In The Supreme Court of the United Kingdom

YASSER AL-SIRRI

Appellant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

Intervener

DD (AFGHANISTAN)

Appellant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

Intervener

UNHCR'S COMPOSITE CASE IN THE TWO LINKED APPEALS

INTRODUCTION

1. UNHCR is well known to this Court. It has supervisory responsibility in respect of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol ("the 1951 Convention"). Under the 1950 Statute of the Office of the UNHCR (annexed to UN General Assembly Resolution 428(V) of 14 December 1950), UNHCR has been entrusted with the responsibility for providing international protection to refugees and others of concern, and together with governments, for seeking permanent solutions for their problems. As set out in the Statute (§8(a)), UNHCR fulfils its mandate inter alia by, "*[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application*

and proposing amendments thereto." UNHCR's supervisory responsibility is also reflected in Article 35 of the 1951 Convention and Article II of the 1967 Protocol, obliging State Parties to cooperate with UNHCR in the exercise of its functions, including in particular, to facilitate UNHCR's duty of supervising the application of these instruments. The supervisory responsibility is exercised in part by the issuance of interpretative guidelines, including in (a) UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1979, reissued January 1992 and December 2011) ("*Handbook*") and (b) UNHCR's subsequent Guidelines on International Protection.

2. In domestic United Kingdom law, UNHCR has a statutory right to intervene before the First Tier and Upper Tribunals (Immigration and Asylum Chamber).[1] In this Court UNHCR seeks, in appropriate cases, permission to intervene to assist through submissions on issues of law related to its mandate with respect to refugee protection and the 1951 Convention. Such permission when sought, including the ability to attend the hearing and make brief oral submissions, has always been granted by the House of Lords and Supreme Court. So too in this case, for which UNHCR is very grateful. UNHCR has read and considered the printed cases lodged by the appellants Al-Sirri and DD. As is clear from the analysis set out below, UNHCR essentially agrees with the points advanced by the appellants. It aims to avoid merely repeating what they have said and, by lodging a single composite case in both linked appeals, to avoid repeating itself.

UNHCR'S KEY MATERIALS

3. In the context of Article 1F(c) of the 1951 Convention UNHCR invites particular attention to the following core materials, which will be gathered together for the Court in a single volume of "UNHCR Materials":

[1] Rule 49 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and rule 9(5) of the Amended Tribunal Procedure (Upper Tribunal) Rules 2008, in force since 15 February 2010.

(1) UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1979, reissued January 1992 and December 2011) ("*Handbook*").

(2) UNHCR's *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees* (2001) ("*Memorandum 2001*").

(3) UNHCR's *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* (September 2003) *("Guidelines 2003"*). These need to be read together with:

(4) UNHCR's *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* (September 2003) ("*Background Note 2003*").

(5) UNHCR's *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* (December 2005) ("*Note 2005*").

(6) UNHCR's *Statement on Article 1F of the 1951 Convention* (July 2009) ("*Statement 2009*").[2]

(7) *The Summary Conclusions – Exclusion from Refugee Status, of the Lisbon Expert Roundtable*, one of UNHCR's Global Consultations on International Protection (May 2001) ("*Lisbon Roundtable Conclusions 2001*"). These need to be read together with:

(8) Professor Geoff Gilbert, *Current Issues in the Application of the Exclusion Clauses*, a Background Paper commissioned by UNHCR for the Lisbon Roundtable (May 2001) (published in updated form in *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (ed. Erika Feller, Volker Türk and Frances Nicholson), Cambridge University Press, 2003, pp. 425-478) ("*Gilbert Background Paper 2001*").

4. UNHCR commends these materials to the Court. This Court has previously recognised the assistance that can be derived from such sources. Lord Bingham said in R v Asfaw [2008] 1 AC 1061 (at §13) that: "*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*

[2] This was issued in the context of the preliminary ruling references to the Court of Justice of the European Union ("CJEU") from the German Federal Administrative Court regarding the interpretation of Articles 12(2)(b) and (c) of EU Directive 2004/83 ("the Qualification Directive"): see Germany v B and D, Joined Cases C-57/09 and C-101/09, 9 November 2010.

are bound to facilitate its duty of supervising the application of the provisions of the Convention." Lord Bingham referred to the observations of the then Simon Brown LJ (in R v Uxbridge MC ex p Adimi [2001] QB 667 at 678), suggesting that UNHCR's Guidelines "*should be accorded considerable weight*". Lord Clyde noted in Horvath v Secretary of State for the Home Department [2001] 1 AC 489 at 515, that the *Handbook* has "*the weight of accumulated practice behind it*". It has been accepted as a valid source of interpretation under Article 31(3)(b) of the 1969 Vienna Convention on the Law of Treaties ("the Vienna Convention"), in reflecting "subsequent practice in the application of the treaty": Pushpanathan v Canada (Minister of Citizenship and Immigration) [1998] 1 SCR 982 (Pushpanathan [1998]), §54. Other endorsements have included those in K and Fornah [2007] 1 AC 412, §15 by Lord Bingham;[3] Januzi v Secretary of State for the Home Department [2006] 2 AC 426 §20 by Lord Bingham;[4] Adan (Lul Omar) v Secretary of State for the Home Department [2001] 2 AC 477 at 520 by Lord Steyn;[5] and R v Home Secretary ex parte Robinson [1998] 1 QB 929 at 938 by Lord Woolf.[6]

UNHCR'S CORE SUBMISSIONS

(1) As an exclusionary provision within an instrument intended to provide humanitarian protection, Article 1F must be interpreted narrowly and applied restrictively. This is particularly important in the case of Article 1F(c) which is drafted in broad and vague terms and would otherwise be open to abuse.

