

**Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees**

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Geneva, 4 September 2003

This Background Note forms an integral part of UNHCR's [Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees](#) (HCR/GIP/03/05, 4 September 2003).

## **I. INTRODUCTION**

### **A. Background**

1. The 1950 Statute of the United Nations High Commissioner for Refugees (hereinafter “the UNHCR Statute”), the 1951 Convention and 1967 Protocol relating to the Status of Refugees (hereinafter “the 1951 Convention”) and the 1969 Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa (hereinafter “the OAU Convention”) contain provisions for excluding from the benefits of refugee status certain persons who would otherwise qualify as refugees. These provisions are commonly referred to as the “exclusion clauses”.

2. Events in the last decade, prompted in large part by the conflicts in the Great Lakes and the former Yugoslavia and their aftermath, have resulted in increased requests for clarification of the exclusion clauses. Recent anti-terrorism initiatives have further focused attention on these provisions. This Background Note provides a detailed analysis and review of the exclusion clauses, taking into account the practice of States, UNHCR and other relevant actors, UNHCR’s *Handbook on Procedures and Criteria for Determining Refugee Status* (hereinafter “the Handbook”), case law, the *travaux préparatoires* of the relevant international instruments, and the opinions of academic and expert commentators. It also draws on the constructive discussion of this topic at the May 2001 Expert Roundtable held in Lisbon, Portugal, as part of UNHCR’s Global Consultations on International Protection (second track). It is hoped the information provided in this Background Note, along with the Guidelines on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, will facilitate the proper application of Article 1F of the 1951 Convention through a thorough treatment of the main issues. Obviously, each case must be considered on its own merit, bearing in mind the matters discussed below. 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.

### **B. Objectives and general application**

3. 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.

4. Consequently, as with any exception to human rights guarantees, the exclusion clauses must always be interpreted restrictively and should be used with great caution. As paragraph 149 of the Handbook emphasises, such an approach is particularly warranted in view of the serious possible consequences of exclusion for the individual. Moreover, the growth in universal jurisdiction and the introduction of international criminal

tribunals reduces the role of exclusion as a means of ensuring fugitives face justice, thus reinforcing the arguments for a restrictive approach.<sup>1</sup>

### C. The exclusion clauses in the international refugee instruments

5. Paragraph 7(d) of the UNHCR Statute provides that the competence of the High Commissioner shall not extend to a person:

In respect of whom there are serious reasons for considering that he [or she] has committed a crime covered by the provisions of treaties of extradition or a crime mentioned in article VI of the 1945 London Charter of the International Military Tribunal or by the provisions of article 14, paragraph 2, of the 1948 Universal Declaration of Human Rights.<sup>2</sup>

6. Article 1F of the 1951 Convention states that the provisions of that Convention “shall not apply to any person with respect to whom there are serious reasons for considering” that:

(a) he [or she] has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he [or she] has committed a serious non-political crime outside the country of refuge prior to his [or her] admission to that country as a refugee; or

(c) he [or she] has been guilty of acts contrary to the purposes and principles of the United Nations.

7. The grounds for exclusion are enumerated *exhaustively* in the 1951 Convention. While these grounds are subject to interpretation, they cannot be supplemented by additional criteria in the absence of an international convention to that effect. Article I(5) of the OAU Convention replicates the language contained in Article 1F of the 1951 Convention except for a reference to persons who have been “guilty of acts contrary to the purposes and principles of the Organization of African Unity”. As the OAU Convention complements the 1951 Convention, the latter phrase should be read as subsumed within Article 1F(c) of the 1951 Convention, given the close connection between the OAU’s and the UN’s purposes.

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<sup>1</sup> During the 29<sup>th</sup> meeting of the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, the French delegate (M. Rochefort) maintained that the proposed Article 1F(b) was necessary because “in the present state of affairs, there was no international court of justice competent to try war criminals or violations of common law already dealt with by national legislation”. (UN doc. A./CONF.2/SR.29 at 21).

<sup>2</sup> The provisions of the London Charter are discussed below in the section on Article 1F(a). Article 14 of the Universal Declaration of Human Rights states:

(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.

(2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

#### **D. Relationship with other provisions of the 1951 Convention**

8. The exclusion clauses found in Article 1F should be distinguished from Articles 1D and 1E of the 1951 Convention, as the latter deal with persons not in need, rather than undeserving, of international protection. **Article 1D** provides that the 1951 Convention shall not apply to persons receiving protection or assistance from organs or agencies of the United Nations other than UNHCR. They may, however, fall within the scope of the 1951 Convention in the event that “such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations”.<sup>3</sup> In such circumstances, consideration of exclusion pursuant to Article 1F may arise.

9. Under **Article 1E**, the 1951 Convention does not “apply to a person who is recognized by the competent authorities of the country in which he [or she] has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country”. The object and purpose of this Article can be seen as excluding from refugee status those persons who do not require refugee protection because they already enjoy greater protection than that provided under the 1951 Convention in another country apart from the country of origin where they have regular or permanent residence and where they enjoy a status that is in effect akin to citizenship.

10. Moreover, Article 1F should not be confused with **Article 33(2)** of the 1951 Convention which provides that the benefit of the *non-refoulement* provision “may not ... be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he [or she] is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country”. Unlike Article 1F which is concerned with persons who are not eligible for refugee status, Article 33(2) is directed to those who have already been determined to be refugees. Articles 1F and 33(2) are thus distinct legal provisions serving very different purposes. Article 33(2) applies to refugees who become an extremely serious threat to the country of asylum due to the severity of crimes perpetrated by them. It aims to protect the safety of the country of refuge and hinges on the assessment that the refugee in question poses a major actual or future threat. For this reason, Article 33(2) has always been considered as a measure of last resort, taking precedence over and above criminal law sanctions and justified by the exceptional threat posed by the individual – a threat such that it can only be countered by removing the person from the country of asylum.

#### **E. Temporal scope**

11. Whereas Article 1F(b) specifies that the crime in question must have been committed “outside the country of refuge prior to [the individual’s] admission to that country as a refugee”,<sup>4</sup> the other exclusion clauses contain no temporal or territorial references. Given the serious nature of the crimes concerned, Articles 1F(a) and 1F(c) are therefore

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<sup>3</sup> See also, UNHCR, “Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees”, October 2002.

<sup>4</sup> See also paragraphs 44–45 below.

applicable at any time, whether the act in question took place in the country of refuge, country of origin or in a third country. Once such crimes are committed, the individual is excluded from refugee status. If the individual has already been recognised as a refugee, his or her status would need to be revoked.<sup>5</sup>

12. The temporal aspect of the exclusion clauses remains the same in the case of refugees *sur place* (where the claim to refugee status flows from circumstances arising after departure from the country of origin). Thus, in order for Article 1F(a) and (c) to apply, the crime in question need not have taken place before the events giving rise to the refugee claim. Indeed, if a recognised refugee subsequently engages in conduct coming within the scope of Article 1F(a) or 1F(c), revocation of refugee status would be appropriate. By contrast, for Article 1F(b), only crimes committed outside the country of refuge prior to the person's admission to that country as a refugee are relevant.

#### **F. Cancellation of refugee status (*ex tunc*)**

13. General principles of administrative law allow for the cancellation of refugee status where it is subsequently revealed that the basis for such a decision was absent in the first place, either because the applicant did not meet the inclusion criteria or because one of the exclusion clauses would have applied at the time of decision-making had all the facts been known. Cancellation is, however, not related to a person's conduct post-determination. It is important therefore to differentiate between cancellation of refugee status on the basis of exclusion and expulsion or withdrawal of protection from *non-refoulement* under Articles 32 and 33(2) of the 1951 Convention. The former rectifies a mistaken grant of refugee status,<sup>6</sup> while the latter provisions govern the treatment of those properly recognised as refugees.

14. Facts that would have justified exclusion may only become known after recognition of the individual as a refugee. Paragraph 141 of the Handbook states:

Normally it will be during the process of determining a person's refugee status that the facts leading to exclusion under these clauses will emerge. It may, however, also happen that facts justifying exclusion will become known only after a person has been recognized as a refugee. In such cases, the exclusion clause will call for a cancellation of the decision previously taken.

15. The erroneous decision may be due to fraud or misrepresentation regarding facts central to the refugee claim on the part of the applicant or may be attributable to the authorities (for example, inadequate decision-making). The act of cancellation corrects an administrative or judicial decision that was wrong *ab initio* by rescinding the original erroneous determination (from then or *ex tunc*). In such a scenario, the person is not and has never been a refugee. The prompt and transparent rectification of such errors is

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<sup>5</sup> See paragraph 17 below.

<sup>6</sup> On cancellation of refugee status generally, see paragraph 117 of the Handbook and also S. Kapferer, "Cancellation of Refugee Status", Legal and Protection Policy Research Series, UNHCR, Department of International Protection, PPLA/2003/02, March 2003.

necessary to preserve the integrity of the refugee definition. Generalised suspicions about involvement in terrorist activity based solely on religious, ethnic or national origin, or political affiliation do not, however, justify a process of reviewing the grant of refugee status generally to entire groups of refugees.

16. There may be occasions when, after the exclusion of an individual, information comes to light which casts doubt on the applicability of the exclusion clauses. In such cases, the exclusion decision should be reconsidered and refugee status recognised if appropriate.

### **G. Revocation of refugee status (*ex nunc*)**

17. In principle, refugees, including those recognised on a *prima facie* basis, must conform to the laws and regulations of the country of asylum as set out in Article 2 of the 1951 Convention and if they commit crimes are liable to criminal prosecution. The 1951 Convention foresees that such refugees can be subject to expulsion proceedings in accordance with Article 32 and, in exceptional cases, to removal under Article 33(2). Neither action per se involves revocation of refugee status. Where, however, a refugee engages in conduct coming within the scope of Article 1F(a) or 1F(c), for instance, through involvement in armed activities in the country of asylum, this would trigger the application of the exclusion clauses. In such cases, revocation of refugee status (from now or *ex nunc*) is appropriate, provided of course that all the criteria for the application of Article 1F(a) or 1F(c) are met.<sup>7</sup>

### **H. Responsibility for determination of exclusion**

18. Under the 1951 Convention and the OAU Convention, competence to decide whether a refugee claimant falls under the exclusion clauses lies with the State in whose territory the applicant seeks recognition as a refugee. Nevertheless, UNHCR has a responsibility under paragraph 8 of its Statute in conjunction with Article 35 of the 1951 Convention to help States that may require assistance in their exclusion determinations, and to supervise their practice in this regard.

19. As a matter of policy, UNHCR does not normally determine refugee status in countries that are party to the 1951 Convention/1967 Protocol. Determination of refugee status by States and determination of such status by UNHCR under its mandate are, however, not mutually exclusive. In some countries, for instance, UNHCR takes part in the national refugee status determination procedures. Given UNHCR's supervisory role,

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<sup>7</sup> In the African context, the OAU Convention sets out "cessation clauses", which are in effect based on exclusion considerations. If a refugee, including a refugee recognised on a *prima facie* basis, engages in subversive activities in the sense of Article III(2) of the OAU Convention, then *prima facie* recognition could "cease" on the basis of Article I(4)(g), which provides that the Convention will cease to apply to refugees infringing its purposes and objectives. Subversive activities would include the taking up of armed activities against any OAU Member State. Since the OAU Convention complements the 1951 Convention, Article I(4)(g) should be read within the framework of Article 1F of the 1951 Convention.

States are expected to pay due regard to UNHCR's interpretation of the relevant refugee instruments, whether in individual cases or on general issues. This Background Note intends to promote a common approach to the interpretation of the exclusion clauses, thus reducing the possibility of conflict between decisions made by different States and/or UNHCR.

20. The UNHCR Statute provides that the competence of the High Commissioner shall not extend to certain persons on similar (but not identical) grounds to those found in Article 1F of the 1951 Convention. Determinations of this nature clearly fall to UNHCR. Given that Article 1F represents a later and more specific formulation of the category of persons envisaged in paragraph 7(d) of the UNHCR Statute, the wording of Article 1F is considered more authoritative and takes precedence. UNHCR officials are therefore encouraged to apply the 1951 Convention formula in determining cases of exclusion.

