IN THE COURT OF APPEAL **C5/2013/2712**
ON APPEAL FROM THE UPPER TRIBUNAL

BETWEEN:

AH (ALGERIA)

Appellant/Claimant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent/Defendant

UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

Intervener

CASE FOR THE INTERVENER

A. INTRODUCTION

1. The United Nations High Commissioner for Refugees ("UNHCR") intervenes, with the Court's permission, in light of its supervisory responsibility in respect of the 1951 Convention relating to the Status of Refugees and its attendant 1967 Protocol ("the 1951 Convention"). UNHCR is well known to the courts. 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 mandate to provide protection to refugees and, together with governments, for seeking permanent solutions to their problems.[1] 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

[1] Statute of the Office of the United Nations High Commissioner for Refugees, GA Res. 428(v), Annex, UN Doc A/1775 (1950) at §1.

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 (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]

2. In domestic United Kingdom law, UNHCR has a statutory right to intervene before the First Tier and Upper Tribunals (Immigration and Asylum Chamber).[3] 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 interpretation and application of 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 Court of Appeal (and also by the House of Lords and Supreme Court). So too in this case, for which UNHCR is very grateful.

3. This case raises important issues related to the interpretation and application of Article 1F(b) of the 1951 Convention. UNHCR's submissions in this appeal are strictly limited to questions of law and, in line with its supervisory responsibility, offered to ensure that the exclusion clause in Article 1F(b) of the 1951 Convention is applied in a manner consistent with international refugee law.

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[2] UNHCR issues "Guidelines on International Protection" pursuant to its mandate, as contained in its Statute, in conjunction with Article 35 of the 1951 Convention. The Guidelines complement the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, 1 January 1992, reissued December 2011* and are intended to provide guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff.

[3] 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.

B. UNHCR'S KEY MATERIALS

4. In the context of Article 1F(b), 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) 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 *Statement on Article 1F of the 1951 Convention* (July 2009) ("*Statement 2009*").[4]

   (6) *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:

[4] 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.

(7) 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*").

5. UNHCR commends these materials to the Court. The House of Lords and the Supreme Court have 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 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*". The observations of both Lord Bingham and Simon Brown LJ were recently endorsed by the Supreme Court in Al-Sirri v Secretary of State for the Home Department [2013] 1 AC 745 at §36. 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 at §54.

C. POINTS TO NOTE AT THE OUTSET

6. UNHCR sets out below its Core Submissions (§7) and detailed analysis (§§9-64). It may be helpful at the outset to have in mind these points:

(1) The rationale behind the exclusion clauses in Article 1F is twofold:

(i) Certain acts are so grave that they render their perpetrators undeserving of international protection as refugees. (Protection is from persecutors, not for persecutors.)

(ii) The refugee framework should not stand in the way of serious criminals facing justice.

See *Background Note 2003* §3 (§18 below); see also *Guidelines 2003* §2 (§17 below).

(2) Article 1F(b) is primarily intended to address the second of these concerns (to prevent serious criminals from hiding behind the institution of asylum to escape accountability for their crimes) but also serves to exclude those who are undeserving of refugee status on account of certain serious crimes or heinous acts, and to protect the receiving country against security threats emanating from such persons (see core submission (3) below).

(3) As to 'expiation':

(i) Where the individual has served a commensurate sentence or has otherwise been rehabilitated (§56 below), they are not a serious criminal hiding behind the institution of asylum to escape accountability for their crimes. Exclusion from international refugee protection would, in principle, no longer be required to serve the purpose of precluding serious criminals from evading justice (§56 below).

(ii) In such a case, and where the individual does not pose a threat to the community or the security of the receiving State (see §63 below), exclusion would, in principle, be consistent with the object and purpose of the 1951 Convention notwithstanding the existence of expiating factors (§60 below) only in a case of an individual responsible for crimes of a particularly serious nature

(ie. truly heinous crimes of comparable nature and gravity and similar egregiousness to those covered by Article 1F(a) or (c)) (see §§61-62 below).

D. UNHCR'S CORE SUBMISSIONS

7. UNHCR's core submissions are as follows:

CS1 **As an exclusionary provision within an instrument intended to provide humanitarian protection, Article 1F must be restrictively interpreted and applied with caution. This applies to all categories under Article 1F, including Article 1F(b).**

CS2 **Consistent with the overriding human rights purpose of the 1951 Convention, certain key principles are applicable in all cases where exclusion from international refugee protection based on Article 1F is in issue.**

CS3 **The rationale behind the exclusion clauses in Article 1F is twofold: (i) Certain acts are so grave that they render their perpetrators undeserving of international protection as refugees. (ii) The refugee framework should not stand in the way of serious criminals facing justice. Article 1F(b) is primarily intended to address the second of these concerns: to prevent serious criminals from hiding behind the institution of asylum to escape accountability for their crimes.**

CS4 **Article 1F(b) applies to serious and non-political crimes committed outside the country of refuge prior to admission to that country as a refugee.**

CS5 **Article 1F(b) 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 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.**

CS6 **The labels "terrorism" applied to an act, or "terrorist" applied to an individual or organisation, cannot alone suffice to bring an act or an individual within the scope of Article 1F(b). Participation in the activities of a terrorist organisation may, however, give rise to exclusion for serious non-political crimes where there are serious reasons for considering that an individual has incurred**

individual responsibility for a crime that meets the criteria under this provision.

