Refugees, 9 December 2005, Department of International Protection [IAB Tab 45].

¹² See Article 32 of the Vienna Convention on the Law of Treaties which expressly recognizes that such preparatory documents may be relevant as an aid to construction [IAB Tab 8].

¹³ See Goodwin-Gill & McAdam, *The Refugee in International Law* (3rd ed. OUP 2007) p. 184 [IAB Tab 34].

opinion has committed a crime specified in article VI of the London Charter of the International Military Tribunal [IAB Tab 10] or any other act contrary to the purposes and principles of the Charter of the United Nations." [Emphasis added]

22. This generated considerable discussion in the Social Committee of the Economic and Social Council where the Convention was being negotiated. There was little consensus on precisely what acts would be included. As Hathaway notes in *The Law of Refugee Status* (Butterworths 1991) [IAB Tab 35] the "*multiplicity of possible interpretations bears witness to the concern of several delegates that the vagueness of the clause itself left it open to misconstruction or abuse*".¹⁴ Grahl-Madsen in *The Status of Refugees in International Law* (Sijthof 1966) [IAB Tab 36] notes at p. 283: "*It appears from the records that those who pressed for the inclusion of the clause [Article 1F(c)] had only vague ideas as to the meaning of the phrase 'acts contrary to the purposes and principles of the United Nations'*". He too records at p. 283 the concern of the Social Committee of the Economic and Social Council that the "*provision was so vague as to be open to abuse*" and comments further: "*It seems that agreement was reached on the understanding that the phrase should be interpreted very restrictively*".
23. Goodwin-Gill and McAdam note that the British representative had supposed that such 'acts' covered 'war crimes, genocide and the subversion or overthrow of democratic regimes'.¹⁵ The French delegate responded that the provision was aimed at "certain individuals who, though not guilty of war crimes, might have committed acts of similar gravity against the principles of the United Nations, in other words, crimes against humanity" (UN Doc. E/AC.7/SR.166, 22 August 1950, at p. 4). He was concerned that acts criminalized by the *London Charter of the International Military Tribunal*, 82 U.N.T.S. 280 [IAB Tab 10], would only be found to exist where a war had actually taken place. This would allow all manner of atrocities to be committed without the London Charter being violated simply because of the

¹⁴ Hathaway, *Law of Refugee Status* (Butterworths 1991) at p. 228 [IAB Tab 35].

¹⁵ Goodwin-Gill & McAdam, *The Refugee in International Law* (3rd ed. OUP 2007) p. 184 and fn 254 [IAB Tab 34].

absence of military, interstate conflict. The reference to the London Charter alone, according to the French delegate, would fail to include:

“tyrants . . . guilty of acts contrary to the purposes and principles of the Charter, who had by such acts helped to create the fear from which the refugees had fled. The fact that they had themselves become suspect to their superiors and were in their turn a prey to the fear which they had themselves created, would . . . certainly not [entitle them] to the automatic benefit of the international protection granted to refugees.”¹⁶

24. The Supreme Court of Canada in Pushpanathan v Canada (Minister of Citizenship and Immigration) [1998] 1 SCR 982 [IAB Tab 30] at [60], [63] and [64] considered the travaux préparatoires as follows:

“[60]...Though initially one of the objectors who considered the provision dangerously vague, the Canadian delegate eventually agreed that the individuals caught by Article 1F(c) and not otherwise identified by the London Charter were those “persons who had abused positions of authority by committing crimes against humanity, other than war crimes” (E/AC.7/SR.166, at p. 10 (emphasis added)). In short, the delegates whose minds were changed by the statement of the French delegate believed that they were identifying non-war-related crimes against humanity and that this was a distinct concept worthy of a separate provision, even if the acts falling into that category could not be clearly enumerated at that time.