## **I. Consequences of exclusion**

21. Where the exclusion clauses apply, the individual cannot be recognised as a refugee and benefit from international protection under the 1951 Convention. Nor can the individual fall within UNHCR's mandate. The State concerned is not, however, obliged to expel him or her. Moreover, it may wish to exercise criminal jurisdiction over the individual, or indeed be under an obligation to extradite or prosecute the person concerned, depending on the nature of the offence committed. A decision by UNHCR to exclude a refugee means that that individual can no longer receive protection or assistance from the Office.

22. Despite being unable to access international protection under the 1951 Convention, an excluded individual is still entitled to be treated in a manner compatible with international law and, in particular, relevant human rights obligations. Although States enjoy a considerable degree of authority to expel aliens from their territory, there are a number of restrictions to this (as illustrated in Annex A). Thus, an excluded individual may still be protected against return by operation of other international instruments, notably Article 3 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 7 of the 1966 International Covenant on Civil and Political Rights, and/or Article 3 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.

## **II. SUBSTANTIVE ANALYSIS<sup>8</sup>**

### **A. ARTICLE 1F(a): CRIMES AGAINST PEACE, WAR CRIMES AND CRIMES AGAINST HUMANITY**

23. Article 1F(a) refers to persons with respect to whom there are serious reasons for considering that they have committed "a crime against peace, a war crime, or a crime

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<sup>8</sup> For a detailed analysis of the jurisprudence and application of the exclusion clauses see the special supplementary issue of the *International Journal of Refugee Law* on exclusion from protection, vol. 12, 2000.



against humanity, as defined *in the international instruments drawn up to make provision in respect of such crimes*". Several instruments exist today which define or elaborate on the notion of "crimes against peace, war crimes and crimes against humanity".<sup>9</sup> Of continuing significance is the 1945 Charter of the International Military Tribunal (the London Charter), Article 6 of which is reproduced in the Handbook.<sup>10</sup> The most recent international effort to define these crimes is found in the Statute of the International Criminal Court (ICC) adopted in June 1998 and in force since 1 July 2002. Its definitions of crimes against humanity, war crimes and crimes against peace will be further elaborated upon in Elements of Crimes<sup>11</sup> to be adopted by State Parties to the ICC. Other relevant international legal instruments<sup>12</sup> which may be used to interpret this exclusion clause are:

- the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention);
- the four 1949 Geneva Conventions for the Protection of Victims of War;
- the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid;
- the 1977 Additional Protocol to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I);
- the 1977 Additional Protocol to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II);
- the 1984 Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (the Convention against Torture);<sup>13</sup>

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<sup>9</sup> Some of these instruments are listed in Annex VI of the Handbook.

<sup>10</sup> The provisions of Article 6 are also set out in paragraph 26 as well as Annexes B and C below.

<sup>11</sup> For the ICC Statute see <http://www.un.org/law/icc/statute/rome fra.htm> . Article 8(1) of the ICC Statute states that the Elements of Crimes will assist the ICC in the interpretation and application of the crimes under its jurisdiction. The adopted text will be identical to that currently available as the Finalized Draft Text, July 2000 (PCNICC/2000/1/Add.2); see Annex 1 (Resolution F) of the Final Act of the 1998 Diplomatic Conference in Rome.

<sup>12</sup> See <http://www.icrc.org/ihl.nsf/WebFULL?OpenView> (for Geneva Conventions and Protocols); <http://www.un.org/icty/legaldoc/index.htm> (for ICTY Statute); and <http://www.ictt.org/ENGLISH/basicdocs/statute.html> (for ICTR statute). These documents are also available on request from the Protection Policy and Legal Advice Section of the Department of International Protection, UNHCR, Geneva.

<sup>13</sup> Regional instruments relating to torture may also be relevant. See 1985 Inter-American Convention to Prevent and Punish Torture; 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

- The Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (the ICTY Statute);
- The Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 (the ICTR Statute).

24. Relevant non-binding but authoritative sources are the 1950 Report of the International Law Commission (ILC) to the General Assembly (including the Nuremberg Principles),<sup>14</sup> the 1973 Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity,<sup>15</sup> and the Draft Code of Crimes against the Peace and Security of Mankind which was provisionally adopted by the ILC in 1996.<sup>16</sup>

25. Article 1F(a) allows for a dynamic interpretation of the relevant crimes so as to take into account developments in international law. Although the ICC Statute represents the most recent attempt by the international community to define the relevant crimes, it should not be referred to exclusively when interpreting the scope of Article 1F(a) and the definitions used in other instruments must also be given due consideration. Nevertheless, the Statute and jurisprudence of the ICC may well become the principal sources for interpreting the crimes covered by Article 1F(a).

### **Crimes against peace**

26. The London Charter remains the only international instrument to contain a definition of this crime. It considers a crime against peace to arise from the “planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing”. Clearly, the adoption<sup>17</sup> of a definition of the “crime of aggression” for the purposes of the ICC Statute (Article 5(1)(d) and (2)) will provide much needed clarity regarding the scope of this offence.

27. Although non-binding in nature, discussion of “aggression” in both the UN General Assembly and the ILC is of some interest. “Aggression” has been defined by the General Assembly as “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any manner inconsistent with

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<sup>14</sup> Yearbook of ILC, 1950, vol. II.

<sup>15</sup> General Assembly resolution 3074 (XXVIII), 3 December 1973.

<sup>16</sup> A/CN.4/L.522, 31 May 1996.

<sup>17</sup> Pursuant to Articles 121 and 123 of the ICC Statute, adoption of such a definition will not be possible until at least seven years have elapsed from the entry into force of the Statute.

the Charter of the United Nations”.<sup>18</sup> Article 16 of the ILC’s Draft Code of Crimes Against the Peace and Security of Mankind states: “An individual, who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State, shall be responsible for a crime of aggression.”<sup>19</sup>

28. It is evident that crimes against peace can only be committed in the context of the planning or waging of a war or armed conflict. As wars or armed conflicts are only waged by States or State-like entities in the normal course of events, a crime against peace can only be committed by individuals in a high position of authority representing a State or State-like entity.

29. There are few precedents for exclusion of individuals under this category, (partly no doubt due to the paucity of international regulation in this area), and UNHCR is not aware of any jurisprudence dealing with crimes against peace as an exclusionary provision. Many acts that fall potentially within this concept may in any case also constitute war crimes and, indeed, crimes against humanity.

### **War crimes**

30. War crimes involve grave breaches of international humanitarian law<sup>20</sup> (otherwise known as the law of armed conflict) and can be committed by, or perpetrated against, civilian as well as military persons. Attacks committed against any person not or no longer taking part in hostilities, such as wounded or sick combatants, prisoners of war, or civilians are regarded as war crimes. 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 conflicts as well.<sup>21</sup> This is reflected in both the jurisprudence of the ICTY<sup>22</sup> and in the ICC Statute. An international armed conflict arises whenever the use of force is employed by one State against another. Determining the existence of a non-international armed conflict is often more complex.

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<sup>18</sup> General Assembly resolution 3312 (XXIX), 1974.

<sup>19</sup> ILC Report, A/51/10, 1996, ch. II(2), paragraphs 46–48. See also, <http://www.un.org/law/ilc/texts/dcodefra.htm>.

<sup>20</sup> International humanitarian law comprises rules which, in times of armed conflict, seek to protect persons who are not or are no longer taking part in the hostilities, and to restrict the methods and means of warfare employed.

<sup>21</sup> The precise scope of war crimes may, however, depend on the nature of the conflict. See, for example, the differentiation between war crimes committed in international armed conflict and those committed in non-international armed conflicts in Article 8 of the ICC Statute.

<sup>22</sup> In the case of *Tadic*, 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 Tribunal held, however, that violations of the laws or customs of war, commonly referred to as war crimes, include prohibitions of acts committed both in international and non-international armed conflicts. (ICTY Case No. IT-94-I-T, Decision of 10 August 1995 on Jurisdiction.)

Internal disturbances and tensions, such as riots and other sporadic acts of violence, do not constitute a non-international armed conflict.<sup>23</sup>

31. Article 8 of the ICC Statute sets out an extensive list of acts considered to be war crimes, but this list is not exhaustive, so recourse must also be made to other relevant instruments (set out in Annex B). Moreover, the forthcoming study by the International Committee of the Red Cross on customary rules of international humanitarian law<sup>24</sup> will provide further guidance on the scope of those war crimes found in the above instruments which are derived from customary international law.

32. War crimes, whether in the context of international or non-international armed conflict, cover such acts as:

- Wilful killing of protected persons in the context of the four Geneva Conventions
- Torture or other inhuman treatment, including biological experiments, on such persons
- Wilfully causing great suffering or serious injury to body or health
- Attacks on, or indiscriminate attacks affecting, the civilian population or those known to be *hors de combat*
- Attacking non-defended localities and demilitarised zones
- Taking civilians as hostages
- Transferring protected persons in occupied areas to the territory of the occupier
- Extensive destruction and appropriation of property, not justified by military necessity
- Wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial
- Compelling a prisoner of war to serve in the forces of a hostile power
- Pillaging
- Employing prohibited weapons such as poisonous gases

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<sup>23</sup> See Article 1 of Additional Protocol II to the 1949 Geneva Conventions and Articles 8(2)(d) and 8(2)(f) of the ICC Statute. Common Article 3 of the 1949 Geneva Conventions does not provide a clear definition of non-international armed conflicts to which it applies but it is generally thought to cover a wider range of situations than those set out in Article 1 of Additional Protocol II. This is reflected to some extent in Articles 8(2)(d) and 8(2)(f) of the ICC Statute which define situations of non-international armed conflict differently for war crimes arising from breaches of common Article 3 of the Geneva Conventions as compared with those flowing from violations of Additional Protocol II. In the case of *Tadic*, the ICTY held that a non-international armed conflict, in the context of common Article 3 of the Geneva Conventions, exists where there is “protracted armed violence between governmental armed authorities and organized armed groups or between such groups”. (Case No. IT-94-I-T, Trial Chamber judgment of 7 May 1997).

<sup>24</sup> International Committee of the Red Cross Study on “Customary Rules of International Humanitarian Law”, vols. 1 and 2, Cambridge University Press, forthcoming 2003; see also, <http://www.icrc.org/web/eng/siteeng0.nsf/iwpList263/CE72DB35175CA0FEC1256D330053FA7B>.

## Crimes against humanity

33. Crimes against humanity involve the fundamentally inhumane treatment of the population in the context of a widespread or systematic attack against it. It is possible, however, for a single act to constitute both a crime against humanity and a war crime. While the London Charter and ICTY Statute refer to such crimes as being committed in time of international or non-international armed conflict, it is now accepted that crimes against humanity can also take place in peacetime.<sup>25</sup> This development is confirmed by the ICC Statute, making this the broadest category under Article 1F(a).

34. The London Charter was the first international instrument to use the term “crimes against humanity” as a distinct category of international crimes. It has been further defined in the ICTY, ICTR and ICC Statutes (see Annex C). For example, Article 7 of the ICC Statute states that murder, extermination, enslavement, deportation or forcible transfer, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape and other forms of serious sexual violence, persecution, enforced disappearance, apartheid and other inhumane acts of a similar character, when such acts are committed as part of a widespread or systematic attack directed against any civilian population,<sup>26</sup> constitute crimes against humanity.

35. Genocide is a particular crime against humanity and Article 6 of the ICC Statute<sup>27</sup> replicates the definition found in Article II of the 1948 Genocide Convention:

... any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) imposing measures intended to prevent births within the group;
- (e) forcibly transferring children of the group to another group.