[3] "the UNHCR Guidelines, clearly based on a careful reading of the international authorities, provide a very accurate and helpful distillation of their effect."

[4] "It is...important, given the immense significance of the decisions they have to make, that decision-makers should have some guidance ... Valuable guidance is found in the UNHCR Guidelines on International Protection of 23 July 2003."

[5] "the UNHCR plays a critical role in the application of the Refugee Convention ... Contracting states are obliged to co-operate with UNHCR. It is not surprising therefore that the UNHCR Handbook, although not binding on states, has high persuasive authority, and is much relied on by domestic courts and tribunals: Aust, Modern Treaty Law and Practice (2000), p 191."

[6] "There is no international court charged with the interpretation and implementation of the Convention, and for this reason the Handbook... is particularly helpful as a guide to what is the international understanding of the Convention obligations, as worked out in practice."

5. The 1951 Convention is to be interpreted in accordance with Article 31 of the Vienna Convention: see *Memorandum* 2001, para. 2; and see e.g. R v Asfaw [2008] 1 AC 1061 at §§85, 125 and 140. Article 31(2) recognises the Preamble as part of the context for the purpose of the interpretation of a treaty. The Preamble to the 1951 Convention states that the object of the Convention is to endeavour "*to assure refugees the widest possible exercise of [their] fundamental rights and freedoms*". The 1951 Convention is to have a purposive construction consistent with its humanitarian aims: see e.g. R v Asfaw at §11. It follows that Article 1F must be interpreted in a way that furthers the objectives of the Treaty, and not in such a way as to frustrate its fundamental purpose. As the Supreme Court of Canada rightly recognised in Pushpanathan [1998], §74:

> ***The a priori denial of the fundamental protections of a treaty whose purpose is the protection of human rights is a drastic exception to the purposes of the Convention ... and can only be justified where the protection of those rights is furthered by the exclusion.***

6. As UNHCR explains in its *Guidelines 2003* at §2:

> ***... given the possible serious consequences of exclusion, it is important to apply [the exclusion clauses] with great caution and only after a full assessment of the individual circumstances of the case. The exclusion clauses should ... always be interpreted in a restrictive manner.***[7]

7. As the *Background Note* 2003 explains further at §§3-4:

> ***The rationale behind the exclusion clauses is twofold. Firstly, certain acts are so grave that they render their perpetrators undeserving of international protection as refugees. Secondly, the refugee framework should not stand in the way of serious criminals facing justice. While these underlying purposes must be borne in mind in interpreting the exclusion clauses, they must be viewed in the context of the overriding humanitarian objective of the 1951 Convention.***
>
> ***Consequently, as with any exception to human rights guarantees, the exclusion clauses must always be interpreted restrictively and should be used with great caution.***

[7] See also *Lisbon Roundtable Conclusions 2001* at §4.

8. A restrictive interpretation is, if anything, particularly important with regard to Article 1F(c). The general nature of the wording of this exclusion clause, the associated risk of States abusing its potentially wide scope, and the severe consequences that its application involves, require that it be applied with caution and read narrowly: see *Handbook* §163; *Guidelines 2003* §17.[8] As the *Background Note 2003* explains at §46:

> ***Given the vagueness of this provision, the lack of coherent State practice and the dangers of abuse, Article 1F(c) must be read narrowly.***[9]

9. In relation to the *travaux préparatoires* (Vienna Convention Article 32), Professor Hathaway draws attention to "*the concern of several delegates that the vagueness of the clause itself left it open to misconstruction or abuse*"[10]. Professor Grahl-Madsen, recording the similar concern of the Social Committee of the Economic and Social Council that the "*provision was so vague as to be open to abuse*", observes that: "*It seems that agreement was reached on the understanding that the phrase should be interpreted very restrictively*".[11]

(2) Article 1F(c) is applicable to acts which, even if they are not covered by the definitions of war crimes, crimes against humanity or crimes against peace in international instruments within the meaning of Article 1F(a), are nonetheless of a comparable egregiousness and character, such as serious and sustained human rights violations and acts which have been clearly identified and accepted by the international community as being contrary to the purposes and principles of the United Nations.

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[8] This approach was endorsed by Spanish Supreme Court in a judgment of 27 March 2008 in Moto v Spanish Government.

[9] See also *Statement 2009*, pp. 13-14; *Gilbert Background Paper 2001*, pp.455-457; *Lisbon Roundtable Conclusions 200* §14.

[10] Hathaway, *Law of Refugee Status* (Butterworths 1991) at p. 228.

[11] Grahl-Madsen, *The Status of Refugees in International Law* (Sijthof 1966) at p.283.