[63] What is crucial, in my opinion, is the manner in which the logic of the exclusion in Article 1F generally, and Article 1F(c) in particular, is related to the purpose of the Convention as a whole. The rationale is that those who are responsible for the persecution which creates refugees should not enjoy the benefits of a Convention designed to protect those refugees. As La Forest J. observes in *Ward, supra*, at p. 733, “actions which deny human dignity in any key way” and “the sustained or systemic denial of core human rights . . . se[t] the boundaries for many of the elements of the definition of ‘Convention refugee’”. This purpose has been explicitly recognized by the Federal Court of Appeal in the context of the grounds specifically enumerated in Article 1F(a) in *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433, where Linden J.A. stated (at p. 445): “When the tables are turned on persecutors, who suddenly become the persecuted, they cannot claim refugee status. International criminals, on all sides of the conflicts, are rightly unable to claim refugee status.”

[64] This brings me back to the second point to be taken from the declarations of the French delegate referred to earlier. In the light of the general purposes

¹⁶ See Pushpanathan v Canada (Minister of Citizenship and Immigration) [1998] 1 SCR 982 at paras [59] - [63] [IAB Tab 30].

of the Convention, as described in *Ward*, and elsewhere, and the indications in the *travaux préparatoires* as to the relative ambit of Article 1F(a) and F(c), the purpose of Article 1F(c) can be characterized in the following terms: to exclude those individuals responsible for serious, sustained or systemic violations of fundamental human rights which amount to persecution in a non-war setting.”

Academic Commentators on Article 1F(c)

25. A number of authoritative academic commentators have considered the meaning of Article 1F(c).

25.1 Professor James Hathaway in the *Law of Refugee Status* (Butterworths 1991) [IAB Tab 35] acknowledges the wide variation in interpretation of the Article and the inherent problems with such interpretations. He states at p. 229:

“A sensible and purposeful interpretation of this exclusion clause, advocated by the United Nations, is therefore that it is intended to enable states effectively to act as agents of the international community in bringing to bear basic norms of acceptable international conduct against government officials who ought reasonably to understand and respect them, and to avoid tarnishing refugee status by the admission to protection of those who have exploited their political authority to jeopardize the well-being of individuals, their nation, or the world community.” [footnotes omitted]

25.2 Professor Atle Grahl-Madsen in *The Status of Refugees in International Law* (Sijthoff 1966) [IAB Tab 36] analyses the provision by reference to its drafting history and text of the UN Charter. He writes at p. 286:

“However carefully we read these provisions, it is difficult to see how persons who do not occupy a responsible governmental position may offend against the Purposes and Principles thus set forth, with the possible exception of certain flagrant acts in disregard of human rights and fundamental freedoms...”

Article 1F(c) of the Refugee Convention must, however, be applied with considerable restraint. Thus, a person who may be accused of having carried out policies incompatible with the principle of ‘equal rights of men and women’ [cf. second paragraph of the Preamble, also Article 1(3) of the UN Charter], should not automatically be labelled

as 'guilty of acts contrary to the purposes and principles of the United Nations....

There seems, therefore to be a case for limiting the applicability of Article 1F(c) to those categories mentioned by the French delegate in the Social Committee of the Economic and Social Council...namely persons occupying governmental posts, such as Heads of State, cabinet members, officials, and agents of a government, who are guilty of persecutory measures and atrocities in defiance of human rights, or who have instigated, committed, or abetted acts of State contrary to the maintenance of a just peace; with the possible addition of persons who, although acting in an individual capacity, are guilty of especially flagrant violations of human rights, like those mentioned above."

- 25.3 Professor Geoff Gilbert's background paper commissioned for the Lisbon expert roundtable (see paragraph 19.4 above) published in *Refugee Protection in International Law* (eds. Feller, Turk and Nicholson, Cambridge University Press 2003) [IAB Tab 37] notes at pp. 455-6 the danger with such an imprecise phrase in allowing States to exclude applicants without adequate justification. He writes at pp. 456-7 with specific reference to terrorism:

"What is clear after 11 September 2001 and the subsequent Security Council resolutions, particularly Resolution 1377, is that acts of international terrorism constituting a threat to international peace and security are contrary to the purposes and principles of the United Nations. Nevertheless, the guiding principle has to be that all limitations on rights have to be interpreted restrictively...