36. The ICC Statute confirms that crimes against humanity are distinguishable from isolated offences or common crimes as they must form part of a widespread or systematic attack against the civilian population. In some cases, this may be the result of a policy of persecution or serious and systematic discrimination against a particular national, ethnic, racial or religious group. An inhumane act committed against an individual may constitute a crime against humanity if it is part of a coherent system or a series of systematic and repeated acts.<sup>28</sup> Crimes against humanity may be identified from the

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<sup>25</sup> See ICTY case of *Tadic*, No. IT-94-1-D (Decision on Jurisdiction, 2 October 1995).

<sup>26</sup> “‘Attack directed against any civilian population’ means a course of conduct involving the multiple commission of [such] acts against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.” (Article 7(2)a, ICC Statute).

<sup>27</sup> Although genocide is dealt with in a separate provision to crimes against humanity in the ICC Statute, it should still be considered a crime against humanity for the purpose of Article 1F(a).

<sup>28</sup> See paragraph 271 of the judgment of the ICTY Appeals Chamber in the case of *Tadic* (No. IT-94-1-T, 15 January 1999).

nature of the acts in question, the extent of their effects, the knowledge of the perpetrator(s), and the context in which such acts take place.

## **B. ARTICLE 1F(b): SERIOUS NON-POLITICAL CRIMES**

37. Article 1F(b) provides for the exclusion from refugee status of persons who have committed a “serious non-political crime” outside the country of refuge prior to being admitted to that country as a refugee. By contrast, both the Constitution of the International Refugee Organisation (IRO) and the UNHCR Statute refer to extraditable crimes in the context of exclusion. Similar language was not retained for the 1951 Convention, which instead describes the nature of the crime with greater precision. State practice in applying this provision has varied, although as noted by the Supreme Court of Canada, Article 1F(b) “contains a balancing mechanism in so far as the specific adjectives ‘serious’ and ‘non-political’ must be satisfied”.<sup>29</sup>

### **Serious crime**

38. The term “serious crime” obviously has different connotations in different legal systems. It is evident that the drafters of the 1951 Convention did not intend to exclude individuals in need of international protection simply for committing minor crimes. Moreover, the gravity of the crime should be judged against international standards, not simply by its characterisation in the host State or country of origin. Indeed, the prohibition of activities guaranteed by international human rights law (for example, freedom of speech) should not be considered a “crime”, much less one of a serious nature.

39. In determining the seriousness of the crime the following factors are relevant:

- the nature of the act;
- the actual harm inflicted;
- the form of procedure used to prosecute the crime;
- the nature of the penalty for such a crime;
- whether most jurisdictions would consider the act in question as a serious crime.

40. The guidance in the Handbook<sup>30</sup> that a “serious” crime refers to a “capital crime or a very grave punishable act” should be read in the 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).

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<sup>29</sup> *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, Supreme Court of Canada, [1998] 1 SCR 982, paragraph 73.

<sup>30</sup> See paragraph 155 of the Handbook.

## Non-political crime

41. State practice on the concept of “non-political” has been varied, with some jurisdictions following more closely the approaches used in extradition law. A serious crime should be considered non-political when 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.<sup>31</sup> Thus, the motivation, context, methods and proportionality of a crime to its objectives are important factors in evaluating its political nature. Egregious acts of violence, such as those commonly considered to be of a “terrorist” nature, will almost certainly fail the predominance test, being wholly disproportionate to any political objective.<sup>32</sup>

42. Increasingly, extradition treaties specify that certain crimes, notably those characterised as acts of terrorism, are to be regarded as non-political for their purposes (although such treaties typically also contain non-persecution clauses). Such a designation is significant in determining the political element of a crime in the Article 1F context but should nevertheless be considered in light of all relevant factors.<sup>33</sup>

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<sup>31</sup> See paragraph 152 of the Handbook. This approach is reflected in the jurisprudence of many States. In *Aguirre-Aguirre v. Immigration and Naturalization Service (INS)*, 119 S.Ct. 1439 (1999), the US Supreme Court endorsed the approach taken in the earlier case of *McMullen v. INS*, 788 F. 2d 591 (9th Circuit 1986), which held that a “serious non-political crime” is a crime not committed out of “genuine political motives”, not directed toward the “modification of the political organization or ... structure of the state”, with no direct “causal link between the crime committed and its alleged political purpose and object” or where the act is disproportionate to the objective. In *T. v. Secretary of State for the Home Department*, [1996] Imm AR 443, the UK House of Lords held that a crime is political for the purposes of Article 1F(b) if it is committed for a political purpose (i.e. overthrow of government or inducing change in government policy) and there is a sufficiently close and direct link between the crime and the alleged purpose. In determining the latter, consideration must be given to whether the means employed were directed towards a military/government target and whether it was likely to involve indiscriminate killing or injury to members of the public. In *Wagner v. Federal Prosecutor and the Federal Justice and Police Department*, the Swiss Federal Tribunal ruled that “a common crime or offence constitutes a relative political offence if the act, given the circumstances and in particular the motivation and goals of the perpetrator, has a predominantly political character”. This is presumed if the offence “was carried out in the context of a power struggle within the State or if it was carried out to remove someone from under the power of a State suppressing all opposition. There must be a close, direct and clear link between such acts and their intended goal”. (Unofficial translation of judgment of the 2nd public law section of 3 October 1980, BGE, 106 IB 309.)

<sup>32</sup> See further paragraph 81 below.

<sup>33</sup> See *McMullen v. INS*, above footnote 31. For further, detailed analysis of extradition and how this relates to exclusion, see S. Kapferer, “The Interface between Extradition and Asylum”, Legal and Protection Policy Research Series, UNHCR, Department of International Protection, PPLA (forthcoming 2003).

43. For a crime to be regarded as political in nature, the political objective should be consistent with human rights and fundamental freedoms. A political goal which breaches fundamental human rights cannot form a justification. This is consistent with provisions of human rights instruments specifying that their terms shall not be interpreted as implying the right to engage in activities aimed at the destruction of the human rights and fundamental freedoms of others.

### **Outside the country of refuge**

44. 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”.<sup>34</sup> The term “outside the country of refuge” would normally be the country of origin, but it could also be another country apart from the country of refuge.<sup>35</sup> It cannot in principle be the country where the applicant seeks recognition as a refugee.<sup>36</sup> 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; they do not fall within the scope of the exclusion clause under Article 1F(b). The logic of the Convention is thus that the type of crimes covered by Article 1F(b) committed after admission would be handled through rigorous domestic criminal law enforcement and/or the application of Article 32 and Article 33(2) where necessary.

45. In rare cases, domestic courts have interpreted Article 1F(b) of the 1951 Convention to mean that any serious non-political crime committed before formal recognition as a refugee would lead automatically to the application of Article 1F(b). Under this interpretation, an applicant who committed a serious non-political crime in the country of asylum, but before formal recognition as a refugee, would be excluded. In UNHCR’s view, it would not be correct to use the phrase “prior to admission ... as a refugee” to refer to the period in the country prior to *recognition* as a refugee, as the recognition of refugee status is declaratory and not constitutive.<sup>37</sup> “Admission” in this context includes mere physical presence in the country.

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<sup>34</sup> See paragraphs 11 and 12 on the temporal aspect of the exclusion clauses generally.

<sup>35</sup> See also paragraph 153 of the Handbook.

<sup>36</sup> “The Conference eventually agreed that crimes committed before entry were at issue...”, G. S. Goodwin-Gill, *The Refugee in International Law*, Clarendon Press, Oxford, 2nd edition, 1996, p. 102.

<sup>37</sup> Likewise, the French Conseil d’Etat in a case concerning a recognised refugee who committed a crime in the country of asylum, ruled that even if Article 33(2) may permit the return of a refugee to his/her country of origin this article does not permit the removal of refugee status (*Pham*, 21 May 1997). The Conseil d’Etat further ruled that a crime committed by an asylum-seeker on the territory of a host country was subject to penal sanction and even to expulsion within the terms of Articles 32 and 33 of the 1951 Convention but did not justify exclusion from refugee status (*Rajkumar*, 28 September 1998).



### C. ARTICLE 1F(c): ACTS CONTRARY TO THE PURPOSES AND PRINCIPLES OF THE UNITED NATIONS

46. Article 1F(c) excludes from international protection as refugees persons who have been “guilty of acts contrary to the purposes and principles of the United Nations”.<sup>38</sup> The purposes and principles of the United Nations are spelt out in Articles 1 and 2 of the UN Charter,<sup>39</sup> although their broad, general terms offer little guidance as to the types of acts that would deprive a person of the benefits of refugee status. The *travaux préparatoires* are also of limited assistance, reflecting a lack of clarity in the formulation of this provision, but there is some indication that the intention was to cover violations of human rights which, although falling short of crimes against humanity, were nevertheless of a fairly exceptional nature. Indeed, as apparently foreseen by the drafters of the 1951 Convention, this provision has rarely been invoked.<sup>40</sup> In many cases, Article 1F(a) or Article 1F(b) are likely to be applicable to the conduct in question. Given the vagueness of this provision, the lack of coherent State practice and the dangers of abuse,<sup>41</sup> Article 1F(c) must be read narrowly.

47. The principles and purposes of the United Nations are reflected in myriad ways, for example by multilateral conventions adopted under the aegis of the UN General Assembly and in Security Council resolutions. Equating any action contrary to such instruments as falling within Article 1F(c) would, however, be inconsistent with the object and purpose of this provision. Rather, it appears that Article 1F(c) only applies to acts that offend the principles and purposes of the United Nations in a fundamental manner. Article 1F(c) is thus triggered only in extreme circumstances by activity which

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<sup>38</sup> Under Article 14(2) of the Universal Declaration of Human Rights, also, the right to seek and to enjoy in other countries asylum from persecution “may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations”.

<sup>39</sup> The purposes of the United Nations are: to maintain international peace and security; to develop friendly relations among nations; to achieve international cooperation in solving socio-economic and cultural problems, and in promoting respect for human rights; and to serve as a centre for harmonising the actions of nations. The principles of the United Nations are: sovereign equality; good faith fulfilment of obligations; peaceful settlement of disputes; refraining from the threat or use of force against the territorial integrity or political independence of another State; and assistance in promoting the work of the United Nations.

<sup>40</sup> Grahl-Madsen writes:

It appears from the records that those who pressed for the inclusion of the clause had only vague ideas as to the meaning of the phrase “acts contrary to the purposes and principles of the United Nations”... [I]t is easily understandable that the Social Committee of the Economic and Social Council expressed genuine concern, feeling that the provision was so vague as to be open to abuse. It seems that agreement was reached on the understanding that the phrase should be interpreted very restrictively.

A. Grahl-Madsen, *The Status of Refugees in International Law*, Sijthoff, Leyden, 1972, vol. 1, p. 283.

<sup>41</sup> During negotiations on Article 1F(c), the delegate of Pakistan, concurring with the representative of Canada, said the phrase was “so vague as to be open to abuse by governments wishing to exclude refugees” (E/AC.7/SR.160, p. 16).

attacks the very basis of the international community's coexistence under the auspices of the United Nations. The key words in Article 1F(c) – “acts contrary to the purposes and principles of the United Nations” – should therefore be construed restrictively and its application reserved for situations where an act and the consequences thereof meet a high threshold. This threshold should be defined in terms of the gravity of the act in question, the manner in which the act is organised, its international impact and long-term objectives, and the implications for international peace and security. Thus, crimes capable of affecting international peace, security and peaceful relations between States would fall within this clause, as would serious and sustained violations of human rights.

48. Furthermore, given that Articles 1 and 2 of the UN Charter essentially set out the fundamental principles States must uphold in their mutual relations, in principle only persons who have been in a position of power in their countries or in State-like entities would appear capable of violating these provisions (in the context of Article 1F(c)). In this context, the delegate at the Conference of Plenipotentiaries, who pressed for the inclusion of this clause, specified that it was not aimed at the “man in the street”. The UNHCR Handbook likewise states in paragraph 163 that “an individual, in order to have committed an act contrary to these principles, must have been in a position of power in a member State and instrumental to his State's infringing these principles”.<sup>42</sup> Indications in some jurisdictions that this provision can apply to individuals not associated with a State or State-like entity do not reflect this general understanding.<sup>43</sup> Moves to apply this provision more broadly, for example to activities such as drug trafficking<sup>44</sup> or smuggling/trafficking of migrants, are also misguided.