CS7 **Having regard to the core submissions (1)-(3) above, in cases where it is established that the person committed a crime within the scope of Article 1F(b), but where elements of expiation, such as service of a sentence or other kinds of rehabilitation exist, these always need to be taken into consideration when determining whether denial of international refugee protection would nevertheless be consistent with the object and purpose of the 1951 Convention.**

8. The core submissions are addressed in turn below.

CS1 As an exclusionary provision within an instrument intended to provide humanitarian protection, Article 1F must be restrictively interpreted and applied with caution. This applies to all categories under Article 1F, including Article 1F(b).

9. The 1951 Convention is to be interpreted in accordance with the Vienna Convention (see e.g. *Memorandum 2001* at §2). This has been expressly recognised by leading appellate courts (see, e.g., R (ST) v Secretary of State for the Home Department [2012] 2 AC 135 at §30;[5] R v Asfaw at §125;[6] Januzi at §4[7]). Article 31(1) of the Vienna Convention requires a decision maker to interpret a treaty "*in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*". Article 31(2) recognises the Preamble as part of the context for the purposes 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 freedom*". The 1951 Convention is to have a purposive construction consistent with its humanitarian aims (see, e.g., R v Asfaw at §11; K and Fornah at §10; HJ (Iran) v Secretary of State for the Home Department [2011] 1 AC 596 at §14; RT (Zimbabwe) v Secretary of State for the Home Department [2013] 1 AC 152] at §§29-31; Pushpanathan at §57). It follows that Article 1F must be interpreted in

[5] "*[The 1951 Convention] must be interpreted as an international instrument, not a domestic statute.*"
[6] "*The starting point for the interpretation of an international treaty such as the [1951 Convention] is the [Vienna Convention].*"
[7] "*[The 1951 Convention] must be interpreted as an international instrument, not a domestic statute, in accordance with the rules prescribed in the [Vienna Convention].*"

a way that furthers the objectives of the 1951 Convention, and not in such a way as to frustrate its purpose.

10. As the Supreme Court of Canada rightly recognised in Pushpanathan at §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.***

11. 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.***

12. 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.***

13. In Al-Sirri at §75, the Supreme Court expressly agreed with "*the UNHCR view … that the exclusion clauses in the Refugee Convention must be restrictively interpreted and cautiously applied*". This is of general application to the three limbs of Article 1F of the 1951 Convention, including Article 1F(b).

CS2 Consistent with the overriding human rights purpose of the 1951 Convention, certain key principles are applicable in all cases where exclusion from international refugee protection based on Article 1F is in issue.

14. In light of the overriding human rights purpose of the 1951 Convention, a number of key principles are applicable in all cases where exclusion is considered in relation to a person's criminal conduct to ensure that Article 1F is interpreted restrictively and applied with caution. These principles are reflected in the following overall framework for the examination of cases where exclusion under Article 1F is in issue:

(1) Article 1F exhaustively enumerates the acts which may give rise to exclusion.[8]

(2) Article 1F requires a finding that there are serious reasons for considering that the person concerned has incurred individual responsibility for acts within its scope.[9]

(3) In UNHCR's view, a proportionality assessment, in which the seriousness of the applicant's criminal conduct is weighed against the consequences of exclusion, needs to be conducted as part of an individualised assessment of all relevant facts.[10]

(4) Consistent with the exceptional nature of the exclusion clauses and the general legal principle that the person wishing to establish an issue should bear the burden of proof, the onus to justify exclusion is on the decision-making authority.[11]

(5) The standard of proof ("*serious reasons for considering*") requires clear and credible evidence.[12] While proof of guilt in the sense of a criminal conviction is not required,[13] the standard must be sufficiently high to

[8] *Guidelines 2003* at §3; *Background Note 2003* at §7.
[9] *Background Note* at §§50–75.
[10] *Guidelines 2003* at §24; *Background Note 2003* at §§76-78.
[11] *Background Note 2003* at §§105-106.
[12] *Guidelines 2003*, §35; *Background Note 2003*, §§108-111. See also Council of Europe, Committee of Ministers, *Recommendation Rec(2005)6 of the Committee of Ministers to Member States on Exclusion From Refugee Status in the Context of Article 1 F of the Convention Relating to the Status of Refugees of 28 July 1951*, 23 March 2005.
[13] See, e.g., in the UK, Al-Sirri, § 75(4); in Germany, Bundesverwaltungsgericht, BVerwG 10 C 24.08, 24 November 2009, at §35; and in Belgium, Le Commissaire général aux réfugiés et aux apatrides c. XXX, Arrêt no. 200.321, Belgium, Conseil d'Etat, 13 July 2012, at p. 8.

ensure that refugees are not erroneously excluded. UNHCR considers that the "*balance of probabilities*" is too low a threshold.[14] UNHCR's position was accepted in Al-Sirri, where the Supreme Court examined relevant international jurisprudence and found, inter alia, that "*if the decision-maker is satisfied that it is more likely than not that the applicant has not committed the crimes in question […], it is difficult to see how there could be serious reasons for considering that he had done so*" (at §75).[15]

(6) The exceptional nature and inherent complexity of exclusion requires that the applicability of Article 1F be examined within a regular refugee status determination procedure offering proper procedural safeguards, rather than in admissibility or accelerated procedures.[16] A holistic approach to determining eligibility for international refugee protection, whereby both exclusion and inclusion issues are examined, is best suited to ensure a full assessment of the factual and legal issues arising in cases where the application of Article 1F is considered.[17]

CS3 The rationale behind the exclusion clauses in Article 1F is twofold: (i) Certain acts are so grave that they render their perpetrators undeserving of international protection as refugees. (ii) The refugee framework should not stand in the way of serious criminals facing justice. Article 1F(b) is primarily intended to address the second of these concerns: to prevent serious criminals from hiding behind the institution of asylum to escape accountability for their crimes.