Article 1F(c) is vague and is open to abuse by States. It is clear that there is State practice interpreting it widely, but there is as yet no internationally accepted understanding of all those 'acts contrary to the purposes and principles of the United Nations'. Given that Article 1F(c) is a limitation on a fundamental right, there is strong reason to restrict its ambit, and, since acts contrary to the purposes and principles of the United Nations are those perpetrated by States, it would promote consistency within international law to confine the scope of Article 1F(c) to acts committed by persons in high office in government or in a rebel movement that controls territory within the State or in a group perpetrating international terrorism that threatens international peace and security. Those perpetrating acts of international terrorism constituting a threat to international peace and security who are not high-ranking members of the organization should be excluded under Article 1F(b)."

25.4 Professor Guy Goodwin-Gill & Dr Jane McAdam in *The Refugee in International Law* (3rd ed. OUP 2007) [IAB Tab 34] note that the weight of academic opinion would limit the exclusion clause to heads of state and high officials, while reserving its exceptional application to individuals such as torturers and others guilty of flagrant human rights abuses (p. 186). They consider the application to international terrorism in some detail at pp. 191-197 and conclude at p. 197:

“While ‘terrorism’ may indeed be contrary to the purposes and principles of the United Nations and therefore a basis for exclusion under article 1F(c), conformity with international obligations requires that decisions to exclude or subsequently to annul a decision on refugee status be taken in accordance with appropriate procedural guarantees. Article 1F(c) ought only to be applied, therefore, where there are serious reasons to consider that the individual concerned has committed an offence specifically identified by the international community as one which must be addressed in the fight against terrorism, and only by way of a procedure conforming to due process and the State’s obligations generally in international law.”

26. Thus, it can be seen that there is a broad consensus among the leading academics specialist in the area of the Geneva Convention that a purposive construction of the provision points to it being applied principally to state actors or state-like entities. Commentators accept that it should be applied restrictively and confined to offences which impinge on the international plane. This is all the more critical in a case concerning a non-state actor. Thus academic opinion concurs with the UNHCR’s views.

State Practice on Article 1F(c)

27. The Courts both here and abroad have considered the meaning and scope of Article 1F(c) on relatively few occasions. UNHCR would draw the Court’s attention to the following decisions from foreign courts.

28. First, the Canadian courts including the Supreme Court of Canada have considered Article 1F(c) in Pushpanathan v Canada (Minister of Citizenship and Immigration) [1998] 1 SCR 982, Supreme Court of Canada [IAB Tab 30]. P appealed against his exclusion from refugee status. He had been convicted

in Canada of a serious narcotics offence (conspiracy to traffick). The Convention Refugee Determination Division upheld the authorities decision that the appellant was excluded from classification as a refugee on the basis of Article 1F(c). The leading judgment of Bastarache J held at [64] and [65]:

“the purpose of Article 1F(c) can be characterized in the following terms: to exclude those individuals responsible for serious, sustained or systemic violations of fundamental human rights which amount to persecution in a non-war setting....

[65]... In my view, attempting to enumerate a precise or exhaustive list stands in opposition to the purpose of the section and the intentions of the parties to the Convention. There are, however, several types of acts which clearly fall within the section. The guiding principle is that where there is consensus in international law that particular acts constitute sufficiently serious and sustained violations of fundamental human rights as to amount to persecution, or are explicitly recognized as contrary to the purposes and principles of the United Nations, then Article 1F(c) will be applicable.”