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<sup>42</sup> See, for example, the case of X. and family, judgment of 14 May 1996, EMARK 1996/18, Swiss Asylum Appeals Commission, applying Articles 1F(a) and 1F(c), concerning a high-ranking official in the Somali government, and the case of *Nader*, decision of 26 October 2001, French Commission des recours des réfugiés, sections réunis (Refugee Appeals Commission), concerning a high-ranking member of the South Lebanese Army commanding the militia group's special forces. In other cases, exclusion under Article 1F(c) was ruled out on the grounds that the individual's rank was not sufficiently high. See, for instance, the decisions of the Swiss Asylum Appeals Commission in the cases of Y.Z. and family, 14 September 1998 (former cabinet member of Najibullah regime in Afghanistan); Y.N., 27 November 2001 (former major in special presidential division (DSP) of Mobutu regime in former Zaire), and D.M., 17 December 2001 (low-ranking officer in former Zaire). By contrast, the Belgian Commission permanente de recours des réfugiés (Permanent Refugee Appeals Commission, CPRR) excluded a member of the DSP on the grounds that the applicant could not reasonably have ignored the Division's role, nor the nature of the missions entrusted to him over a period of two years, CPRR, R3468, 25 June 1996. See S. Kapferer, “Exclusion Clauses in Europe – A Comparative Overview of State Practice in France, Belgium and the United Kingdom”, 12 *International Journal of Refugee Law*, 2000, p. 195 at p. 212.

<sup>43</sup> In *Pushpanathan*, see above footnote 29, the Supreme Court of Canada indicated that although the application of Article 1F(c) to non-state actors may be difficult, the possibility “should not be excluded a priori” (paragraph 68).

<sup>44</sup> In *Pushpanathan*, see above footnote 29, the Supreme Court of Canada rejected the argument that drug trafficking fell within Article 1F(c) and returned the case to the Convention Refugee Determination Division (CRDD), which excluded him from refugee status under Article 1F(a) and 1F(c) for crimes against humanity and complicity in terrorist activities associated with the Liberation Tigers of Tamil Eelam (LTTE). The Federal Court Trial Division later upheld the

49. The question of whether acts of international terrorism fall within the ambit of Article 1F(c) has nevertheless become of increasing concern, including not least since the Security Council determined in Resolutions 1373(2001) and 1377(2001) that acts of international terrorism are a threat to international peace and security and are contrary to the purposes and principles of the United Nations. Yet the assertion – even in a UN instrument – that an act is “terrorist” in nature would not by itself suffice to warrant the application of Article 1F(c), not least because “terrorism” is without clear or universally agreed definition. Rather than focus on the “terrorism” label, a more reliable guide to the correct application of Article 1F(c) in cases involving a terrorist act is the extent to which the act impinges on the international plane – in terms of its gravity, international impact, and implications for international peace and security. In UNHCR’s view, only terrorist acts that are distinguished by these larger characteristics, as set out by the aforementioned Security Council Resolutions, should qualify for exclusion under Article 1F(c). Given the general approach to Article 1F(c) described above, egregious acts of international terrorism affecting global security may indeed fall within the scope of Article 1F(c), although only the leaders of groups responsible for such atrocities would in principle be liable to exclusion under this provision. As discussed in paragraphs 41, 79–84, terrorist activity may also be excludable under the other exclusion provisions.

#### **D. INDIVIDUAL RESPONSIBILITY**

50. The question of exclusion often hinges on the extent to which the individual is personally responsible for the acts in question. General principles regarding individual liability are discussed below, but specific considerations apply to crimes against peace and acts against the purposes and principles of the United Nations. As crimes against peace (Article 1F(a)) are committed in the context of the planning or waging of aggressive wars or armed conflicts and armed conflicts are only waged by States or State-like entities, traditionally personal liability under this provision can only attach to individuals in a position of high authority representing a State or State-like entity. (The ICC definition when adopted will provide clarification on this issue.)<sup>45</sup> Similarly, as mentioned before, it is generally understood that acts covered by Article 1F(c) can only be committed by persons holding high positions in a State or State-like entity.<sup>46</sup> By contrast, individuals with or without any connection to a State can perpetrate war crimes, crimes against humanity and serious non-political crimes.

51. In general, individual responsibility, and therefore the basis for exclusion, 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. Even in the face of the horrors of the Nazi regime, the

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CRDD decision, relying on a dissenting opinion of the 1998 Supreme Court decision in the case but without otherwise addressing the issue (IMM-4427-01, judgment of 3 September 2002).

<sup>45</sup> See above footnote 11.

<sup>46</sup> See paragraph 48 above.

International Military (Nuremberg) Tribunal did not attribute collective responsibility in the cases of “persons who had no knowledge of the criminal purposes or acts of the organization and those who were drafted by the State for membership, unless they were personally implicated” in the commission of the acts in question. According to the Tribunal: “The criterion for criminal responsibility ... lies in moral freedom, in the perpetrator’s ability to choose with respect to the act of which he is accused.”<sup>47</sup> This approach is also reflected in Articles 25 and 28 of the ICC Statute. Article 25 sets out the grounds for individual responsibility for crimes under its jurisdiction. 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.

52. Contemporary guidance on the nature of individual criminal responsibility can be found in the jurisprudence of the ICTY and ICTR, in particular in the ICTY judgment in the case of *Kvočka et al* (Omarska and Keraterm camps)<sup>48</sup> where grounds for individual responsibility were discussed under four headings – instigation, commission, aiding and abetting, and participation in a joint criminal enterprise.<sup>49</sup> “Instigating” was described as the prompting of another person to commit an offence, with the intent to induce the commission of the crime or in the knowledge that there was a substantial likelihood that the commission of a crime would be a probable consequence. “Commission” of a crime, the most obvious form of culpability, was considered to arise from the physical perpetration of a crime or from engendering a culpable omission in violation of the criminal law, in the knowledge that there was a substantial likelihood that the commission of the crime would be the consequence of the particular conduct.

53. “Aiding or abetting” requires the individual to have rendered a substantial contribution to the commission of a crime in the knowledge that this will assist or facilitate the commission of the offence. The contribution may be in the form of practical assistance, encouragement or moral support and must have a substantial (but not necessarily causal) effect on the perpetration of the crime. Aiding or abetting may consist of an act or omission and may take place before, during or after the commission of the crime, although the requirement of a substantial contribution must always be borne in mind, especially when failure to act is in question. Thus, presence at the scene of a crime is not in itself conclusive of aiding or abetting, but it could give rise to such liability if such presence is shown to have had a significant legitimising or encouraging effect on the principal actor. This may often be the case where the individual present is a superior to those committing the crimes (although liability in such circumstances may also arise under the doctrine of command/superior responsibility, discussed below in paragraph 56).

54. Finally, the Trial Chamber in *Kvočka et al* considered liability arising from participation in a joint criminal enterprise (or common purpose), whether as a co-

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<sup>47</sup> Quoted in N. Weisman, “Article 1F(a) of the 1951 Convention Relating to the Status of Refugees in Canadian Law”, 8 *International Journal of Refugee Law*, 1996, p. 111 at p. 132.

<sup>48</sup> Case No. IT-98-30/1, Trial Chamber judgment, 2 November 2001. The Trial Chamber built upon the approach taken by the ICTY Appeal Chamber in *Tadic*, Case No. IT-94-1, 15 July 1999.

<sup>49</sup> See paragraph 122 onwards of the judgment.

perpetrator or as an aider or abettor. 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 ...”<sup>50</sup>

55. 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 organisation or group, and (perhaps most importantly) the role of the individual in relation to the seriousness and the scope of the crimes committed.<sup>51</sup>

56. Article 28 of the ICC Statute deals with the specific issue of command/superior responsibility. This provision states that a military commander is responsible for crimes committed by those under his or her effective control if she or he knew or, in the circumstances, ought to have known that his or her subordinates were committing or about to commit such crimes but he or she failed to take all necessary and reasonable measures within his or her power to prevent or repress such acts or to submit the matter to the competent authorities for investigation and prosecution.<sup>52</sup> A similar responsibility is attributed to superiors outside the military context, but only where the crimes fall within his or her area of effective control and responsibility and where the superior either knew or consciously disregarded information that such crimes were about to take, or were taking, place.

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<sup>50</sup> Paragraph 312 of the judgment. The Trial Chamber goes on to state:

The culpable participant *would not need to know of each crime committed*. Merely knowing that crimes are being committed within a system and knowingly participating in that system in a way that substantially assists or facilitates the commission of a crime or which allows the criminal enterprise to function effectively or efficiently would be enough to establish criminal liability. *The aider or abettor or co-perpetrator of a joint criminal enterprise contributes to the commission of the crimes by playing a role that allows the system or enterprise to continue its functioning.* (ibid., emphasis added)

<sup>51</sup> Thus, the Trial Chamber indicated that an accountant who works for a company initially in ignorance of its involvement in distributing child pornography might become liable as a participant in the criminal enterprise if he continues to work for the company after he discovers the true nature of its activities. His ongoing role in the company would make a substantial contribution to the criminal enterprise. On the other hand, the office cleaner who becomes aware of the company’s criminal activities but continues to perform his role would not attract individual responsibility as his functions are not sufficiently significant in terms of furthering the criminal enterprise (paragraphs 285–6).

<sup>52</sup> For an exploration of command responsibility under the ICTY Statute see the judgment in *Blaskic*, No. IT-95-14-T, 3 March 2000.

## Senior officials of repressive regimes

57. Given the principles set out above, the automatic exclusion of persons purely on the basis of their senior position in a government is not justified. “Guilt by association” judges a person on the basis of their title rather than their actual responsibilities or actions. Instead, an individual determination of responsibility is required for each official in order to ascertain whether the applicant knew of the acts committed or planned, tried to stop or oppose the acts, and/or deliberately removed him- or herself from the process.<sup>53</sup> Moreover, consideration must be given as to whether the individual had a moral choice.<sup>54</sup> Persons who are found to have performed, engaged in, participated in orchestrating, planning and/or implementing, or to have condoned or acquiesced in the carrying out of criminal acts by subordinates, should be excluded from refugee status.<sup>55</sup>

58. Notwithstanding the above, a presumption of individual responsibility reversing the burden of proof may arise as a result of such a senior person’s continued membership of a government (or part of it) clearly engaged in activities that fall within the scope of Article 1F. This would be the case, for example, where the government concerned has faced international condemnation (in particular from the UN Commission on Human Rights or the Office of the UN High Commissioner of Human Rights) for gross or systematic human rights abuses. Where the individual has remained in a senior government position despite such criticisms, exclusion may be justified, unless he or she can rebut the presumption of knowledge and personal involvement in such abuses.

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<sup>53</sup> See paragraph 56 above concerning the issue of command/superior responsibility.

<sup>54</sup> In establishing that the acts in question were voluntary or that no choice was available for the individual, relevant questions may include: Were the acts part of official government policy of which the official was aware? Was the official in a position to influence this policy one way or the other? To what extent would the official’s life or that of family members have been endangered if he or she had refused to be associated with or involved in the perpetration of the crime(s)? Did the official make any attempt to distance him- or herself from the policy, or to resign from the government? For cases examining these issues, see above footnote 42.