15. The exclusion clauses contained in Article 1F of the 1951 Convention form part of the normative framework for determining eligibility for international protection as a refugee. They exclude from refugee status persons who would otherwise meet the criteria of the refugee definition set out in Article 1A(2) (the so-called "*inclusion*" criteria), but are considered undeserving of refugee status. The proper application of Article 1F to those who fall within its scope, in line

[14] *Background Note 2003* at §§107-111; *Statement 2009* at §2.2.2.
[15] The Supreme Court expressly agreed with UNHCR's view that "'*serious reasons*' *is stronger than 'reasonable grounds'*" and that "*[t]he evidence from which those reasons are derived must be 'clear and credible' or 'strong'*". See further core submission (5) below.
[16] *Guidelines 2003* at §31; *Background Note 2003* at §§98-99.
[17] *Guidelines 2003* at §31; *Background Note 2003* at §§99-100.

with the principles and standards outlined at core submissions (1) and (2), is necessary to protect the integrity of the institution of asylum.

16. The UNHCR Executive Committee,[18] in Conclusion No. 82 (XLVIII), 1997, at paragraph (d), reiterated "*the need for full respect to be accorded to the institution of asylum*", drawing attention inter alia to:

> ***(v) the need to apply scrupulously the exclusion clauses stipulated in Article 1 F of the 1951 Convention and in other relevant international instruments, to ensure that the integrity of the asylum institution is not abused by the extension of protection to those who are not entitled to it.***

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

> ***The rationale for the exclusion clauses, which should be borne in mind when considering their application, is that certain acts are so grave as to render their perpetrators undeserving of international protection as refugees. Their primary purpose is to deprive those guilty of heinous acts, and serious common crimes, of international refugee protection and to ensure that such persons do not abuse the institution of asylum in order to avoid being held legally accountable for their acts. The exclusion clauses must be applied "scrupulously" to protect the integrity of the institution of asylum, as is recognised by UNHCR's Executive Committee in Conclusion No. 82 (XLVIII), 1997.***

18. As the *Background Note 2003* explains further at §§2-3:

> ***As the Executive Committee of UNHCR recognised in Conclusion No. 82 (XLVIII), 1997, paragraph d(v), the exclusion clauses must be applied "scrupulously" to protect the integrity of the institution of asylum.…***
>
> ***The rationale behind the exclusion clauses is twofold. First, 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.***

19. The exclusion ground in Article 1F(b) is primarily intended to address the second of these concerns. However, preventing serious criminals from hiding

[18] The UNHCR Executive Committee is an intergovernmental group currently consisting of 94 Member States of the United Nations and the Holy See that advises the UNHCR in the exercise of its protection mandate. While its Conclusions are not formally binding on States, they are relevant to the interpretation and application of the international refugee protection regime.

behind the institution of asylum to escape accountability for their crimes is not the sole purpose of this provision. Article 1F(b) also applies to persons whose past criminal conduct renders them undeserving of refugee status because the individual is responsible for crimes of a particularly serious nature. Its scope is not limited to persons seeking to escape extradition or to situations in which a prosecution is already under way. In UNHCR's view, which is held by numerous commentators,[19] Article 1F(b) may also apply where no prosecution for the crime committed is conducted in the country of commission, or where no extradition treaty exists between the countries concerned. In UNHCR's assessment, the drafting history does not support the view that Article 1F(b) may apply only to crimes which are extraditable or remain justiciable.[20]

20. Exclusion under Article 1F(b) (and indeed any of the other grounds in Article 1F) of the 1951 Convention achieves its purpose of protecting the integrity of the institution of asylum by making sure that international refugee protection is not extended to those who are considered undeserving and therefore not entitled to it on account of their involvement in certain serious crimes or heinous acts. As expressly provided in Article 1F, such persons are not eligible for refugee status and do not qualify for international protection in accordance with the 1951 Convention.

21. As is clear from its language, the application of Article 1F(b) of the 1951 Convention does not require a finding that the individual concerned poses a

[19] See, for example, W. Kälin and J. Künzli, Article 1F(b): "Freedom Fighters, Terrorists, and the Notion of Serious Non-Political Crimes," *Int J Refugee Law* (2000) 12 (suppl 1), at pp. 69-71; "Current issues in the application of the exclusion clauses", Feller, E., Türk, V. & Nicholson, F., eds, *Refugee Protection In International Law: UNHCR's Global Consultations on International Protection*, (Cambridge: Cambridge University Press, 2003), at pp. 447-448; G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law,* 3rd ed (Oxford: Oxford University Press, 2007), at p. 174; A. Zimmermann and P. Wennholz, "*Article 1F*" in Zimmermann, A., Dörschner, J. and Machts, F., eds, *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford: Oxford University Press, 2011), at pp. 596-597.