29. The Court then went on to consider what categories of acts would fall within Article 1F(c). In so doing they made reference to three distinct scenarios, namely:

29.1 First, where a widely accepted international agreement or United Nations resolution explicitly declares that the commission of certain acts is contrary to the purposes and principles of the United Nations, there is a strong indication that those acts will fall within Article 1F(c); (see [66])

29.2 Secondly, other sources of international law may be relevant in a court’s determination of whether an act falls within Article 1F(c), e.g. determinations by the International Court of Justice may be compelling; (see [67])

29.3 Thirdly, although it may be more difficult for a non-state actor to perpetrate human rights violations on a scale amounting to persecution without the state thereby implicitly adopting those acts, the possibility should not be excluded *a priori*. The Court must also take into consideration that some crimes that have specifically been

declared to contravene the purposes and principles of the United Nations are not restricted to state actors. (see [68])

30. On the facts of the case, there was no indication that drug trafficking fell within any of the three outlined scenarios. Accordingly, the appeal was allowed.¹⁷ The UNHCR would welcome the recognition by the Canadian Supreme Court that it is inappropriate to prescribe the acts covered by Article 1F(c) by reference to a list. Secondly, the UNHCR acknowledges the finding that such acts if to be ascribed to non-state actors must be seen as a residual category and that acts must be consensus in international law for acts to be included within the ambit of Article 1F(c).
31. Secondly, in Wakn v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 1245, Federal Court of Australia [IAB Tab 32], the Australian court considered Article 1F(c) in the context of an application for judicial review of the decision of a tribunal to make a determination based on Article 1F. The Court considered the UNHCR Handbook, the Joint Position defined by the Council of the European Union on 4 March 1996, along with the decision in Pushpanathan, and a memorandum written by the Netherlands' State Secretary for Justice to the Netherlands Parliament in 1997¹⁸. This latter memorandum referred to an "obligation to ensure that exclusion under Article 1F is based on meticulous investigation and solid grounds" (at para [50]). The Court commented:

"[51] The Australian jurisprudence presently supports the proposition that the use of the words 'serious reasons for considering that ...' does not mandate a positive finding by the receiving State that the applicant for protection has engaged in conduct of the kind contemplated in Art 1F....[52] It

¹⁷ See also Zrig v Canada (Minister of Citizenship and Immigration), Federal Court of Appeal [2003] 3 FC 761 [IAB Tab 31]: "Article 1F(a) and (c) deals with extraordinary activities, that is international crimes in the case of Article 1F(a), or acts contrary to international standards in the case of Article 1F(c)...These are activities which I characterize as extraordinary because, if I might so phrase it, they have been criminalized by the international community collectively for exceptional reasons, and their nature is described in international instruments (Article 1F(a)) or in terms of such instruments (Article 1F(c))..."

¹⁸ The Netherlands Ministry of Justice has held that it will not use Article 1F(c) as an independent ground of exclusion. See reference in Gilbert in *Refugee Protection in International Law* at p. 457, fn. 163 [IAB Tab 37].

should be emphasised however that the absence of a requirement for a positive finding of the commission of conduct of the kind contemplated by Art 1F is not inconsistent with the need for ‘meticulous investigation and solid grounds’ in order to meet the standard of ‘serious reasons for considering that’ the conduct has been engaged in. It would be a matter for concern if the Tribunal, in an Art 1F case, merely extrapolated from the criminality of an organisation to that of an individual within it without undertaking any clear analysis of purpose or complicity...”

32. Thirdly, in Georg K v Ministry of the Interior, 71 ILR 284, 1968 (Austrian Administrative Court) [IAB Tab 33], the Austrian Court upheld the denial of refugee status under Article 1F(c) to someone who had carried out a bombing campaign to reunite South Tyrol with Austria. As Gilbert comments this was “*an individual whose actions affect the relations of nations*”.¹⁹
33. The UNHCR takes issue with the approach taken by the Tribunal in this case at [27]-[33] as to the correct analysis of Article 1F(c). The UNHCR’s position is as set out in paragraph 7 above and supported by reference to the materials cited in these submissions.

D Issue 1: UK Legislation and Article 1F(c)

Qualification Directive

34. The European Union has adopted EC Directive 2004/83 [IAB Tab 11] in relation to minimum standards applying to refugee and humanitarian protection. The recitals to the Directive include:

“(3) the Geneva Convention and protocol provide the cornerstone of the international legal regime for the protection of refugees....