10. The Court's attention has been invited to Articles 1 and 2 of the UN Charter, provisions which are primarily directed at States and the UN itself. They and their language do not, of themselves, answer the question of what acts are properly caught by Article 1F(c). Purposes of the United Nations (Article 1) include relevantly the maintenance of international peace and security, and the development of friendly relations among nations. The principles are directed to the UN and member States and include the sovereign equality of member States, the fulfilment of the Charter obligations in good faith, the settlement of international disputes by peaceful means and refraining in their international relations from the threat or use of force against the territorial integrity or political independence of any State. Discerning the kinds of acts which fall within the Article 1F(c) exclusion, as being "contrary to the purposes and principles of the United Nations", should be approached by reference to the object and purpose of the 1951 Convention as a whole, as well as the purpose of the exclusionary provision itself: see Pushpanathan [1998] at §55.

11. The essential purpose of the exclusion provisions in Article 1F(a) and (c) was to ensure that the Convention guarantees refuge from persecutors and not for persecutors. As the *Background Note 2003* explains at §3:

> ***The rationale behind the exclusion clauses is twofold. Firstly, certain acts are so grave that they render their perpetrators undeserving of international refugee protection. Secondly, the refugee framework should not stand in the way of serious criminals facing justice.***

12. Article 1F(a) and Article 1F(c) were both intended to address the first of these concerns. See also Pushpanathan [1998] at §§63, 74. There is an overlap between these two exclusion grounds. Indeed, acts which fall within Article 1F(a) are also "contrary to the purposes and principles of the United Nations."[12] Developments in international law since the adoption of the 1951 Convention mean that some of the acts originally covered only by Article 1F(c) would now fall within the scope

[12] See *Handbook* §162.

of Article 1F(a). This applies, in particular, to crimes against humanity, for which a nexus with an armed conflict is no longer required in international law.[13] As a consequence, the overlap between Article 1F(c) and Article 1F(a) is even greater today than in 1951. "Serious non-political crimes" within the meaning of Article 1F(b) may also, in certain circumstances, fall within Article 1F(c), as may for example be the case for serious and sustained human rights violations which do not meet the definition of crimes against humanity.

13. Where acts can properly be said to fall under Articles 1F(a) or 1F(b), it is preferable to assess them against the criteria under these provisions rather than under Article 1F(c). Articles 1F(a) and (b) are specific and clearly defined, and have been subject to greater jurisprudential interpretation. Invoking them promotes analytical clarity, and minimises the risk of expansive interpretations of Article 1F(c) (concerning acts "contrary to the purposes and principles of the United Nations"), reducing the possibility of abuse of the exclusion clauses.

14. As is seen from the *travaux*, most of the discussion related to the exclusion grounds in what became Articles 1F(a) and (b) and was directly concerned with the exclusion of those who had committed very serious crimes. As regards Article 1F(c) it was considered that acts "contrary to the purposes and principles of the United Nations" encompassed the crimes listed in Article 1F(a) as well as certain other acts which were deemed equally unacceptable but were not covered by the definitions of war crimes, crimes against humanity and crimes against peace which existed at the time the 1951 Convention was drafted.[14]

15. Article 1F(c) should be reserved for situations where the act and consequences thereof meet a high threshold defined in terms of the gravity of the act in

[13] Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment of the International Criminal Tribunal for the former Yugoslavia (ICTY), 15 July 1999, §249.
[14] UN Doc. E/AC.7/SR.166, 22 August 1950, at p. 4 and cited in Pushpanathan [1998] at §59; A/CONF.2/SR.24, 27 November 1951.

question[15], the manner in which it is organised, its international impact and long-term objectives, and the implications for international peace and security.[16] In order for exclusion under Article 1F(c) to apply the act must offend the principles and purposes of the United Nations in a fundamental manner.[17]

16. In addition, acts which have been clearly identified and accepted by the international community as being contrary to the purposes and principles of the United Nations may also fall within the scope of Article 1F(c). As stated by the Supreme Court of Canada in Pushpanathan [1998], at §65:

> ***The guiding principle is that where there is consensus in international law that particular acts constitute sufficiently serious and sustained violations of human rights as to amount to persecution, or are explicitly recognised as contrary to the purposes and principles of the United Nations, then Article 1F(c) will be applicable.***

17. In most instances, acts which meet the requirements of Article 1F(c) will constitute crimes in international and/or national law.[18] UNHCR does not exclude the possibility that an act which does not constitute a crime under either international or national law could, in theory, be included within the scope of Article 1F(c). However, as noted in the Handbook, at §162:

> ***While Article 1 F (c) does not introduce any specific new element, 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. Taken in conjunction with the latter, it has to be assumed, although this is not specifically stated, that the acts covered by [Article 1F(c)] must also be of a criminal nature.[19]***

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[15] As the Spanish Supreme Court held in Severo Moto v Spanish Government, Article 1F(c) "… must be reserved for those persons that are guilty of the most serious and unacceptable actions, in extreme circumstances…."

[16] See *Background Note 2003* §47; *Statement 2009* §2.3.2.

[17] See *Background Note 2003* §47.

[18] Cf. the Swiss Federal Administrative Court, Case E-5256/2006 of 13 July 2010, §5.2.3: *"For individual liability to be established, it is also necessary for the person to have committed or substantially helped to commit a criminal act."*

[19] See also Article 14 1948 Universal Declaration of Human Rights; para. 7(d) of the 1950 UN Statute.