[20] The *travaux préparatoires* indicate that the drafters of the 1951 Convention were concerned that the future international refugee protection regime should not undermine extradition relations between States, but also to make sure that States would be able to distinguish such persons from *bona fide* refugees with a view to keeping the former outside the refugee definition, independently of extradition considerations. Rather than replicating the explicit references to extradition in its forerunner provisions in earlier instruments, the drafters defined the scope of Article 1F(b) in terms of the gravity of the crimes, their character, as well as the place and time of their commission. See U.N. Doc. A/CONF.2/SR.24, at pp. 5-6, 11-13; UN Doc. A/Conf.2/SR 29, at pp. 11-12, 14, 16-19, 23-24.

risk to the security of the receiving country, or to its community.[21] As seen in core submission (4), security considerations per se do not form part of the criteria enumerated in Article 1F(b). While the drafters of the 1951 Convention were aware of the need to incorporate provisions enabling States to address legitimate concerns about threats to their public order, security or community, they did so primarily through the exceptions to the principle of *non-refoulement* contained in Articles 33(2)[22] rather than in the clauses providing for exclusion from refugee status.[23]

22. Concerns about possible security threats resulting from the presence of dangerous criminals were nevertheless part of the context in which the drafters of the 1951 Convention discussed exclusion under the provision that was to become Article 1F(b).[24] Thus, as stated in UNHCR's *Handbook*, insofar as it applies to persons responsible for serious non-political crimes who constitute a threat to others, Article 1F(b) also serves to "*protect the community of a receiving country from the danger of admitting a refugee who has committed a serious common crime*".[25] This may be relevant, in certain circumstances, when considering whether it would be consistent with the object and purpose of the 1951 Convention to apply exclusion to an individual notwithstanding the existence of expiating factors (see core submission (7)).

CS4 Article 1F(b) applies to serious and non-political crimes committed outside

[21] See too the decision of the House of Lords in T v Immigration Officer [1996] AC 742 at 771 (Lord Mustill).

[22] Article 33(2) provides: "*The benefit of the present provision [non refoulement] may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.*" Other provisions of the 1951 Convention which are relevant in this context include Article 2 (which confirms the duty of refugees and asylum-seekers to conform to the laws and regulations of the host State, including measures taken for the maintenance of public order) and Article 32 (which provides that refugees lawfully in the territory of a State may be expelled only on grounds of national security or public order, albeit not to a country where they would face persecution, and subject to specific due process safeguards).

[23] See *Background Note 2003* at §10. See too the decision of the Supreme Court of Canada in Pushpanathan at §58.

[24] On several occasions during the discussions on exclusion, the drafters referred to the expulsion provisions which were to become Article 33(2) of the 1951 Convention, indicating that the two issues were intricately linked. See, for example, UN Doc. A/CONF.2/SR.24, at pp. 4-5, 9, 11 and 13; UN Doc. A/CONF.2/SR.29, at pp. 18-19. See also core submission (7) below.

[25] *Handbook* at §§151, 157.

the country of refuge prior to admission to that country as a refugee.

23. Article 1F(b) provides for the exclusion from refugee status of persons where there are serious reasons for considering that an individual has committed a "*serious non-political crime*" outside the country of refuge prior to being admitted to that country as a refugee. When assessing exclusion based on this provision, the following elements must be considered: (a) whether there is a "*serious crime*"; (b) whether that crime is "*non-political*"; as well as (c) temporal and (d) geographic restrictions.

24. As the UNHCR *Handbook* states, at §155, "*a 'serious' crime must be a capital crime or a very grave punishable act*". As UNHCR explains in its *Guidelines 2003* at §14:

> ***This category [Article 1F(b)] does not cover minor crimes nor prohibitions on the legitimate exercise of human rights. In determining whether a particular offence is sufficiently serious, international rather than local standards are relevant. The following factors should be taken into account: the nature of the act, the actual harm inflicted, the form of procedure used to prosecute the crime, the nature of the penalty and whether most jurisdictions should consider it a serious crime. Thus, for example, murder, rape and armed robbery would undoubtedly qualify as serious offences, whereas petty theft would obviously not.***

25. As the *Background Note 2003* explains further at §40:

> ***The guidance in the Handbook that a "serious" crime refers to a "capital crime or a very grave punishable act" should be read in light of the factors listed above. Examples of 'serious' crimes include murder, rape, arson and armed robbery. Certain other offences could also be deemed serious if they are accompanied by the use of deadly weapons, involve serious injury to persons, or there is evidence of serious habitual criminal conduct and other similar factors. On the other hand, crimes such as petty theft or the possession for personal use of illicit narcotic substances would not meet the seriousness threshold of Article 1F(b).***

26. The Court of Appeal recognised the significance of a non-domestic foundation for 'seriousness' in the present case in AH (Algeria) v Secretary of State for the Home Department [2012] 1 WLR 3469 (Sullivan LJ) at §31:

> ***While the Convention leaves it to the domestic courts of the signatory states to decide whether, in any particular case, a non-political crime is***

> ***'serious' that determination must be founded upon a common starting point as to the level of seriousness that must be demonstrated if a person is to be excluded from the protection of the Convention by reason of his past criminal conduct.***

27. Having noted, at §33 (Sullivan LJ) that "*there would appear to be a degree of uniformity among the commentators that the [UNHCR] Handbook [at §155] sets the threshold at or about the correct degree of seriousness*", the Court of Appeal held, at §38 (Sullivan LJ), with reference to Germany v B and D:

> ***It is clear, therefore, that for the purpose of Article 12(2)(b) or (c) [of Council Directive 2004/83/EC], which correspond to Article 1F(b) or (c) of the 1951 Convention] there must be an assessment of the level of seriousness of the acts committed, and the seriousness must be of such a degree that the offender cannot legitimately claim refugee status.***

28. A serious crime should only be considered "*non-political*" when other motives are the predominant feature of the specific crime committed. As UNHCR explains in the *Handbook* at §152:

> ***In determining whether an offence is "non-political" or is, on the contrary, a "political" crime, regard should be given in the first place to its nature and purpose i.e. whether it has been committed out of genuine political motives and not merely for personal reasons or gain. There should also be a close and direct causal link between the crime committed and its alleged political purpose and object. The political element of the offence should also outweigh its common-law character. This would not be the case if the acts committed are grossly out of proportion to the alleged objective. The political nature of the offence is also more difficult to accept if it involves acts of an atrocious nature.***

29. This is further elaborated upon in the *Guidelines 2003* at §15:

> ***A serious crime should be considered non-political where other motives (such as personal reasons or gain) are the predominant feature of the specific crime committed. Where no clear link exists between the crime and its alleged political objective or when the act in question is disproportionate to the alleged political objective, non-political motives are predominant. The motivation, context, methods and proportionality of a crime to its objectives are important factors in evaluating its political nature***[26]

[26] See also *Background Note 2003* at §§41-43.