(22) Acts contrary to the purposes and principles of the United Nations are set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations and are, amongst others, embodied in the United Nations resolutions relating to measures combating terrorism, which declare that ‘acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations’ and that ‘knowingly financing, planning and inciting

¹⁹ Gilbert in *Refugee Protection in International Law*, p. 456; see generally pp. 455-464. [IAB Tab 37]

terrorist acts are also contrary to the purposes and principles of the United Nations.”

35. Article 12 of the Directive states:

“(2) A third country national or stateless person is excluded from being a refugee where there are serious reasons for considering that:

...

(c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.

(3) Paragraph 2 applies to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein.”

36. The UNHCR has made substantive comments to the provisions of the Qualification Directive. The Court’s attention is drawn in particular to the comments in so far as they relate to Recital 22 and Article 12.²⁰

37. Article 12(2) of the Qualification Directive is implemented in UK law by the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 [IAB Tab 3], reg 7(1) of which states: “A person is not a refugee if he falls within the scope of Article 1D, 1E or 1F of the Geneva Convention.” It should be noted that while the wording of the 2006 Regulations is faithful to the provisions of the Convention, the terms of the Qualification Directive are not.

Domestic Legislation

38. The UK has sought to affect the scope of Article 1F(c) by section 54 of the Immigration, Asylum and Nationality Act 2006 [IAB Tab 4] which prescribes certain acts relating to terrorism as being included within 1F(c). Further, the UK has sought to define terrorism in section 1 of the Terrorism Act 2000 [IAB Tab 5].

²⁰ See UNHCR’s Comments on the Implementation of Council Directive 2004/83/EC of 29 April 2004 [IAB Tab 44]; and UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 [IAB Tab 46].

39. The UNHCR provided detailed comments at the drafting stage to what is now section 54 (formerly Clause 52).²¹ Its position in summary is:
- 39.1 States are encouraged to use the provisions of Article 1F rigorously in a manner consistent with international standards;
 - 39.2 The interrelationship between the clauses means that acts of a “terrorist” nature are likely to fall within one or more of the clauses;
 - 39.3 It is accepted that acts of terrorism may fall within the scope of Article 1F(c) but s 54 may result in an overly broad application of the Article, which should be read narrowly;
 - 39.4 Although there is reference in Security Council resolutions to effect that acts of international terrorism are contrary to the purposes and principles of the United Nations, those resolutions do not contain definitions of terrorism or international terrorism. The absence of such a definition further justifies the need to adopt a restrained approach in determining the applicability of Article 1F(c).
 - 39.5 Article 1F(c) envisages acts of such a nature as to impinge on the international plane in terms of their gravity, international impact and implications for international peace and security.
 - 39.6 In making exclusion determinations under Article 1F(c) each case will require individual consideration. The UNHCR is concerned that the automatic and non-restrictive use of the Article to all acts designated by domestic legislation as terrorist may result in the disproportionate application of the exclusion clause in a manner contrary to the overriding humanitarian object and purpose of the Geneva Convention.

²¹ See UNHCR Note on Clause 52 of the Immigration, Asylum and Nationality Bill dated 15 December 2005 [IAB Tab 47].

40. The UNHCR would agree with the formulation of Ouseley J sitting in the Special Immigration Appeals Commission in Y v SSHD [2006] UKSIAC 36/2005 [IAB Tab 27] at [148]:

“[Article 1F(c)] requires that there be serious grounds for thinking that an individual is guilty of acts which, to use the language of KK ‘are the subject of intense disapproval by the governing body of the entire international community’. Merely characterising them as ‘terrorist’ is neither necessary nor sufficient.”