(3) Article 1F(c) only applies to acts that have an international character, aspect or dimension. The existence of a 'cross-border element' in the circumstances or act, such as where Government-destabilising action is contributed to or facilitated from a third country (or so-called 'safe haven') does not as such provide the international element required to bring the act in question within the scope of Article 1F(c).

18. Article 1F(c) is inherently international in aspect, given that its scope is derived from Articles 1 and 2 of the UN Charter. Those provisions set out fundamental principles that govern the conduct of States in relation to each other and in relation to the international community as a whole. The focus of enquiry as to the international element ought therefore to be on the nature of the act and in particular its consequences and how these adversely impact on the purposes and principles of the UN and principally on international peace and security and international relations. Thus, for an act to fall within Article 1F(c) it must have an international character, aspect or dimension. As explained in the *Guidelines 2003*, at §17:

> ***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.***[20]

19. This theme was referred to by the Court of Justice of the European Union ("CJEU") in Germany v B and D [2010] Joined Cases C-57/09 and C-101/09 (Germany v B and D [2010]) by reference to "*international terrorist acts*" (§83) in the context of Article 1F(c) contrasted with the simple reference to "*terrorist acts*" for the purposes of Article 1F(b) (§81).[21] It is also reflected in Georg K v Ministry of the Interior, 71 ILR 284, 1968 (Austrian Administrative Court), where the Austrian Administrative Court's decision on exclusion was, as Gilbert has

[20] See also *Background Note 2003* §47.

[21] UNHCR does not consider Pushpanathan [1998] §65 to be inconsistent with the requirement of an international dimension. Nowhere was that matter addressed, nor the requirement rejected.

observed, in the context of "*an individual whose actions affect the relations of nations*".[22] The Court of Appeal's more expansive observations in DD (Afghanistan) (Pill LJ at §§62-63) are not well-founded; and Carnwath LJ's observation in SS (Libya) v Secretary of State for the Home Department [2011] EWCA 1547 at §27 relates to "terrorism" rather than Article 1F(c).

20. An international dimension is not established merely by reference to resolutions by the UN Security Council or the General Assembly stating that a particular act is contrary to the "purposes and principles" of the UN, although the existence of wording to this effect in resolutions, treaties or other expressions of States' views may indicate the existence of international consensus that certain acts are so considered. Such statements do not, in and of themselves, provide a basis for the automatic application of exclusion based on Article 1F(c).[23]

21. Nor will the international character, aspect or dimension required for the application of Article 1F(c) be satisfied simply by the existence of a 'cross-border element' in the circumstances of the case. So, for example, an act which is aimed at destabilising a Government and which would otherwise lack an international character, aspect or dimension as to its implications and consequences, does not necessarily gain such a character, aspect or dimension, simply because it may involve (a) the use of tracking by a satellite in space or (b) the use of a website hosted in another State or (c) the involvement of some person situated abroad. The position would be different if a foreign State were knowingly facilitating participation in the act by a person for whose actions it has provided a 'safe haven', since that would have clear implications for inter-State relations. The requisite international character means that the act must cause or be liable to

[22] *Gilbert Background Paper 2001*, p. 456; see generally pp. 455-464. See also the decision of the Belgian *Commission Permanente de recours des refugies* Dec. No. 2-2607/F2192/cd, in which it accepted UNHCR's interpretation of recital 22 to the Qualification Directive, holding that a terrorist act could only be said to constitute a threat to international peace and security where the protagonist committed the act with the aim of seriously intimidating a population or of gravely destabilising or destroying fundamental political, economic or constitutional structures of a country or international organisation.
[23] See *Note 2005*, §7-8.

cause instability in relations between States or to affect international peace and security.

22. Moreover, the existence of a cross-border element does not justify exclusion under Article 1F(c) for acts during a time of armed conflict which are found to be lawful under the applicable rules and principles of international humanitarian law (IHL). IHL and the provisions of international criminal law which are based on it provide the appropriate legal framework for examining such acts. The appropriate starting point in the context of an exclusion assessment is to determine whether such acts fall within Article 1F(a) as "war crimes".[24] If the acts in question are linked with the armed conflict[25] and consistent with the applicable rules of IHL, and thus lawful under the applicable rules of international law, exclusion under Article 1F will not apply, as such acts do not render the actors (or those associated with them in any other way) "undeserving" of international refugee protection. Where it is found that the acts in question are not linked with the armed conflict, they should be examined in light of other relevant categories of Article 1F other than "war crimes".

(4) Article 1F may give rise to exclusion from international refugee protection only if it is established that there are "serious reasons for considering" that the individual concerned committed the disqualifying acts, or that he or she participated in their

[24] War crimes are serious violations of IHL which entail individual criminal responsibility directly under international law (customary or conventional). Although war crimes were originally considered to arise only in the context of an international armed conflict, it is now generally accepted that war crimes may be committed in non-international armed conflict as well. In the case of Tadic before the International Criminal Tribunal for the former Yugoslavia ("ICTY"), the defence argued, unsuccessfully, that the accused could not be tried for violations of the laws or customs of war under the ICTY Statute because such violations could only be committed in the context of an international armed conflict. The ICTY examined State practice and *opinion juris* on this question and found it to be confirmed that customary international law imposes criminal liability for serious violations of common Article 3 of the 1949 Geneva Conventions as well as relevant provisions of Additional Protocol No. II of 1977 and rules of customary international law. See *Background Note 2003* § 30.