<sup>55</sup> In a recent decision of the ICTY, *Prosecutor v. Dr Milomir Stakic*, Case No. IT-97-24, 31 July 2003, the Trial Chamber II found that the defendant’s participation in crimes against humanity and violations of the laws and customs of war, which had occurred in the Prijedor Municipality of Bosnia and Herzegovina, where the defendant had held leading positions in the municipality at the time, amounted to co-perpetration. The summary of the Trial Chamber judgment noted that for co-perpetration, “it is essential to prove the existence of an agreement or silent consent to reach a common goal by coordinated co-operation with joint control over the criminal conduct. The co-perpetrator must have acted in the awareness of the substantial likelihood that crimes would occur and must have been aware that his role was essential for the achievement of the common goal.” The Trial Chamber also found that the “common goal could not be achieved without joint control over the final outcome and this element of interdependency characterises the criminal conduct. No participant could have achieved the common goal on his own. However, each participant could individually have frustrated the plan by refusing to play his part or by reporting crimes.”

## **Organisations which commit violent crimes or incite others to commit them<sup>56</sup>**

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 knowingly contributed in a substantial manner to such acts. A plausible explanation regarding the applicant's non-involvement or dissociation 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.<sup>57</sup>

60. Nevertheless, the purposes, activities and methods of some groups, sub-groups or organisations are of a particularly violent nature, for example where this involves indiscriminate killing or injury of the civilian population, or acts of torture. Where membership of such a group is voluntary, it raises a presumption that the individual concerned has somehow contributed significantly to the commission of violent crimes, even if this is simply by substantially assisting the organisation to continue to function effectively in pursuance of its aims.<sup>58</sup> In such cases, the burden of proof is reversed.<sup>59</sup> Membership may, in such cases, give rise to individual responsibility, for example, where the person concerned is in control of the funds of an organisation that he or she knows is dedicated to achieving its aims through violent crimes.<sup>60</sup>

61. Caution must be exercised when such a presumption of responsibility arises. Care should be taken to consider the actual activities of the group, the organisation's place and

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<sup>56</sup> See also section on terrorism below at paragraphs 79–84.

<sup>57</sup> For example, in one Canadian case the applicant, who had been forcibly conscripted into the Salvadoran army, deserted at the first possible opportunity after finding out that the army used torture. The court considered this a relevant factor in concluding that the applicant was not guilty of the commission of war crimes or crimes against humanity or excludable from refugee status. *Moreno v. Canada (Minister of Employment and Immigration)*, Action A-746-91 (Federal Court of Appeal, 14 September 1993).

<sup>58</sup> See paragraphs 50–55 above, for discussion of individual responsibility, including in the context of a joint criminal enterprise in the ICTY judgment in *Kvočka et al* (Omarska and Keraterm camps), IT-98-30/1, 2 November 2001.

<sup>59</sup> See below paragraphs 105–106.

<sup>60</sup> See, for example, the Canadian case of *Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 FC 317 (CA): “Mere membership in an organization which from time to time commits international offences is not normally sufficient for exclusion from refugee status... [N]o one can commit international crimes without personal and knowing participation”. The Court found, further, that mere presence at the scene of an offence is insufficient to qualify as personal and knowing participation. The Court also held, however, that “where an organization is principally directed to a limited, brutal purpose, such as a secret police activity, mere membership may by necessity involve personal and knowing participation in persecutorial acts”.

role in the society in which it operates,<sup>61</sup> its organisational structure, the individual's position in it, and his or her ability to influence significantly its activities. Regard must also be had to the possible fragmentation of certain organisations. In some cases, the group in question is unable to control acts of violence committed by militant wings. Unauthorised acts may also be carried out in the name of the group. Moreover, the nature of the group's violent conduct may have evolved, so the individual's membership must be examined in the context of the organisation's behaviour at the relevant time. Finally, defences to exclusion, such as duress, should be kept in mind.

62. Given the above, where an individual is associated with an organisation denounced as terrorist on a list drawn up by the international community (or, indeed, individual States) this does not mean exclusion is automatically justified.<sup>62</sup> Rather, consideration of the applicability of the exclusion clauses is triggered. A presumption of individual responsibility may arise if the list has a credible basis and if the criteria for placing a particular organisation or individual on the list are such that all members or the listed person(s) can reasonably be considered to be individually involved in violent crimes.<sup>63</sup>

### **Ex-combatants<sup>64</sup>**

63. Former members of military units should not necessarily be considered excludable, unless of course serious violations of international human rights law and international humanitarian law are reported and indicated in the individual case. Also, the fact that such individuals may initially have been subject to separation from the refugee population in mass influx situations should not be read as tantamount to a legal finding of exclusion.<sup>65</sup> If ex-combatants have been involved in conflicts characterised by violations of international humanitarian law, the question of individual responsibility should be examined. This will raise similar issues to those discussed above in relation to members

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<sup>61</sup> See *Gurung v. Secretary of State for the Home Department*, UK Immigration Appeal Tribunal, Appeal No. [2002]UKIAT04870 HX34452-2001, 15 October 2002, summary of conclusions, paragraph 3, which continues: "The more an organisation makes terrorist acts its modus operandi, the more difficult it will be for a claimant to show his voluntary membership of it does not amount to complicity."

<sup>62</sup> The impact of lists of terrorist suspects or organisations is discussed further in paragraphs 80, 106 and 109 below.

<sup>63</sup> The United Nations Security Council (UNSC) Sanctions Committee, established in 1999 by Security Council (SC) Resolution 1267(1999) which imposed sanctions on Taliban-controlled Afghanistan, has since 2000 been mandated under SC resolution 1333(2000) to establish and maintain a list of individuals and entities designated as being associated with al-Qaida and the Taliban. The existing sanctions, which the Committee is mandated to monitor, require all States to do the following in connection with listed individuals and entities: freeze assets, prevent entry into or transit through their territories, and prevent the direct or indirect sale, supply and transfer of arms and military equipment. The UNSC Counter-Terrorism Committee, established by UNSC resolution 1373(2001), does not have a list of terrorist organisations or individuals.

<sup>64</sup> For the purpose of this background note, the term "ex-combatant" applies to persons who took an active part in a non-international or international armed conflict.

<sup>65</sup> See Executive Committee, Conclusion No. 94 (LIII), 2002, paragraph (c)(vii) and, for exclusion in mass influx situations, paragraphs 96–97 below.



of organisations which commit violent crimes. It is, however, important to note that in many cases exclusion may not be relevant at all as the former combatant may not have a well-founded fear of persecution.

## **E. GROUNDS FOR REJECTING INDIVIDUAL RESPONSIBILITY**

### **Lack of mental element (*mens rea*)**

64. As reflected in Article 30 of the ICC Statute, criminal responsibility can normally only arise where the individual concerned committed the material elements of the offence with knowledge and intent. Where there is no such mental element (*mens rea*) a fundamental aspect of the criminal offence is missing and therefore no individual criminal responsibility arises. A person has intent where, in relation to conduct, the person means to engage in the conduct or, in relation to consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events. Knowledge means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. Thus, for example, an individual who intended to commit the act of murder cannot be liable for a crime against humanity if he or she was unaware of an ongoing widespread or systematic attack against the civilian population. Such knowledge is a requisite component of the mental element of a crime against humanity. In such a case, the applicability of Article 1F(b) may be more appropriate.

65. In certain circumstances the individual may actually lack the mental capacity to be held responsible for a crime, for example, on the grounds of insanity, mental handicap, involuntary intoxication or, in the case of children, immaturity.<sup>66</sup>

### **Defences to criminal liability**

66. Regard should be had to general principles of criminal liability to determine whether a valid defence exists for the crime in question, as outlined in the examples below.

#### *(i) Superior orders*

67. A commonly-invoked defence is that of “superior orders” or coercion by higher governmental authorities, although it is an established principle of law that the defence of superior orders does not absolve individuals of blame. According to the Nuremberg Principles: “The fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility under international law, provided a moral choice was in fact possible for him.”<sup>67</sup>

68. Article 7(4) of the ICTY Statute provides that “the fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility”. Article 33 of the ICC Statute states that the defence of superior orders

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<sup>66</sup> See also paragraph 91 below on minors.

<sup>67</sup> Principle IV, Nuremberg Principles.

will only apply if the individual in question was under a legal obligation to obey the order in question, was unaware that the order was unlawful and the order itself was not manifestly unlawful (the latter being deemed so in all cases of genocide or crimes against humanity).

*(ii) Duress/coercion*

69. The defence of duress was often linked to that of superior orders during the post-Second World War trials. According to Article 31(d) of the ICC Statute, the defence of duress only applies if the incriminating act in question

results from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided.

There are, therefore, stringent conditions to be met for the defence of duress to arise.

70. Where duress is pleaded by an individual who acted on the command of other persons in an organisation, consideration should be given as to whether the individual could reasonably have been expected simply to renounce his or her membership, and indeed whether he or she should have done so earlier if it was clear that the situation in question would arise. Each case should be considered on its own facts. The consequences of desertion plus the foreseeability of being put under pressure to commit certain acts are relevant factors.

*(iii) Self-defence; defence of other persons or property*

71. The use of reasonable and necessary force to defend oneself rules out criminal liability. Similarly, reasonable and proportionate action to defend another person or, in the case of war crimes, property which is essential for the survival of the person or another person or for accomplishing a military mission, against an imminent and unlawful use of force, may also provide a defence to criminal responsibility under certain circumstances (see, for example, Article 31(c) of the ICC Statute).

## **Expiation**

72. The exclusion clauses themselves are silent on the role of expiation, whether by serving a penal sentence, the grant of a pardon or amnesty, the lapse of time, or other rehabilitative measures. Paragraph 157 of the Handbook states that:

... The fact that an applicant convicted of a serious non-political crime has already served his sentence or has been granted a pardon or has benefited from an amnesty is also relevant. In the latter case, there is a presumption that the exclusion clause is no longer applicable, unless it can be shown that, despite the pardon or amnesty, the applicant's criminal character still predominates.

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.<sup>68</sup> 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).

74. As for lapse of time, this in itself would not seem good grounds for setting aside the exclusion clauses, particularly in the case of crimes generally considered not subject to a statute of limitation. A case by case approach is necessary once again, however, taking into account the actual period of time that has elapsed, the seriousness of the offence and whether the individual has expressed regret or renounced criminal activities.

75. The effect of pardons and amnesties also raises difficult issues. Although there is a trend in some regions towards ending impunity for those who have committed serious violations of human rights, this has not become a widely accepted practice. In considering the impact on Article 1F, consideration should be given as to whether the pardon or amnesty in question is an expression of the democratic will of the relevant country and whether the individual has been held accountable in other ways (e.g. through a Truth and Reconciliation Commission). In some cases, a crime may be of such a heinous nature that the application of Article 1F is still considered justified despite the existence of a pardon or amnesty.

## **F. PROPORTIONALITY CONSIDERATIONS**

76. The incorporation of a proportionality test when considering exclusion and its consequences provides a useful analytical tool to ensure that the exclusion clauses are applied in a manner consistent with the overriding humanitarian object and purpose of the 1951 Convention.<sup>69</sup> State practice on this issue is not, however, uniform with courts in some States rejecting such an approach, generally in the knowledge that other human rights protection mechanisms will apply to the individual,<sup>70</sup> while others take account of proportionality considerations.<sup>71</sup>

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<sup>68</sup> See, for example, the case of O.M., Swiss Asylum Appeals Commission, judgment of 25 March 1999.

<sup>69</sup> On a similar basis, modern extradition treaties generally include a provision prohibiting the surrender of fugitives to the requesting State where this would lead to their persecution.

<sup>70</sup> Such mechanisms are discussed above in paragraph 22 and Annex A.