30. Article 1F(b) also requires the crime to have been committed "*outside the country of refuge prior to [the individual's] admission to that country as a refugee*". Individuals who commit "*serious non-political crimes*" within the country of refuge are subject to that country's criminal law process and, in the case of particularly grave crimes, to Articles 32 and 33(2) of the 1951 Convention.[27]

CS5 Article 1F(b) 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 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.

31. 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.[28] This requires an individualised assessment, on the basis of clear and credible evidence, that "*there are serious reasons for considering*" that the person concerned has incurred individual responsibility for (in the context of Article 1F(b)) a serious non-political crime outside the country of refuge prior to his or her admission to the host country as a refugee, in full observance of due process safeguards.[29]

32. As UNHCR explains in its *Background Note 2003* at §51:

> ***In general, individual responsibility…arises where the individual committed, or made a substantial contribution to, the criminal act, in the knowledge that his or her act or omission would facilitate the criminal conduct. Thus, the degree of involvement of the person concerned must be carefully analysed in each case. The fact that acts of an abhorrent and outrageous nature have taken place should not be allowed to cloud the issue … Apart from actual commission of the crime, criminal acts may include ordering, solicitation, inducement, aiding, abetting, contribution to a common purpose, attempts and, in the case of genocide, incitement to commit a crime.*** [30]

[27] See *Guidelines 2003* at §16; *Background Note 2003* at §§44-45.
[28] See *Background Note 2003* at §§50-75.
[29] See *Background Note 2003* at §§98-100.
[30] See also *Guidelines 2003* at §§18-20.

33. As a general proposition, it can be said that such involvement 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.[31]

34. Three issues will need to be addressed: (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 ie. defences such as duress, coercion or self-defence.[32] As the Supreme Court said in Al-Sirri, adopting the approach in Germany v B and D and JS (Sri Lanka) v Secretary of State for the Home Department [2011] 1 AC 184, in a passage focused on Article 1F(c), but applicable, in UNHCR's view, to all categories of exclusion under Article 1F (at §15):

> ***for exclusion from international refugee protection to be justified, it must be established that there are serious reasons for considering that the person concerned had individual responsibility ... This requires an individualised consideration of the facts of the case, which will include an assessment of the person's involvement in the act concerned, his mental state and possible grounds for rejecting individual responsibility.***

35. There is increasing recognition of the significance of international criminal law and the jurisprudence of international bodies for the interpretation and application of Article 1F of the 1951 Convention, including with regard to determining individual responsibility. Thus, for example, in JS (Sri Lanka), the Supreme Court (Lord Brown, at §8) held that the Rome Statute of the International Criminal Court ("ICC") ("Rome Statute") "*should now be the starting point for considering whether an applicant is disqualified from asylum*" of the 1951 Convention. Lord Brown further held at §9:

> ***It is convenient to go at once to the ICC Statute, ratified as it now is by more than a hundred States and standing as now surely it does as the most comprehensive and authoritative statement of international***

[31] See further core submission (6) below.
[32] See *Background Note* 2003 at §§51, 64-75; Germany v B and D at §§94-97.

thinking on the principles that govern liability for the most serious international crimes… [33]

36. As the Supreme Court of Canada said in Ezokola at §50:

> ***Article 25 of the Rome Statute provides extensive descriptions of modes of commission. These enumerated modes of liability have been described as the culmination of the international community's efforts to codify individual criminal responsibility under international law.***

37. Both JS (Sri Lanka) and Ezokola are concerned with exclusion in the context of Article 1F(a), which, of course, contains an explicit reference to "*international instruments*". Despite the absence of a comparable reference in Article 1F(b), UNHCR considers reliance on international standards to also be appropriate in cases raising the possibility of exclusion under Article 1F(b), as it ensures a consistent approach to exclusion under this provision across jurisdictions. In this regard, the relevant provisions of the Rome Statute and its application by the ICC, as well as the jurisprudence developed by the international criminal tribunals with regard to the criteria for individual responsibility in customary international law, provide decision-makers with helpful guidance. The Rome Statute is particularly relevant as it codifies concepts and principles governing individual responsibility applicable in a wide range of countries.

38. As discussed further in core submission (6), the key principle with regard to establishing individual responsibility, including in an exclusion context, is "no guilt by association". The mere fact of having been a member of a group or organisation involved in acts falling within the scope of Article 1F of the 1951 Convention is not as such sufficient to establish individual responsibility for acts committed by other members or otherwise under the responsibility of the group or organisation.[34] In Ezokola at §3, the Supreme Court of Canada said "*[i]ndividuals may be excluded from refugee protection for international crimes*

[33] Discussing individual responsibility for crimes within the scope of Article 1F(a), Lord Brown then referred to Articles 25, 28 and 30 of the Rome Statute as well as Article 7(1) of the Statute of the ICTY and the jurisprudence of the ICTY Appeals Chamber on the notion of a joint criminal enterprise, *ibid.*, at §§11-14 and 15-20, respectively. See also core submission (6) below.