41. The application of Recital (22) of the Qualification Directive [IAB Tab 11] and section 1 of the Terrorism Act 2006 [IAB Tab 5] has impermissibly broadened the scope of Article 1F(c) of the Geneva Convention. It thus introduces the likelihood of wrongly excluding persons who may otherwise benefit from international protection, in contravention to the object and purpose of the Convention. Its application without due determination of the nature of the acts in question, their impact and seriousness would be contrary to the object and purpose of the Convention. By way of example it would place members of the armed South African group, Umkhonto We Sizwe, led by Nelson Mandela, outside the protection of the Geneva Convention.

42. In 2004 the Security Council in its Resolution 1566 (2004)²² called on all States to cooperate fully in the fight against terrorism. It set out three essential criteria for acts to be covered, namely that they be:

42.1 Committed, including against civilians, with the intent to cause death or serious bodily injury, or taking of hostages; and

42.2 Committed with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organisation to do or abstain from doing any act; and

²² UN SCR 1566 (2004): Threats to international peace and security caused by terrorist acts, S/RES/1566 (2004) of 8 October 2004 [IAB Tab 12].

42.3 Constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism.

43. The United Nations Special Rapporteur has expressed support for the criteria set up in Resolution 1566 (2004) as a means of confining the term “act of terrorism” to conduct that is of a “genuinely terrorist nature”. When considering this approach in defining “terrorism”, he considered that the adoption of a cumulative approach can serve as an appropriate safety mechanism to ensure that only conduct of a terrorist nature is identified as such.²³
44. In his analysis, the Special Rapporteur considered the existing conventions and protocols pertaining to aspects of terrorism as the appropriate starting point for determining the kinds of acts which, at the international level, are to be viewed as “terrorist in character”.²⁴ However, given the very broad scope of some of these conventions and protocols, the Special Rapporteur noted that not every offence under these instruments can be properly characterized as terrorist in all circumstances. The Special Rapporteur also emphasized that not every crime under national law or even international law can be characterized as an act of terrorism, let alone be defined as such. Certain additional elements, which are related to intention and purpose, must also be present for an offence to be correctly qualified as an act of terrorism.²⁵
45. It is the view of the Special Rapporteur that “terrorist offences” should thus be confined to instances where the following three conditions as stipulated by the Resolution 1566 (2004) cumulatively meet: (a) acts committed with the intent to cause death or serious bodily injury, or taking of hostages; and (b) for the purpose to provoking a state of terror, intimidating a population, or

²³ See the *Report of the Special Rapporteur on the promotion of and protection of human rights and fundamental freedoms while countering terrorism*, A/62/263, 15 August 2007 at paras. 26-50. [IAB Tab 13]

²⁴ This is on the basis that these instruments are broadly representative of international consensus on what conduct is to be proscribed in the fight against terrorism. See *Report of the Special Rapporteur on human rights and terrorism*, at para. 33. [IAB Tab 13]

²⁵ *Ibid*, at paras. 38 and 39.

compelling a Government or an international organization to do or to abstain from doing any act; and (c) constituting offences within the scope of and as defined in the international conventions and protocols relating to terrorism.²⁶

46. In determining whether an act of terrorism may fall under the scope of Article 1F(c), it should be noted that reliance on UN Security Council resolutions (as well as on the Qualification Directive, recital 22) which recognize that acts of international terrorism are contrary to the purposes and principles of the UN, should not suggest an automatic application of Article 1F(c). Despite such recognition at the international level, States are nevertheless obliged to act in accordance with the UN Charter and their obligations under international law, including those under the Geneva Convention, when undertaking measures in the field of counter terrorism pursuant to UN organs. In this context, the UN organs have repeatedly affirmed that international cooperation and measures undertaken by States to prevent and combat terrorism must be consistent with all their obligations under international law, including the Charter of the UN and relevant international conventions and protocols, in particular, human rights law, refugee law and humanitarian law, and the rule of law.²⁷

²⁶ *Ibid.*, at paras. 38-42 and 50.