<sup>71</sup> For example, the Belgian Commission permanente de recours des réfugiés has balanced the threat of persecution against the gravity of the crimes committed in the case of Ethiopian asylum-seekers (decisions W4403 of 9 March 1998 and W4589 of 23 April 1998). Proportionality

77. In UNHCR's view, consideration of proportionality is an important safeguard in the application of Article 1F. The concept of proportionality, while not expressly mentioned in the 1951 Convention or the *travaux préparatoires*, has evolved in particular in relation to Article 1F(b), since it contains a balancing test in so far as the specific terms "serious" and "non-political" must be satisfied.<sup>72</sup> More generally, it represents a fundamental principle of international human rights law<sup>73</sup> and international humanitarian law.<sup>74</sup> Indeed, the concept runs through many fields of international law.<sup>75</sup> As with any

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considerations have also arisen in Swiss cases, for example in Decision 1993 No. 8, the Swiss Asylum Appeals Commission held:

To determine an act to be a particularly serious crime in the sense of Article 1F(b) of the Convention, it is necessary that, all things considered, the interest of the perpetrator in being protected against serious threats of persecution in his country of origin appear less by comparison with the reprehensible nature of the crime that he committed and with his guilt. (unofficial translation. Original text reads: Pour qualifier une action de crime particulièrement grave au sens de l'art. 1 F, let. b de la Convention, il faut que, tout bien pesé, l'intérêt de l'auteur à être protégé de graves menaces de persécutions dans son pays d'origine apparaisse moindre en comparaison du caractère répréhensible du crime que celui-ci a commis ainsi que sa culpabilité.)

In the case of E.K., judgment of 2 November 2001, EMARK 2002/9, concerning two former members of the Kurdish separatist PKK from Turkey, the Swiss Asylum Appeals Commission took into account proportionality considerations, such as the length of time since the acts were committed, the young age at which they were committed, and the asylum-seekers' subsequent withdrawal from the organisation.

<sup>72</sup> See text above at footnote 29.

<sup>73</sup> This is reflected, for example, in the jurisprudence of the European Court of Human Rights. The principle of proportionality is not mentioned in the text of the 1950 European Convention on Human Rights (ECHR), but it has emerged as a key concept in the jurisprudence, in particular to assess whether an interference with an ECHR right is justified under a specified exception. For example, in the case of *Silver v. United Kingdom* (1983), the Court, in summarising certain principles to determine whether an interference to a right under the ECHR was "necessary in a democratic society", included a requirement that the interference must be "proportionate to the legitimate aim pursued" (paragraph 97). In this case, the Court found violations under Article 8 of the right of the applicants, who were convicted prisoners, to respect for their correspondence. Proportionality considerations are therefore employed in order to balance the general interests of the community with the fundamental rights of the individual. They also arise in the context of the 1966 International Covenant on Civil and Political Rights (ICCPR). For example, the Human Rights Committee in its decision in *Guerrero v. Colombia* (CCPR/C/15/D/45/1979, 31 March 1982) found a breach of Article 6(1) of the ICCPR (right to life) on the basis that the use of force by the police was disproportionate to the law enforcement requirements of the situation, thus leading to the arbitrary death of the individual concerned (paragraph 13.3).

<sup>74</sup> For example, Article 51(5)(b) of Additional Protocol I to the Geneva Conventions prohibits indiscriminate attacks, including attacks "which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated".

<sup>75</sup> The International Court of Justice (ICJ) in its judgment in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, ICJ Reports, 1986, p. 14, found that the right of self-defence, as an exception to the prohibition on the use of force in the UN Charter, must be exercised in a proportionate manner. The ICJ confirmed that this proportionality

exception to a human rights guarantee, the exclusion clauses must therefore be applied in a manner proportionate to their objective, especially bearing in mind that a decision leading to exclusion does not equate with a full criminal trial<sup>76</sup> and that human rights guarantees may not represent an accessible “safety valve” in some States.

78. In reaching a decision on exclusion, it is therefore necessary to weigh up the gravity of the offence for which the individual appears to be responsible against the possible consequences of the person being excluded, including notably the degree of persecution feared. If the applicant is likely to face severe persecution, the crime in question must be very serious in order to exclude the applicant. This being said, such a proportionality analysis would normally not be required in the case of crimes against peace, crimes against humanity, and acts contrary to the purposes and principles of the United Nations, as the acts covered are so heinous that they will tend always to outweigh the degree of persecution feared. By contrast, war crimes and serious non-political crimes cover a wider range of behaviour. For those activities which fall at the lower end of the scale, for example, isolated incidents of looting by soldiers, exclusion may be considered disproportionate if subsequent return is likely to lead, for example, to the individual’s torture in his or her country of origin. Where, however, persons have intentionally caused death or serious injury to civilians as a means of intimidating a government or a civilian population, they are unlikely to benefit from proportionality considerations.

## **G. APPLICABILITY OF ARTICLE 1F TO PARTICULAR ACTS**

### **Terrorism<sup>77</sup>**

79. There is, as yet, no internationally accepted legal definition of terrorism. The final report of the International Law Commission on the Draft Code of Crimes against the Peace and Security of Mankind did not include a crime of “terrorism”, nor do the ICC Statute or recent Security Council Resolutions concerning action to combat terrorism in the face of the attacks in the United States on 11 September 2001. Negotiations continue on a draft UN Comprehensive Convention on International Terrorism.<sup>78</sup> At the regional level, however, the December 2001 European Union Common Position on the Application of Specific Measures to Combat Terrorism<sup>79</sup> attempts to provide a general

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requirement was a requirement of customary international law in its Advisory Opinion on the Legality of Use of Nuclear Weapons (1996).

<sup>76</sup> See paragraph 107 below on standard of proof.

<sup>77</sup> For a recent discussion of terrorism in the context of refugee protection, see UNHCR, “Addressing Security Concerns without Undermining Refugee Protection”, November 2001.

<sup>78</sup> See also, Report of the UN Working Group on Measures to Eliminate Terrorism, 29 October 2001 (A/C.6/56/L.9); Policy Working Group on the United Nations and Terrorism, Report, 6 August 2002 (A/57/273 S/2002/875).

<sup>79</sup> “Terrorist act” is defined in Article 1(3) of Council Common Position of 27 December 2001 (2001/931/CFSP) as:

one of the following intentional acts, which, given its nature or its context, may seriously damage a country or an international organisation, as defined as an offence under national law, where committed with the aim of:

(i) seriously intimidating a population, or

definition of terrorist acts. In the continuing absence of a universally accepted definition of terrorism, the focus has been on prohibiting specific acts that are condemned by the entire international community, irrespective of the motive behind them. There are currently some twenty global or regional treaties pertaining to international terrorism, although not all of them are in force.<sup>80</sup>

80. In many cases, consideration of the exclusion clauses will not be necessary in relation to terrorist suspects as their fear will be of legitimate prosecution for criminal acts as opposed to persecution for a 1951 Convention reason.<sup>81</sup> Where an individual has committed terrorist acts as defined within the international instruments mentioned in Annex D and a risk of persecution is at issue, the person may be excludable from refugee status.<sup>82</sup> In these circumstances, the basis for exclusion under Article 1F will depend on the act in question and all surrounding circumstances. In each and every case, individual responsibility must be established, that is, the individual must have committed the act of terrorism or knowingly made a substantial contribution to it. This remains the case even when membership of the organisation in question is itself unlawful in the country of origin or refuge. The fact that an individual may be on a list of terrorist suspects or

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- (ii) unduly compelling a Government or an international organisation to perform or abstain from performing any act, or
  - (iii) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation:
    - (a) attacks upon a person's life which may cause death;
    - (b) attacks upon the physical integrity of a person;
    - (c) kidnapping or hostage taking;
    - (d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property, likely to endanger human life or result in major economic loss;
    - (e) seizure of aircraft, ships or other means of public or goods transport;
    - (f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons;
    - (g) release of dangerous substances, or causing fires, explosions or floods the effect of which is to endanger human life;
    - (h) interfering with or disrupting the supply of water, power or any other fundamental natural resource, the effect of which is to endanger human life;
    - (i) threatening to commit any of the acts listed under (a) to (h);
    - (j) directing a terrorist group;
    - (k) participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the group."

<sup>80</sup> See Annex D and UN Secretary-General's Report on Measures to Eliminate Terrorism, (A/56/160), 3 July 2001.

<sup>81</sup> Care must be taken to distinguish between prosecution for legitimate reasons and prosecution as a form of persecution (see paragraphs 56–60 of the Handbook).

<sup>82</sup> See paragraph 109 below on the care to be taken when referring to the various definitions of terrorist crimes.

associated with a proscribed terrorist organisation should trigger consideration of the exclusion clauses. Depending on the organisation, exclusion may be presumed but it does not mean exclusion is inevitable.<sup>83</sup>

81. In many such cases, it is Article 1F(b) that will apply as violent acts of terrorism are likely to fail the predominance test<sup>84</sup> used to determine whether the crime is political. Moreover, if one of the international treaties mentioned in Annex D has abolished the political offence exemption in relation to extradition for the act in question, this would suggest that the crime is non-political for the purposes of Article 1F(b). It is not, however, a case of deeming all terrorist acts to be non-political but of judging the individual act in question against the Article 1F(b) criteria.<sup>85</sup>

82. Moreover, although providing funds to “terrorist groups” is generally a criminal offence, (and indeed instruments such as the 1999 International Convention for the Suppression of Financing of Terrorism require this), such activities may not necessarily reach the gravity required to fall under Article 1F(b).<sup>86</sup> The particulars of the specific crime need to be looked at – if the amounts concerned are small and given on a sporadic basis, the offence may not meet the required level of seriousness. On the other hand, a regular contributor of large sums to a terrorist organisation may well be guilty of a serious non-political crime. Apart from constituting an excludable crime in itself, financing may also lead to individual responsibility for other terrorist crimes. For example, where a person has consistently provided large sums to a group in full knowledge of its violent aims, that person may be considered to be liable for violent acts carried out by the group as his or her monetary assistance has substantially contributed to such activities. Factors leading to individual responsibility in such circumstances are discussed in paragraphs 50–56 above.

83. Although Article 1F(b) is of most relevance in connection with terrorism, in certain circumstances a terrorist act may well fall within Article 1F(a), for example as a crime

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<sup>83</sup> The evidential value of such lists is considered in paragraphs 62, 106 and 109 of this Background Note.

<sup>84</sup> See paragraph 41 above.

<sup>85</sup> In *T. v. Secretary of State for the Home Department*, [1996] Imm AR 443, the UK House of Lords stated:

We too think it is inappropriate to characterise indiscriminate bombings which lead to the death of innocent people as political crimes. Our reason is not that all terrorist acts fall outside the protection of the Convention. It is that it cannot be properly said that these particular offences qualify as political. In our judgement, the airport bombing [at issue in the case] in particular was an atrocious act, grossly out of proportion to any genuine political objective. There was simply no sufficiently close or direct causal link between it and the appellant’s alleged political purpose. It offends common sense to suppose that FIS’s [Front Islamique du Salut] cause of supplanting the government could be directly advanced by such an offence.

<sup>86</sup> In any case, financing offences should not cover contributions to groups that are engaged in armed conflicts and who abide by the relevant rules of international humanitarian law. This is recognised, for example, in Article 2(1)(b) of the 1999 International Convention for the Suppression of the Financing of Terrorism.

against humanity. In exceptional circumstances, the leaders of terrorist organisations carrying out particularly heinous acts of international terrorism which involve serious threats to international peace and security may be considered to fall within the scope of Article 1F(c).<sup>87</sup>

84. In the international community's efforts to combat acts of terrorism it is important that unwarranted associations between terrorists and refugees/asylum-seekers are avoided. Moreover, definitions of terrorist crimes adopted on the international, regional and national level will need to be extremely precise to ensure that the "terrorist" label is not abused for political ends, for example to prohibit the legitimate activities of political opponents. Such definitions may influence the interpretation of the exclusion clauses and, if distorted for political ends, could lead to the improper exclusion of certain individuals.<sup>88</sup> Indeed, unwarranted applications of the "terrorist" label could trigger recriminations amounting to persecution against an individual.