[25] The requirement of a nexus between an act and the armed conflict (i.e. that the act in question took place in the context of and was associated with the armed conflict) is one of the elements which must be met for an act to constitute a war crime. Where the nexus requirement is not met, the act in question may not constitute a war crime, although it may constitute a serious non-political crime (e.g. a murder committed for purely personal reasons) within the meaning of Article 1F(b). The nexus requirement is listed among the Elements of Crimes adopted by the Assembly of States Parties to the International Criminal Court Statute for all acts defined as "war crimes" under the ICC Statute, see http://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf.

commission in such a way as to incur individual responsibility for the acts in question. A rigorous individualised establishment of the facts, and compliance with basic due process safeguards, are required in all cases.

23. For exclusion from international refugee protection to be justified, it needs to be established that the person concerned had personal responsibility for acts within the scope of Article 1F, in line with applicable international standards.[26] This requires an individualised assessment, on the basis of reliable and credible evidence, that "there are serious reasons for considering" that the individual concerned has incurred personal responsibility for (i.e. in the context of Article 1F(c), is "guilty of") acts which are contrary to the purposes and principles of the UN, in full observance of due process safeguards.[27] Three issues which will need to be addressed are: (a) the involvement of the applicant in the excludable act; (b) the applicant's mental state (mens rea); and (c) possible grounds for rejecting individual responsibility.[28]

24. As a general proposition, it can be said that individual responsibility arises where the individual committed an act within the scope of Article 1F, or participated in its commission in a manner that gives rise to individual responsibility, for example, through planning, instigating or ordering the act in question, or by making a significant contribution to the commission of the relevant act, in the knowledge that his act or omission would facilitate the act. The mere fact of having been a member of a group or organization involved in acts within the scope of Article 1F of the 1951 Convention is not as such sufficient to establish individual responsibility for these acts.[29] So, in Germany v B and D

[26] See *Background Note 2003* §§50–75.
[27] See *Background Note 2003* §§98-100; *Statement 2009*, p. 15.
[28] See *Background Note 2003* §§51, 64-75; Germany v B and D [2010] at §§94-97.
[29] *Background Note 2003* §59. See the decisions of the French *Conseil d'Etat* in Case No. 211309, 24.10.01, applying Article 1F(c) to a Congolese national whose position at the heart of a Special Division of the then Zaire President involved responsibility for directing commandos and logistics, such that he could not ignore (and had indeed covered up) grave and repeated violations of human rights by the security service. By contrast, in Case No. 316678, 17.1.11, failure to have publicly disavowed Saddam Hussein's regime in circumstances where the individual must have known of its acts contrary to the principles and purposes of the UN, was not sufficient to establish personal responsibility. In Case No. 170172, 25.3.98 a position of responsibility of a largely diplomatic nature in the Afghan regime was not sufficient to establish personal

[2010], the CJEU confirmed the requirement of an individualised assessment and held that it is not justifiable to base a decision to exclude solely on a person's membership of a group included in a list of "terrorist organisations".[30]

25. In R (JS (Sri Lanka)) v Secretary of State for the Home Department [2011] 1 AC 184, this Court (Lord Brown at §29) rightly rejected the suggestion that membership of an organisation "whose aims, methods and activities are predominantly terrorist" should give rise to any presumption of personal responsibility for terrorist activities, or a 'presumption of criminal complicity'. As Lord Kerr noted at §57 of his judgment, there needs to be a focus on "actual participation of the individual, as opposed to its significance from mere membership." Thus (see Lord Kerr at §56), "there should be participation that went beyond mere passivity or continued involvement in the organisation after acquiring knowledge of the war crimes or crimes against humanity". Personal or individual responsibility may be established on the basis of 'criminal complicity' when there are serious reasons for considering that the individual voluntarily contributed in a significant way to the organisation's ability to pursue its purpose of committing war crimes, aware that his assistance would in fact further that purpose (see Lord Brown at §38 and Lord Hope at §43).[31]

26. In determining whether there is individual responsibility, it is necessary for a rigorous assessment of the facts to be carried out, in accordance with all due process requirements: see *Background Note 2003* §§98-113; Wakn v Minister for

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responsibility. See too the decision of the Federal Court of Canada in Chowdhury v Canada (Minister of Citizenship) 2006 FC 139 (CanLII), §§22-24 (whether the individual "personally and knowingly participated in the brutal acts"); cf. the Federal Court of Canada in Islam v Canada [2010] FCJ No. 87 §§38-40 (willing association).

[30] Germany v B and D [2010]at §§86-99.

[31] See to like effect in the context of a Government (the Iraq regime) the decision of Swiss Federal Administrative Court, Case E-5256/2006 of 13 July 2010 §5.2.3: regard must be had to the person's role, his place in the hierarchy and his capacity to influence the activities of the State in a significant manner. See also decision of the Belgian Council for Aliens Law Litigation, Dec. 54 335 13 January 2011 in which it held that conviction in Belgium for being a member of a terrorist cell was not sufficient to justify exclusion under Article 1F(c). First, it had to be verified whether the individual belonged to the group that committed the act covered by Article 1F(c) and then whether he was 'personally responsible' for those acts.