[34] See *Background Note 2003* at §59.

through a variety of modes of commission … Guilt by association, however, is not one of them."

39. The 1951 Convention calls for an appropriately exacting standard for 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. As noted in core submission (2), 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. As such clear and credible evidence is required to support exclusion.[35]

40. There must be a rigorous assessment of the facts in accordance with all due process requirements: see *Background Note* 2003 §§98-113; Wakn v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 1245 (Federal Court of Australia) §52.[36] As Hathaway and Foster have stated in this context:

> ***While the evidence presented need not be conclusive of the question of guilt or innocence, it must nonetheless truly inform the question of whether it may be 'considered that' in the particular circumstances of the individual case liability … exists.***[37]

41. However, it is important to note that the fact that the individual has been convicted of a crime in a court does not absolve the decision-maker from making his or her own proper assessment of individual responsibility. As this Court recognised in AH (Algeria) at §16 (Sullivan LJ):

> ***I readily accept that the fact of a conviction by a court may well make the task of assessing whether a person falls within article 1F much easier … it will do so only if the nature of the offence of which the person has been convicted and/or the findings made by the court are sufficient to enable the tribunal to reach a conclusion as to the individual's 'own***

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[35] See *Guidelines 2003* at §35.
[36] See also G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law,* 3rd ed (Oxford: Oxford University Press, 2007), at p. 197.
[37] J. C. Hathaway and M. Foster, *The Law of Refugee Status*, 2nd ed (Cambridge: Cambridge University Press, 2014), at p.535.

personal involvement and role in the organisation' or the 'true role' played by the individual in the acts perpetrated by the organisation.

CS6 The labels "terrorism" applied to an act, or "terrorist" applied to an individual or organisation, cannot alone suffice to bring an act or an individual within the scope of Article 1F(b). Participation in the activities of a terrorist organisation may, however, give rise to exclusion for serious non-political crimes where there are serious reasons for considering that an individual has incurred individual responsibility for a crime that meets the criteria under this provision.

42. As in all cases which raise the possibility of exclusion, it is necessary to start by examining whether the acts with which the individual was associated fall within the scope of Article 1F. In this context, it is important to recall that the labels "*terrorism*" applied to an act, or "*terrorist*" applied to an individual or organisation, cannot alone suffice to bring an act or an individual within the scope of Article 1F(b). Despite the absence to date of a universally agreed definition of the term "*terrorism*", it is possible to discern certain criteria that permit identifying those acts which may appropriately be considered "*terrorist*" in the context of an exclusion determination. In UNHCR's view, the approach proposed by the United Nations Special Rapporteur on human rights and terrorism in 2005 is helpful in this regard.[38]

43. In the view of the Special Rapporteur, "*terrorist offences*" should be confined to instances where the following three conditions as stipulated by Security Council Resolution 1566 (2004)[39] are cumulatively met: (a) acts committed with the intent to cause death or serious bodily injury, or taking of hostages; (b) for the purpose to provoking a state of terror, intimidating a population, or compelling a Government or an international organisation 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. [40]

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[38] See the Report of the Special Rapporteur on the promotion of and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, to the Commission on Human Rights, E/CN.4/2006/98, 28 December 2005 ("*SR Report*") at §§26–50.

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

[40] *SR Report* §§38-42, 50.

44. In UNHCR's view, acts considered "*terrorist*" in line with the criteria set out above are likely to fail the predominance test used to determine whether a crime is political[41] and may thus fall within Article 1F(b), provided the seriousness threshold required is satisfied and the geographic and temporal criteria under this provision are also met.[42]

45. If the acts in question meet the criteria of Article 1F(b), it will need to be established whether the person (a) committed the crime – either individually or acting jointly with others as co-perpetrators – or (b) incurred individual responsibility through planning, instigating, ordering, through a substantial contribution which amounts to aiding and abetting, or on the basis of a "*joint criminal enterprise*" ("JCE") or by contributing "*in any other way*" to crimes committed by a group of persons acting with a common purpose, as provided for in Article 25(3)(d) of the Rome Statute. The mode of individual responsibility to be considered will depend on the facts and circumstances of the particular case.

46. An individualised assessment is required also where exclusion is considered in relation to an individual who belongs to a group or organisation involved in crimes properly characterised as "*terrorist*". The principle that exclusion may not be based solely on a person's membership in a particular group, organisation or regime ("no guilt by association") remains fundamental to the proper application of Article 1F of the 1951 Convention. As explained in UNHCR's *Background Note 2003*, at §59:

> ***As with membership of a particular government, membership per se of an organisation that commits or incites others to carry out violent crimes is not necessarily decisive or sufficient to exclude a person from refugee status. The fact of membership does not, in and of itself, amount to participation in an excludable act. Consideration needs to be given to whether the applicant was personally involved in acts of violence or knowing contributed in a substantial manner to such acts. A plausible explanation regarding the applicant's non-involvement or dissociation***

[41] See *Guidelines 2003* at §38, *Background Note 2003* at §81. See also core submission (4) above.
[42] Under certain circumstances, such acts may fall within the scope of Article 1F(c) of the 1951 Convention (see *Guidelines 2003* at §17; 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)* at §§7-8; see also Al Sirri, at §§36-40).