### **Hijacking**

85. Hijacking is an internationally condemned act as reflected by a number of the treaties listed in Annex D, but an act of hijacking does not automatically exclude the perpetrator from refugee status. Rather, it requires consideration of the exclusion clauses, notably Article 1F(b), in the light of the particular circumstances of the case. It is evident that hijacking poses a grave threat to the life and safety of innocent passengers and crew. It is for this reason that there is so much opprobrium attached to acts of hijacking. Thus, acts of hijacking will almost certainly qualify as "serious" crimes and the threshold for the proportionality test will be extremely high – only the most compelling circumstances can justify non-exclusion for hijacking.<sup>89</sup>

86. Among issues requiring consideration are the following:

- whether the applicant's life was at stake for persecution-related reasons (this is relevant to the political nature of the crime, the proportionality test and to the issue of defence to criminal liability);

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<sup>87</sup> In general, it nevertheless remains crucial not to equate Article 1F with a simple anti-terrorism clause. Nor is it necessary for asylum legislation specifically to mention terrorist acts as being excluded from refugee status. See paragraph 49 for further discussion of this issue.

<sup>88</sup> The June 2002 Organisation of American States' Inter-American Convention Against Terrorism, for instance, defines offences for the purposes of the Convention very broadly as those established in ten international terrorism conventions (Article 2). Article 12 declares that States will ensure "that refugee status is not granted to any person in respect of whom there are serious reasons for considering" that he or she has committed an offence as set out in Article 2. While Article 15 affirms that nothing in the Convention shall be interpreted as affecting other rights and obligations of States and individuals *inter alia* under international refugee law, it remains to be seen how such a broad definition is to be reconciled with the exclusion clauses of the 1951 Convention and 1967 Protocol in the individual case.

<sup>89</sup> See also, A.C. Helton, "The Case of Zhang Zhenai: Reconciling the International Responsibilities of Punishing Air Hijacking and Protecting Refugees", 13(4) *Loyola L.A. International & Comparative Law Journal*, June 1991, p. 841.



- whether the hijacking was a last and unavoidable recourse to flee from the danger at hand, that is, whether there were other viable and less harmful means of escape from the country where persecution was feared (political act, proportionality test and defence to criminal liability);
- whether there was significant physical, psychological or emotional harm to other passengers or crew (serious crime, proportionality test).

## **Torture**

87. The prohibition against torture, found in many treaties, is now considered part of customary international law. Article 1 of the key human rights treaty on this matter, the 1984 Convention against Torture, defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person” for certain purposes when “such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”. Thus, to qualify as torture in the context of this Convention, an act must have been carried out with the involvement of a person acting in an official, rather than a private, capacity. Torture may take many forms, including the carrying out of medical or scientific experiments on individuals who have not given their consent.

88. Where acts of torture are part of a systematic attack against the civilian population, this could constitute a crime against humanity under Article 1F(a) of the 1951 Convention. This is explicitly recognised in the ICTY, ICTR and ICC Statutes. It is worth noting that by including torture among the elements of the crime against humanity listed in the ICC Statute,<sup>90</sup> the latter does not seem to envisage that the perpetrator has to be acting in an official role or for a specific purpose. Isolated acts of torture could constitute a serious non-political crime (under Article 1F(b)).

89. Torture may also constitute a war crime under Article 1F(a). The ICTY Tribunal has stated that, in the context of international humanitarian law (unlike in international human rights law), the act of torture need not be committed by a State official or any other person wielding authority.<sup>91</sup> It has also found that the list of prohibited purposes set out in Article 1 of the Convention against Torture is not exhaustive, but merely indicative.

## **Emerging crimes under international law**

90. Since the Second World War, there has been an exponential rise in the types of acts that are considered to give rise to individual criminal responsibility under international law, the most recent landmark being the ICC Statute. Apart from the categories mentioned in Article 1F(a), certain other acts are emerging as possibly crimes under

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<sup>90</sup> Article 7 of the ICC Statute taken with Article 27, which states that the Statute applies “equally to all persons without any distinction based on official capacity”.

<sup>91</sup> Case of *Kvočka et al* (Omarska and Keraterm camps), IT-98-30/1, Trial Chamber judgment, 2 November 2001.

international law. As the law develops, consideration will need to be given as to whether, and in what way, these crimes are covered by Article 1F.

## H. SPECIAL CASES

### Minors

91. In principle, the exclusion clauses can apply to minors but only if they have reached the **age of criminal responsibility**. Great caution should always be exercised, however, when the application of the exclusion clauses is being considered in relation to a minor. Under Article 40 of the 1989 Convention on the Rights of the Child, States shall seek to establish a minimum age for criminal responsibility. Where this has been established in the host State,<sup>92</sup> a child below the minimum age cannot be considered by the State concerned as having committed an excludable offence. For those over this age limit (or where no such limit exists), the maturity of the particular child should still be evaluated to determine whether he or she had the mental capacity to held responsible for the crime in question. The younger the child, the greater the presumption that such mental capacity did not exist at the relevant time.

92. Where **mental capacity** is established, particular attention must be given to whether other grounds exist for rejecting criminal liability, including consideration of the following factors: the age of the claimant at the time of becoming involved with the armed group; the reasons for joining (was it voluntary or coerced or in defence of oneself or others?); the consequences of refusal to join; the length of time as a member; the possibility of not participating in such acts or of escape; the forced use of drugs, alcohol or medication (involuntary intoxication); promotion within the ranks of the group due to actions undertaken; the level of education and understanding of the events in question; and the trauma, abuse or ill-treatment suffered by the child as a result of his or her involvement. In the case of child soldiers, in particular, questions of duress, defence of self and others, and involuntary intoxication, often arise. Even if no defence is established, the vulnerability of the child, especially those subject to ill-treatment, should arguably be taken into account when considering the proportionality of exclusion for war crimes or serious non-political crimes.

93. At all times, regard should be had to the overwhelming obligation to act in the “best interests” of the child in accordance with the 1989 Convention on the Rights of the Child. Thus, specially trained staff should deal with cases where exclusion is being considered in respect of a child applicant.<sup>93</sup> In the UNHCR context, all such cases should be referred to Headquarters before a final decision is made on exclusion. The “best interests” principle should also underlie any post-exclusion action. Articles 39 and 40 of the 1989

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<sup>92</sup> If the age of criminal responsibility is higher in the country of origin, this should also be taken into account (in the child’s favour).

<sup>93</sup> For appropriate procedural and other safeguards, see generally, UNHCR and Save the Children, *Separated Children in Europe Programme: Statement of Good Practice*, October 2000; UNHCR, “Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum”, February 1997.

Convention are also relevant as they deal with the duty of States to assist in the rehabilitation of “victims” (which would tend to include child soldiers) and set down standards for the treatment of children thought to have infringed the criminal law.<sup>94</sup>

### **Family unity**

94. The right to family unity generally operates in favour of dependants and not against them. Thus, where the main applicant is excluded, family members are not automatically excluded as well. Their claims to refugee status would need to be determined on an individual basis. Such claims are valid even where the fear of persecution is a result of the relationship to the excluded relative. Family members are only excluded if there are serious reasons for considering that they too are individually responsible for excludable crimes.

95. Where family members have been recognised as refugees, however, the excluded applicant cannot then rely on the right to family unity to secure protection or assistance as a refugee.

### **Mass influx**

96. As a matter of principle, the exclusion clauses apply in situations of mass influx. From a practical perspective, however, an individual assessment may not be possible at an early stage in such circumstances. This does not mean that group exclusion is justified. Rather, humanitarian principles require that protection and assistance be afforded to all persons until such time as individual refugee status determination can take place. This is subject, though, to the separation of armed elements from the civilian population where mixed flows take place. Suspected armed elements should be interned in a location away from the refugee camp and should not automatically benefit from a *prima facie* determination of refugee status. They should not be considered as asylum-seekers until the authorities have established within a reasonable time-frame that they have genuinely renounced military activities. Only once this has been determined should a claim to refugee status, including consideration of exclusion, be examined on an individual case-by-case basis.<sup>95</sup> Exclusion should not be assumed for such persons – each case must be looked at on its own facts.

97. It is clear that the operational and logistical difficulties surrounding individual status determination in the mass influx context mean that without substantial assistance from

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<sup>94</sup> The 2000 Optional Protocol to the 1989 Convention on the involvement of children in armed conflict, which entered into force in February 2002, similarly commits States Parties to cooperating “in the rehabilitation and social reintegration of persons who are victims of acts contrary” to the Protocol, including children under 18 years who have been forcibly recruited.

<sup>95</sup> See Executive Committee, Conclusion No. 94 (LIII), 2002, paragraph (c)(vii) and UNHCR, “The Civilian Character of Asylum: Separating Armed Elements from Refugees”, Global Consultations on International Protection, (EC/GC/01/5), 19 February 2001, paragraph 20. See also paragraph 63 above on ex-combatants.

the international community such a task is extremely problematic. In particular, the separation and disarming of armed elements is not within UNHCR's mandate and requires a concerted effort by the host government often acting with international assistance.

### **III. PROCEDURAL ISSUES**

#### **A. Fairness of procedure**

98. Given the severe consequences of exclusion for an individual and its exceptional nature, it is essential that rigorous procedural safeguards in relation to this issue are built into the refugee status determination procedure. Reference should be made to the procedural safeguards considered necessary in refugee status determination in general.<sup>96</sup> These include:

- individual consideration of each case;
- opportunity for the applicant to consider and comment on the evidence on the basis of which exclusion may be made;
- provision of legal assistance;
- availability of a competent interpreter, where necessary;
- reasons for exclusion to be given in writing;
- right to appeal an exclusion decision to an independent body; and
- no removal of the individual concerned until exhaustion of all legal remedies against decision to exclude.

#### **B. Consideration of exclusion in the context of refugee status determination**

99. In principle, in particular given the exceptional nature of the exclusion clauses, the applicability of the exclusion clauses should be examined within the regular refugee status determination procedure and not in either admissibility or accelerated procedures. Seeking to determine exclusion at the admissibility stage risks unfairly associating asylum-seekers with criminality. Rather, consideration of exclusion issues in the regular procedure allows the reasons justifying refugee status to be assessed alongside the factors pointing towards exclusion. This holistic approach facilitates a full assessment of the factual and legal issues of the case and is necessary in exclusion cases, which are often complex, require an evaluation of the nature of the alleged crime and the applicant's role in it on the one hand, and of the nature of the persecution feared on the other. This is particularly so where proportionality considerations arise (see paragraphs 76–78 above).

100. The exceptional nature of Article 1F suggests that inclusion should generally be considered before exclusion, but there is no rigid formula. The holistic approach allows for flexibility, taking into account the nature of the particular case. For example, looking at inclusion before exclusion may often be helpful as it prevents unnecessary

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<sup>96</sup> See UNHCR, "Asylum Processes (Fair and Efficient Asylum Procedures)", Global Consultations on International Protection, (EC/GC/01/12), 31 May 2001, in particular paragraph 50 on best practice.

consideration of Article 1F in cases where non-inclusion arises. In cases of suspected terrorists, this would allow for an initial determination as to whether the individual fears legitimate criminal prosecution (and is therefore ineligible for refugee status anyway) as opposed to persecution. Inclusion before exclusion also enables a fuller understanding of the circumstances and international protection concerns about family members to be addressed. Exclusion may exceptionally be considered without particular reference to inclusion issues (i) where there is an indictment by an international criminal tribunal; (ii) in cases where there is apparent and readily available evidence pointing strongly towards the applicant's involvement in particularly serious crimes, notably in prominent Article 1F(c) cases, and (iii) at the appeal stage in cases where exclusion is the question at issue.

### **C. Specialised exclusion units**

101. States have a legitimate interest in determining excludability as swiftly as possible, particularly in the case of suspected terrorists. This is not incompatible with undertaking a substantive factual and legal assessment. UNHCR recommends that exclusion cases be dealt with by specialised exclusion units within the institution responsible for refugee status determination, which would consider such cases on an expedited basis. Staff in these units should have expertise in both international criminal and refugee law as well as access to up-to-date background information, for example, briefings on key terrorist organisations, country of origin information, etc. Such units would maintain clear communication links with intelligence services and criminal law enforcement agencies.