Immigration and Multicultural and Indigenous Affairs [2004] FCA 1245 (Federal Court of Australia) §52. As Professor Goodwin-Gill and Dr McAdam emphasise:

> ***Article 1F(c) ought only to be applied, therefore, where there are serious reasons to consider that the individual concerned has committed [a relevant act], and only by way of a procedure conforming to due process and the State's obligations generally in international law.***[32]

27. The 1951 Convention calls for an appropriately exacting standard for establishing (being satisfied) that an individual has committed or participated in acts covered by Article 1F: by requiring "serious reasons for considering" that the individual is so involved. There is no requirement for a determination proving guilt in the sense of a criminal conviction, but the standard must be sufficiently high to ensure that refugees are not erroneously excluded. Suppose, for example, that it is known that one of two individuals has committed an act, but it has not been established which one of them it was. Reasonableness of suspicion against each of them could not possibly suffice. UNHCR considers that the 'balance of probabilities' test is too low a threshold.[33]

(5) The applicability of Article 1F(c) is principally determined by the act rather than the actor. While many of the acts falling within its scope may, by their nature, be committed only by persons in positions of power within a State or State-like entity, exclusion on this basis may also apply to (i) non-State actors and (ii) persons not in positions of authority or with a leadership function within a State, provided that they are "guilty of" acts within the material scope of Article 1F(c).

28. The UN Charter is a charter between States (see above §10). The focus of Article 1F(c) is therefore on inter-State relations. It is primarily concerned with individuals who, through their governance or control of States or State-like entities, can lead States to act in a manner contrary to UN purposes and

[32] See Goodwin-Gill & McAdam, *The Refugee in International Law* (3rd ed. OUP 2007) p. 197.
[33] See *Background Note 2003* §107-111; *Statement 2009* §2.2.2.

principles: see *Handbook* at §163.[34] Thus, it follows from the material scope of Article 1F(c) that many acts which are covered by this provision could, by their very nature, be committed only by persons in a position of power in a State and instrumental to that State infringing the principles outlined.

29. In its *Guidelines 2003* UNHCR stated at §17:

> ***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.***.[35]

30. In its *Statement 2009* UNHCR expressed its updated position, stating at p.29:

> ***... in light of today's reality, the commission of acts of violence which, because of their nature and gravity, are capable of affecting international peace and security, or the relations between States, or which constitute serious and sustained violations of human rights, may not in all cases require the holding of a position of authority within a State or State-like entity. Thus, in addition to persons in positions of State authority, individuals acting in a personal capacity, including as leaders of a group responsible for "acts of terrorism" which are contrary to the principles and purpose of the United Nations, could also be capable of falling under Article 1F(c), where they are found to possess individual responsibility based on the requisite tests.***

31. As the Canadian Supreme Court put it in Pushpanathan [1998] (at §68):

> ***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.***

32. Goodwin-Gill and McAdam observe (at p.186) that many academic commentators favoured limiting the exclusion clause to heads of State and high officials, while reserving its exceptional application to individuals such as

[34] See also recent decision of the Swiss Federal Administrative Court, Case E-5256/2006 of 13 July 2010 §5.2.3.
[35] See also *Handbook* (1979 edition) §163; *Background Note 2003*, §48.

torturers and others guilty of flagrant human rights abuses.[36] In their view, "individuals at some remove from political responsibility", who were associated with human rights violations either individually or as members of organizations, as well as "individuals acting on behalf of unrecognized entities, belligerent or 'terrorist' groups" may also come within the scope of Article 1F(c).[37]

33. As the CJEU recognised in Germany v B and D [2010], at §84 members of terrorist organisations who had been "*involved in terrorist acts with an international dimension*" could be excluded under Article 12(2)(c) of the Qualification Directive (equivalent to Article 1F(c)). The emphasis on the "*international dimension*" is important, for the reasons given above.

(6) The labels "terrorism" applied to an act, or "terrorist" applied to an individual or organisation, cannot alone suffice to bring an act or individual within the scope of Article 1F(c).

34. Designation of an act as being of a "terrorist" nature will not, of itself, justify the application of exclusion under Article 1F(c). In every case, the nature and impact of the acts must be considered to determine whether they meet the threshold required under this exclusion clause including the requisite international element. As the *Guidelines 2003* explain at §17:

> ***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.***[38]

Noting that the designation of crimes as acts of "terrorism" or "international terrorism" does not automatically mean that the acts in question fall within the scope of Article 1F(c), as the *Note 2005* explains at §§7–8:

[36] Goodwin-Gill & McAdam 2007, with reference to Grahl-Madsen, Kälin and Köfner & Nicolaus (at footnote 261).
[37] Ibid at p. 189.
[38] See also *Background Note 2003* §49, 79-84.

> ***The focus should ... continue to be on the nature and impact of the acts themselves.***
>
> ***In many cases, the acts in question will meet the criteria for exclusion as "serious non-political crimes" within the meaning of Article 1F(b). In others, such acts may come within the scope of Article 1F(a), for example as crimes against humanity, while those crimes whose gravity and international impact is such that they are capable of affecting international peace, security and peaceful relations between States would be covered by Article 1F(c) of the 1951 Convention. Thus, the kinds of conduct listed in PP 8 [preambular paragraph 8] of [UN Security Council] Resolution 1624 – i.e. "acts, methods and practices of terrorism" and "knowingly financing, planning and inciting terrorist acts" – qualify for exclusion under Article 1F(c), if distinguished by these larger characteristics.***

There is strong support for this approach in Germany v B and D [2010] at §99.