> ***from any excludable acts, coupled with an absence of serious evidence to the contrary, should remove the applicant from the scope of the exclusion clauses. (footnote omitted)*** [43]

47. In Germany v B and D, 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". The CJEU stated at §99:

> ***the fact that a person has been a member of an organisation which, because of its involvement in terrorist acts, is on the list forming the Annex to Common Position 2001/83 and that that person has actively supported the armed struggle waged by that organisation does not automatically constitute a serious reason for considering that that person has committed "a serious non-political crime" ... the finding, in such a context, that there are serious reasons for considering that a person has committed such a crime ... is conditional on an assessment on a case-by-case basis of the specific facts, with a view to determining whether the acts committed by the organisation concerned meet the conditions laid down in those provisions and whether individual responsibility for carrying out those acts can be attributed to the person concerned...*** [44]

48. In JS (Sri Lanka), the Supreme Court (Lord Brown at §29) also 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).

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[43] See too *Background Note 2003* at §80.
[44] See also §§86-98.

49. In JS (Sri Lanka), the Supreme Court examined the criteria for individual responsibility with reference to common purpose liability as provided for in Article 25(3)(d) of the Rome Statute (see Lord Brown at §§10-11) as well as the concept of JCE (see Lord Brown at §§7-8, 15-16 and 19-20, and Lord Kerr at §56). With regard to the latter, UNHCR's *Background Note 2003*, explains, with reference to the jurisprudence of the International Criminal Tribunal for the former Yugoslavia ("ICTY") at §§54-55:

> ***A joint criminal enterprise exists wherever there is a plurality of persons, a common plan and participation of the individual in the execution of the common plan. The common plan need not be pre-arranged, however, it can arise extemporaneously and be inferred from the fact that a number of persons act together in order to put it into effect. Individual liability arises where the person concerned has "carried out acts that substantially assisted or significantly effected the furtherance of the goals of the enterprise, with the knowledge that his [or her] acts or omissions facilitated the crimes committed through the enterprise ...".***
>
> ***Whether the individual's contribution to the criminal enterprise is substantial or not depends on many factors, such as the size of the criminal enterprise, the functions performed, the position of the individual in the organization or group, and (perhaps most importantly) the role of the individual in relation to the seriousness and the scope of the crimes committed (footnotes omitted).***

50. Where JCE is considered as the basis for a finding of individual responsibility in an exclusion context, a careful examination of relevant facts will be required to establish the existence of all constituent elements of this mode of participation in the commission of crimes by others. This means, in the first place, determining the existence of the "plurality of persons" and who is/was part of it, and identifying the common purpose at its core in terms of both the criminal goal intended (either as an end in itself or as a method to reach some other goal) and its scope (for example its temporal and geographic limits, and the intended victims), as well as establishing that this criminal purpose is shared by all those acting together within a JCE.[45] Exclusion on this basis would be consistent with international refugee law only if the group or

[45] See the judgment of the ICTY Appeals Chamber in *Prosecutor v Radoslav Brdanin*, IT-99-36-A, 3 April 2007, at §§428-431. In UNHCR's view, the Appeals Chamber's general comments on this mode of individual responsibility, expressed in §428 ("*The Appeals Chamber emphasizes that JCE is not an open-ended concept that permits convictions based on guilt by association. […]*") are fully applicable in the exclusion context.

organisation as well as the common plan or purpose shared by its members are identified, and if it is established that the applicant made a significant contribution, with the requisite *mens rea*, to the commission of crimes which fall within the scope of Article 1F(b). A determination of individual responsibility in accordance with Article 25(3)(d) of the Rome Statute would also need to be based on clear findings regarding the group acting with a common purpose, the scope and aims of that purpose, as well as the applicant's contribution and *mens rea*.

51. In UNHCR's view, existing international standards also provide appropriate criteria for determining individual responsibility where a person engaged in steps towards the commission of a crime within the scope of Article 1F, including Article 1F(b), but which remained incomplete (inchoate). Pursuant to Article 25(3)(f) of the Rome Statute, individual responsibility arises in relation to crimes within the jurisdiction of the ICC where a person "*attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.*"[46] Explicit requirements to criminalise attempt are also included in several international instruments related to terrorism.[47]

52. In the context of an exclusion determination under Article 1F(b), decision-makers should thus be guided by the criteria in Article 25(3)(f) of the Rome Statute when assessing whether a person has incurred individual responsibility for conduct related to serious non-political crimes. For a crime to have reached the attempt stage, it will need to be established, based on clear and credible evidence, that the subjective elements required for the commission of the crime

[46] See A. Eser, *Individual Criminal Responsibility,* in: A. Cassese et al (eds), *The Rome Statue of the International Criminal Court: A Commentary,* (Oxford: Oxford University Press, 2002), at pp. 807-809.
[47] See for example, International Convention against the Taking of Hostages, Article 1(2); International Convention for the Suppression of the Financing of Terrorism, Article 2(4); International Convention for the Suppression of Terrorist Bombings, Article 2(2).

have been completed, and that the person has performed an act which constitutes a substantial step towards the completion of the crime.[48] Mere preparatory acts will not be sufficient. The "substantial step" requirement is met if a person acting with the requisite *mens rea* engages in conduct which is "*already directly endangering the protected interest or object*."[49] An attempt will give rise to individual responsibility not only where the person is the perpetrator, or co-perpetrator, of the crime to be committed, but also where the person's conduct and state of mind meet the criteria for modes of participation such as ordering, solicitation, inducement, aiding and abetting, or common purpose liability.

53. In UNHCR's view, reliance on international standards when determining the nature and seriousness of the crimes in question as well as individual responsibility constitutes an important safeguard against an overly broad application of exclusion to acts which do not meet the seriousness threshold under Article 1F, or to conduct which is not sufficiently close to the commission of crimes to render the person undeserving of international refugee protection.

CS7 Having regard to the core submissions (1)-(3) above, in cases where it is established that the person committed a crime within the scope of Article 1F(b), but where elements of expiation, such as service of a sentence or other kinds of rehabilitation exist, these always need to be taken into consideration when determining whether denial of international refugee protection would nevertheless be consistent with the object and purpose of the 1951 Convention.