²⁷ See Articles 24 and 25 of the UN Charter. See *Resolution 1822 (2008) on threats to international peace and security caused by terrorist acts*, S/RES/1822 of 30 June 2008 [IAB Tab 14], in which the Security Council recognizes the duty of States, as well as of the international cooperation, to comply with international law. It is UNHCR's view, that such recognition extends also to United Nations actions against terrorism, including measures undertaken by counter-terrorism related bodies and member States, which must comply with international law including and human rights law, humanitarian law and refugee law. See also Security Council resolutions: *Resolution 1269 (1999) on the responsibility of the Security Council in the maintenance of international peace and security*, SC/RES/1269 (1999) of 19 October 1999 [IAB Tab 15], para. 4(iv); *Resolution 1373 (2001) Threats to international peace and security caused by terrorist acts*, SC/RES/1373 (2001) of 28 September 2001 [IAB Tab 16], para. 3(f) and 3(g); *Resolution 1624 (2005) Threats to international peace and security (Security Council Summit 2005)*, SC/RES/1624 (2005) of 14 September 2005 [IAB Tab 17], preamb. paras. 2 and 7 and op. paras 1 and 4; and 1377 (2001) [IAB Tab 18]. General Assembly resolutions: *The United Nations Global Counter-Terrorism Strategy*, A/RES/62/272 of 15 September 2008 [IAB Tab 19], Annex, paras. 3, II.2, II.3 and IV.2; *The United Nations Global Counter-Terrorism Strategy*, A/S/60/288, of 20 September 2006 [IAB Tab 20]; and most recently, *Protection of human rights and fundamental freedoms while countering terrorism*, A/RES/62/159 of 11 March 2008 [IAB Tab 21]; *Measures to eliminate international terrorism*, A/RES/62/71 of 8 January 2008 [IAB Tab 22], preamb. paras. 12 and 20; See also Human Rights Council, *Resolution on the Protection of human*

47. Ensuring compliance with international refugee law also encompasses the proper and diligent application of the exclusion clauses of Article 1F of the 1951 Convention. In particular, the application of Article 1F(c) requires an individual examination and a determination on the basis of reliable information that “there are serious reasons for considering” that the person has incurred individual responsibility for acts of terrorism identified by the international community as contrary to the purposes and principles of the UN, in full observance of due process safeguards. Moreover, in the absence to date of a universally agreed definition of the term “terrorism” or “acts of international terrorism”, a careful analysis is to be made as to determine whether the acts meet the high threshold required for the operation of Article 1F(c).
48. It is UNHCR’s view that only those acts which satisfy the characterization of “acts of terrorism” as set out in Security Council Resolution 1566 (2004) and above analysed by the Special Rapporteur may give rise to the application of Article 1F(c) of the Convention. While crimes of terrorist nature, as defined by the Special Rapporteur, could meet the threshold required for the application of Article 1F(c), an individual assessment in each case should nevertheless be undertaken to determine whether the acts in question are contrary to the purposes and principles of the United Nations, in terms of their gravity, international impact, and implications for the maintenance of international peace and security. Doing otherwise would be contrary to the purposes and object of the Convention, which also requires that this provision be applied in good faith and in a restrictive manner. UNHCR is concerned in particular with the Tribunal's expansive definition of international terrorism as applied at [47] of the determination..
49. In conclusion and for the reasons set out above, the UNHCR takes issue with the Tribunal’s approach in this case in its finding that the United Nations’

rights and fundamental freedoms while countering terrorism, A/HRC/L.11 of 27 March 2008 [IAB Tab 23].

resolutions condemning terrorism are “properly reflected in section 54 of the 2006 Act and puts into statutory form what the international law was”: see [28]. As referred to above section 54 of the 2006 Act in turn refers to section 1 of the Terrorism Act 2000, which definition is plainly too broad for the purposes of Article 1F(c).

E Conclusion

50. For the reasons set out in detail above, the UNHCR respectfully submits that the Court adopt its views as to the proper interpretation of Article 1F(c) of the Geneva Convention in its consideration of this appeal.

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19 November 2008