35. Ouseley J, sitting in the Special Immigration Appeals Commission in Y v SSHD [2006] UKSIAC 36/2005, observed as follows (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.***

Goodwin-Gill & McAdam consider the application to international terrorism 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.***

36. Where exclusion is considered in relation to acts involving the use of force or violence in the context of, and associated with, an armed conflict, the acts in

question must be assessed under relevant provisions of IHL (in particular, the 1949 Geneva Conventions and the 1977 Additional Protocols thereto) and international criminal law, notably the 1998 Rome Statute of the International Criminal Court. This is so even if the acts in question are committed by members of a party to the conflict considered to be a "terrorist group" or "organization".

37. Serious violations of IHL which entail individual responsibility under international law (be it custom or treaty) constitute "war crimes" and as such fall within the scope of Article 1F(a) of the 1951 Convention. By contrast, acts of violence in an armed conflict which are lawful under IHL (i.e. directed against legitimate targets and conducted in a manner consistent with applicable rules and principles) do not fall within Article 1F(a), and as such do not give rise to exclusion from international refugee protection including under Article 1F(c).

38. IHL does not provide a definition of terrorism. However, it prohibits most acts committed in armed conflict that would commonly be considered terrorist if they were committed in peacetime.[39] The decisive question is whether particular conduct satisfies the material and mental elements required to establish a war crime under IHL.[40]

39. Those acts or threats of violence, the primary purpose of which is to spread terror among the civilian population, are specifically prohibited in Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II. In its Commentary to Article 13 of Additional Protocol II, the International Committee

[39] See, for example, International Committee of the Red Cross (ICRC), *International humanitarian law: questions and answers*, 5 May 2004, http://www.icrc.org/Web/eng/siteeng0.nsf/html/5YNLEV.

[40] Guidance on the material and mental elements which must be met for a particular conduct to constitute a war crime can be found in two recent studies by the ICRC. See K. Dörmann (ed.), *Elements of War Crimes under the Rome Statute of the International Criminal Court*, ICRC and Cambridge University Press, 2003, and J.-M. Henckaerts and L. Doswald-Beck (eds.), *Customary Rules of International Humanitarian Law*, ICRC and Cambridge University Press, 2005. See also the Elements of Crimes adopted by the Assembly of States Parties to the International Criminal Court Statute, available at http://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf.

of the Red Cross notes that "attacks aimed at terrorizing are just one type of attack, but they are particularly reprehensible."[41]

40. As Lord Justice Stanley Burnton observed in KJ (Sri Lanka) v Secretary of State for the Home Department [2009] EWCA Civ 292 at §34:

> ***acts of a military nature committed by an independence movement ... against the military forces of the government would not constitute acts contrary to the purposes and principles of the United Nations. ... it is necessary to distinguish between terrorism and [an armed campaign against the government].***[42]

(7) Participation in an armed attack against forces operating under and carrying out a UN mandate does not without more engage Article 1F(c). Participation in armed attack against ISAF forces carrying out the UN mandate in Afghanistan does not of itself engage Article 1F(c).

39. An armed attack against a UN-mandated force may give rise to exclusion from international refugee protection, if it meets the criteria required for the application of Article 1F(a), (b) or (c) of the 1951 Convention. When determining whether this is the case, and if so, under which category of Article 1F, decision-makers must have regard to the factual circumstances surrounding the attack.

40. UN-mandated forces are often deployed during or in the immediate aftermath of an armed conflict, where IHL provides the appropriate legal framework for determining the lawfulness of armed attacks against them. There is an important distinction between peace-keeping/peace support operations, on the one hand, and peace enforcement forces, on the other. The former enjoy protection under

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[41] See ICRC, Commentary to Article 13 of Additional Protocol No. II of 1977, at para. 4785, available at: http://www.icrc.org/ihl.nsf/COM/475-760019?OpenDocument. More detailed information on terrorism and the law of armed conflict can be found on the website of the ICRC, at http://www.icrc.org/eng/resources/documents/faq/terrorism-faq-050504.htm. See also ICTY, Prosecutor v. Galic, Case No. IT-98-29, Appeal Chamber judgment of 30 November 2006, at paras. 98 and 102–104).

[42] See also SS (Libya) v SSHD [2011] EWCA Civ 1547 at §37 (per Carnwath LJ) approving the distinction drawn in KJ between the categories of violence; and DD (Afghanistan) v SSHD [2010] EWCA Civ 1407 at §55 (per Pill LJ).

IHL[43] as well as the 1998 Rome Statute of the International Criminal Court.[44] In contrast, personnel or objects belonging to a peace enforcement operation deployed as a party to an armed conflict may be lawfully attacked provided the attacks are carried out in a manner consistent with the relevant rules and principles of IHL.