54. A cautious approach to applying Article 1F(b) (see core submission (1) above), in light of the nature of the 1951 Convention as a human rights instrument, requires that exclusion be applied only in cases that are in line with the purposes of this provision, and thus to protect the integrity of the institution of asylum from being undermined.

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[48] See, for example, Decision on the Confirmation of Charges, *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, 30 September 2008, §§458-460.
[49] See A. Eser, *Individual Criminal Responsibility,* in: A. Cassese et al (eds), *The Rome Statue of the International Criminal Court: A Commentary,* (Oxford: Oxford University Press, 2002), at p.812.

55. In order to ensure that Article 1F(b) is not applied more broadly than necessary to fulfill this purpose, decision-makers should take into account circumstances such as service of a sentence, or other forms of rehabilitation. Where such elements exist, it is necessary to consider whether an applicant whose previous involvement in the commission of a serious non-political crime brings him or her within the scope of Article 1F(b), may nevertheless be considered eligible for refugee status.

56. As noted above in core submission (3), Article 1F(b) is primarily intended to prevent serious criminals from abusing the institution of asylum to escape accountability for their crimes. It follows that where an individual has been convicted of a crime falling within the scope of Article 1F(b) but has since served a sentence that is commensurate with the criminal conduct or has been otherwise rehabilitated, for example through a pardon or amnesty, exclusion from international refugee protection would, in principle, no longer be required to serve the purpose of precluding serious criminals from evading justice. A determination as to whether Article 1F(b) continues to apply in these circumstances must be made as part of a holistic, individualised assessment in light of all relevant factors.

57. As UNHCR explains in its *Guidelines 2003* at §23:

> ***Where expiation of the crime is considered to have taken place, application of the exclusion clauses may no longer be justified. This may be the case where the individual has served a penal sentence for the crime in question, or perhaps where a significant period of time has elapsed since commission of the offence. Relevant factors would include the seriousness of the offence, the passage of time, and any express of regret shown by the individual concerned.***

58. As the *Background Note 2003* explains further at §73:

> ***Bearing in mind the object and purpose behind Article 1F, it is arguable that an individual who has served a sentence should, in general, no longer be subject to the exclusion clause as he or she is not a fugitive from justice. Each case will require individual consideration, however, bearing in mind issues such as the passage of time since the commission of the offence, the seriousness of the offence, the age at which the crime***

was committed, the conduct of the individual since then, and whether the individual has expressed regret or renounced criminal activities…

59. The importance of taking into account factors relating to expiation has also been recognised in academic commentary. As Paul Weis[50], observes:

> ***It is … difficult to see why a person who before becoming a refugee, has been convicted of a serious crime and has served his sentence, should for ever be debarred from refugee status. Such a rule would seem to run counter to the generally accepted principle of penal law that a person who has been punished for an offence should suffer no further prejudice on account of the offence committed.***

60. As also seen above, however, the purpose of Article 1F(b) is not limited to excluding serious criminals who seek to escape justice. Accordingly, there may be circumstances where exclusion based on Article 1F(b) would be consistent with the object and purpose of the 1951 Convention notwithstanding the existence of expiating factors.

61. First, in cases involving persons responsible for crimes of a particularly serious nature, exclusion may be necessary to safeguard the integrity of the institution of asylum.[51] As explained in UNHCR's *Background Note 2003* at §73:

> ***In the case of truly heinous crimes, it may be considered that such persons are still undeserving of international refugee protection and the exclusion clauses should still apply. This is more likely to be the case for crimes under Article 1F(a) or (c), than those falling under Article 1F(b).***

62. Thus, UNHCR considers that exclusion may be appropriate in the case of an applicant who is determined to have committed, or participated in the commission of, crimes that are of a comparable nature and gravity and thus of a similar egregiousness as those covered by Article 1F(a) or Article 1F(c) of the 1951 Convention, even if he or she has served a sentence or has otherwise been rehabilitated.[52]

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[50] P. Weis, "The Concept of the Refugee in International Law" (1960) 87 J. du droit international 928, at 984-986

[51] See above at §§17-18.

[52] See also *Handbook* at §157.

63. Secondly, as seen above, concerns about possible security threats resulting from the presence of dangerous criminals were part of the context in which the drafters discussed the exclusion criteria, and the application of Article 1F(b) to dangerous criminals was also seen as having the effect of protecting the community of the receiving country.[53]

64. Hence, where an applicant, whose criminal past brings him or her within the scope of Article 1F(b), poses a threat to the community or the security of the receiving State, legitimate concerns arising from security risks to the receiving state may be taken into account when considering, as part of a holistic, individualised assessment of all relevant circumstances, whether or not it would be consistent with the object and purpose of the 1951 Convention to apply exclusion despite the fact that the person concerned has served a sentence for his or crime or has otherwise been rehabilitated.[54] In such circumstances, exclusion may apply even if the person concerned has served a sentence and the possibility of expiation is raised.[55]

E. CONCLUSION

65. UNHCR respectfully commends these submissions to the Court as to the proper interpretation of Article 1F(b) of the 1951 Convention in its consideration of this appeal.

21 October 2014

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[53] *Handbook* at §§151, 157. See also the discussion above at §§21-22.
[54] The examination of expiation would be relevant only if it has already been determined that there are serious reasons for considering that the applicant committed crimes within the scope of Article 1F.
[55] See also G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3rd ed (Oxford: Oxford University Press, 2007), at pp. 175-176.