41. In the context of an exclusion assessment, armed attacks against UN-mandated forces in the context of an armed conflict would need to be considered under Article 1F(a). If they constitute a "war crime" as defined in the applicable rules of IHL and relevant provisions in international criminal law, such attacks may give rise to exclusion from refugee status under Article 1F(a), provided individual responsibility has been established in line with applicable standards. In contrast, armed attacks against UN-mandated forces in the context of an armed conflict which are lawful under IHL would not, in UNHCR's view, render an individual who committed or participated in the commission of the attacks undeserving of international refugee protection and therefore excludable under Article 1F(a), (b) or (c).

42. Attacks against UN-mandated forces which are not linked to an armed conflict, or which take place outside the context of an armed conflict (e.g. where such forces have been deployed in a situation which does not meet the threshold required to amount to an armed conflict), would need to be assessed in light of the specific mandate and the criteria under the applicable category of Article 1F. Such acts could fall within the scope of Article 1F(a) as "crimes against humanity", if they amount to fundamentally inhumane acts committed as part of a widespread or systematic attack against civilians. An armed attack against a UN-mandated force under these circumstances may also give rise to exclusion

[43] Directing an attack against personnel and objects involved in a peacekeeping mission in accordance with the UN Charter, as long as they are entitled to the protection given to civilians and civilian objects under IHL is prohibited under customary international law. See ICRC, *Study on Customary International Law*, Rule 33, available online at: http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule33.

[44] Pursuant to Article 8(2)(b)(iii) and Article 8(2)(e)(iii) of the ICC Statute, respectively, intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict, is a war crime in both international and non-international armed conflict.

based on Article 1F(b) as a "serious non-political crime" when "committed outside the country of refuge prior to admission to that country as a refugee".

44. As regards peace-keeping or peace-support personnel, the international community's condemnation of such attacks is reflected in resolutions of the General Assembly and the Security Council[45] as well as the provisions of the 1994 Convention on the Safety of United Nations and Associated Personnel ("Safety Convention", U.N.T.S. 2051, 391, *entered into force on 9 December 2004*), which provides, in Article 7, that "United Nations and associated personnel, their equipment and premises shall not be made the object of attack or of any action that prevents them from discharging their mandate".[46] Article 9(1) of the Safety Convention requires States Party to criminalize under their national law certain acts when directed against personnel or objects belonging to UN-mandated peacekeeping and peace-support forces.[47] It should, however, be noted that personnel and objects belonging to UN-mandated forces deployed as part of a peace enforcement operation are outside the scope of the Safety Convention, which provides, in Article 2(2), that it "shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies."

45. As such, the approach taken by the international community in addressing concerns about the safety and security of UN operations and associated personnel does not, in UNHCR's view, support the conclusion that attacks

[45] Recent examples of GA resolutions addressing the issue include A/RES/64/77 of 7 December 2009; A/RES/65/132 of 15 December 2010; A/RES/66/117 of 15 December 2011; see also SC resolution 1502 (2003) on the protection of humanitarian and United Nations personnel..

[46] The provisions of the Safety Convention also apply to attacks against UN-mandated peacekeeping or peace support forces in the context of an armed conflict; however, in the context of an exclusion assessment, such attacks would need to be considered under Article 1F(a) and if they are lawful in light of the relevant rules of IHL, would not render those participating in them undeserving of international refugee protection.

[47] These include murder, kidnapping or other attacks upon the person or liberty of any United Nations or associated personnel as well as violent attacks upon the official premises, the private accommodation or the means of transportation of any United Nations or associated personnel likely to endanger their person or liberty.

against UN-mandated forces are deemed to be "contrary to the purposes and principles of the United Nations" in all circumstances.

46. Indeed, the Safety Convention reflects the fact that attacks against UN-mandated forces deployed as party to a conflict are governed by IHL and may be lawful, if conducted in a manner consistent with the relevant rules and principles. Moreover, the above-mentioned resolutions adopted by the General Assembly and the Security Council[48] addressing issues related to the safety and security of UN personnel regularly refer to the need to promote and ensure respect for the principles and rules of international law, including international humanitarian law and call on States to become party to the Safety Convention, without, however, stating that attacks against such forces are "contrary to the purposes and principles of the United Nations", for the purpose of exclusion under Article 1F(c).

47. In UNHCR's view, armed attacks against UN-mandated forces may constitute "acts contrary to the purposes and principles of the United Nations" within the meaning of Article 1F(c) only if they meet the criteria set out above in submissions (2) and (3). Moreover, for exclusion based on Article 1F(c) to be justified, it needs to be established that there are serious reasons for considering that the person concerned is "guilty of" acts which meet these requirements, irrespective of the label given to these acts, as explained above in submission (4). These principles apply equally where exclusion is considered in relation to a person's participation in an armed attack against personnel or objects of any UN-mandated force, including the International Security Assistance Force (ISAF) in Afghanistan.[49]

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[48] See above footnote 46

[49] ISAF was established in 2001 by UN Security Council resolution 1386/2001 with a mandate authorizing it "to use all necessary means to fulfil its mandate". In this resolution, ISAF was given the mandate "to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas, so that the Afghan Interim Authority as well as the personnel of the United Nations can operate in a secure environment." Since then, eleven subsequent Security Council resolutions have extended the mandate of ISAF: resolutions 1413/2002; 144/2002; 1510/2003; 1536/2004; 1623/2005, 1707/2006; 1746/2007; 1833/2008; 1890/20091943/2010; 2011/2011.

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