### **D. Deferral for criminal proceedings**

102. Where the individual is wanted by national courts for domestic criminal or extradition proceedings, it may be prudent to defer examination of the asylum application (including applicability of the exclusion clauses) until completion of such judicial proceedings. The latter may have significant implications for the asylum claim, although there is not necessarily an automatic correlation between extradition and exclusion under Article 1F. In general, however, the refugee claim must be determined in a final decision before execution of any extradition order.<sup>97</sup> This is not the case for surrender to an international criminal tribunal, since such surrender does not place the individual at risk of persecution.

### **E. Confidentiality of asylum claim**

103. Consideration of the exclusion clauses may lead to the sharing of data about a particular asylum application with other States, for example, to gather intelligence on an individual's suspected terrorist activities. In line with established principles, information on asylum-seekers, including the very fact that they have made an asylum application,

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<sup>97</sup> Such a determination may not be necessary, for example, where extradition to a third State does not raise the risk of indirect *refoulement* (i.e. the third State will appropriately consider the asylum application if the individual faces deportation following acquittal or completion of sentence).

should not be shared with the country of origin as this may place such persons, their families, friends or associates at risk. In exceptional circumstances, where national security interests are at stake, contact with the country of origin may be justified. For example, this may be the only method by which to obtain concrete evidence about an individual's previous and potentially ongoing terrorist activities. Even in such situations, the existence of the asylum application should still remain confidential.

104. The principle of confidentiality continues in principle to apply even when a final determination of exclusion has been made. This is necessary to preserve the integrity of the asylum system – information given on the basis of confidentiality must remain protected.

## **F. Burden of proof**

105. In asylum procedures generally, the burden of proof is shared between the applicant and the State (reflecting the vulnerability of the individual in this context).<sup>98</sup> As several jurisdictions have explicitly recognised, however, the burden shifts to the State to justify exclusion under Article 1F. This is 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. Moreover, the factors that justify the individual being given the benefit of the doubt in refugee status determination proceedings generally apply equally when exclusion is being considered.

106. In some instances, the burden of proof may be reversed, creating a rebuttable presumption of excludability.<sup>99</sup> This is arguably the case where the individual has been indicted by an international criminal tribunal. It would then be up to the individual to rebut the presumption by proving, for example, mistaken identity. In the context of action against terrorism, lists established by the international community of terrorist suspects and organisations should not generally be treated as reversing the burden of proof. Unlike ICTY/ICTR indictments, such lists would be drawn up in a political, rather than a judicial, process and so the evidentiary threshold for inclusion is likely to be much lower. Moreover, the criteria for inclusion on a list may be much broader than those relevant to the test for exclusion under Article 1F. By contrast, an indictment by an international criminal tribunal will generally be in relation to activity caught by Article 1F, particularly under subparagraph (a). Terrorist lists are discussed further below in paragraph 109.

## **G. Standard of proof**

107. The standard of proof set out in Article 1F – “serious reasons for considering” – is not a familiar concept in domestic legal systems. State practice is not consistent on this matter but does, at least, make it clear that the criminal standard of proof (e.g. beyond reasonable doubt in common law systems) need not be met. Thus, exclusion does not require a determination of guilt in the criminal justice sense. Nevertheless, in order to

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<sup>98</sup> See Handbook, paragraphs 195–199, which discuss burden of proof and UNHCR, “Note on Burden and Standard of Proof in Refugee Claims”, 16 December 1998.

<sup>99</sup> See also paragraph 58 above on a presumption of individual responsibility.

ensure that Article 1F is applied in a manner consistent with the overall humanitarian objective of the 1951 Convention, the standard of proof should be high enough to ensure that *bona fide* refugees are not excluded erroneously. Hence, the “balance of probabilities” is too low a threshold. As found in civil law jurisdictions, serious reasons from which arise a substantial suspicion are at least what is necessary; simple suspicions are not sufficient.<sup>100</sup> General reference to the standard of evidence required for an indictment is in itself unhelpful, as this standard varies between jurisdictions. Given the rigorous manner in which indictments are put together by international criminal tribunals, however, indictment by such bodies, in UNHCR’s view, satisfies the standard of proof required by Article 1F. Depending on the legal system, this may also be the case for certain individual indictments.

108. It would appear that clear and credible evidence of involvement in excludable acts is required to satisfy the “serious reasons” test in Article 1F. An applicant’s confession of involvement in such acts could satisfy the evidentiary test, but the credibility of such a confession would need to be examined, particularly if it was made in the country of origin where the applicant may have been subject to coercion. Again, the applicant’s conviction for an excludable offence could be sufficient evidence for exclusion, if the conviction appears to have been reliable. An assessment of the fairness of the criminal proceedings is required, taking into account the relevant country’s adherence to international standards on criminal justice. Similarly, the fact that an individual has been indicted in a foreign jurisdiction (rather than by an international criminal tribunal) or is subject to an extradition request should not automatically be considered sufficient evidence for exclusion. In all cases, proper recourse must be made to accurate country of origin information, for example, to evaluate whether a confession made in a criminal investigation is reliable.

109. Credible testimony of witnesses or other sources of reliable information set against the applicant’s own statements (including an assessment of their credibility) may also provide sufficient evidence for the purposes of exclusion under Article 1F. With regard to the latter, an individual’s inclusion on an international list of terrorist suspects should trigger consideration of the exclusion clauses but does not in itself satisfy the “serious reasons” test. As discussed in paragraph 106 above, this is due to the evidentiary and substantive criteria governing such lists. Similarly, where international lists are drawn up of terrorist organisations and an individual appears to be associated with such a group, this should prompt consideration of the applicability of the exclusion clauses. Exceptionally, where the criteria governing the list are such that the designated organisations, including its members, can reliably be considered to be heavily involved in violent crime, a presumption of individual responsibility for an excludable act may arise, but as discussed in paragraphs 57 and 58 above this should be analysed carefully. National lists of terrorist suspects or organisations will tend to have a lower evidentiary value than their international counterparts, due to the lack of international consensus.

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<sup>100</sup> See Swiss Asylum Appeals Commission, case of M.B., 14 September 1998, 1999/12; case of S.X. 11 December 1999; case of S.M. 28 May 2001; case of Y.N., 27 November 2001.

110. When a rebuttable presumption does arise, the standard of proof to be met by the applicant to rebut the presumption is that of a plausible explanation regarding non-involvement or dissociation from any excludable acts, coupled with an absence of serious evidence to the contrary.

111. In establishing whether the standard of proof has been met in a particular case, lack of cooperation by the individual concerned may raise difficulties, although non-cooperation in itself does not establish guilt in the absence of clear and credible evidence of individual responsibility. On the other hand, an applicant's refusal to cooperate with the determination procedure may lead to non-inclusion in some cases. It should also not be a bar to establishing that sufficient evidence, as outlined in paragraphs 105 and 106, exists for Article 1F to apply.<sup>101</sup> Nevertheless, it is always important to assess the reasons for the individual's non-cooperation as it may be due to problems of understanding (for example, due to poor interpretation), to trauma, mental capacity, fear, or other factors.

## **H. Sensitive evidence**

112. Exclusion should not be based on evidence that the individual concerned does not have the opportunity to challenge, as this offends principles of fairness and natural justice. Nevertheless, where revealing the source and/or the substance of the evidence may put witnesses at risk or compromise national security interests, a conflict arises with the full disclosure principle.

113. Exceptionally, anonymous evidence (where the source is concealed) may be relied upon but only where this is absolutely necessary to protect the safety of witnesses and the asylum-seeker's ability to challenge the substance of the evidence is not substantially prejudiced. Secret evidence or evidence considered in camera (where the substance is also concealed) should not be relied upon to exclude. The desire to withhold the nature of certain evidence will tend to arise where national security interests are at stake, but such interests may be protected by introducing procedural safeguards which also respect the asylum-seeker's due process rights.<sup>102</sup> For example, consideration should be given to disclosing the general content of the sensitive material to the individual but reserving the details for his or her legal representative only (on the basis that the latter has been vetted to receive such evidence). Moreover, the exclusion decision, including the fairness of relying on such partially-disclosed material, could be challenged in private hearings before an independent tribunal (which has access to all relevant evidence).

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<sup>101</sup> Such non-cooperation may, however, mean that exclusion is irrelevant as the refugee claim cannot in any case be established.

<sup>102</sup> For instance, the European Court of Human Rights noted in *Chahal v. United Kingdom* (1995) that "there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice" (paragraph 131).



## **ANNEX A: Consequences of exclusion**

Some of the legal considerations constraining States' powers of expulsion include:

- Article 3(1) of the 1984 UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment provides: “No State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he [or she] would be in danger of being subjected to torture.”
- Article 7 of the 1966 International Covenant on Civil and Political Rights states: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment...”
- Article 22(8) of the 1969 American Convention on Human Rights provides: “In no case may an alien be deported or returned to a country, regardless of whether or not it is his [or her] country of origin, if in that country his [or her] right to life or personal freedom is in danger of being violated because of his [or her] race, nationality, religion, social status, or political opinions.”
- Article 37(a) of the 1989 Convention on the Rights of the Child provides: States Parties shall ensure that: No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment...”
- Article 3 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, which states: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” The established case law of the European Court of Human Rights has determined that the expulsion or extradition of a person to a country where he or she risks being subjected to such treatment violates Article 3.<sup>103</sup>
- The return of a person to face the death penalty may be prohibited under applicable international human rights law, either as a form of inhuman and degrading treatment or because the host State has abolished the use of the death penalty. At the regional level, the 2003 Protocol to the Protocol amending the 1977 European Convention on the Suppression of Terrorism, adds to Article 5 of the latter Convention the statement: “Nothing in this Convention shall be interpreted either as imposing on the requested State an obligation to extradite if the person subject of the extradition request risks being exposed to the death penalty or ... to life imprisonment without the possibility of parole...”
- Several international instruments embody the principle that no alien who is lawfully present in the territory of a State (or, as the case may be, no alien coming under the specific category covered by the instrument) may be expelled except in pursuance of a

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<sup>103</sup> See “UNHCR Manual on Refugee Protection and the European Convention on Human Rights”, April 2003.

decision reached in accordance with the law.<sup>104</sup> Some of these instruments provide that such an alien may not be expelled except on grounds of national security or public order.

- Various international instruments enshrine the principle that the collective expulsion of aliens is prohibited. In addition, the principle that an expulsion must be carried out in a manner least injurious to the person affected was well established by the beginning of the century.
- Extradition treaties often include a non-persecution clause, which prevents the surrender of an individual where this would put him or her at risk of persecution (as opposed to legitimate prosecution).

### **ANNEX B: Instruments defining war crimes**

Article 6(b) of the **London Charter** includes within the concept of war crimes murder or ill-treatment of civilian populations, murder or ill-treatment of prisoners of war, the killing of hostages, or any wanton destruction of cities, towns or villages or devastation that is not justified by military necessity.

The “grave breaches” specified in the **1949 Geneva Conventions**<sup>105</sup> and Article 85 of **Additional Protocol I** also constitute war crimes. These include wilful killing, torture or other inhuman treatment, wilfully causing great suffering or serious injury to body or health, of protected persons; attacks on, or indiscriminate attack affecting the civilian population or those known to be *hors de combat*, population transfers; practices of *apartheid* and other inhuman and degrading practices involving outrages on personal dignity based on racial discrimination; and attacking non-defended localities and demilitarised zones. “Grave breaches” take place in the context of international armed conflicts.

Articles 2 and 3 of the **ICTY Statute** cover grave breaches of the 1949 Geneva Conventions and violations of the laws and customs of war. In relation to international armed conflicts, the crimes covered include wilful killing, torture or inhuman treatment, wilfully causing great suffering or serious injury to body or health, of protected persons; extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; compelling a prisoner of war or a civilian to serve in the forces of a hostile power; wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial; unlawful deportation or transfer or unlawful confinement of a civilian; and taking civilians as hostages. In relation to internal armed conflicts, war crimes are considered to arise from violations of common Article 3 of the

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<sup>104</sup> International Covenant on Civil and Political Rights, Article 13; 1984 Protocol No. 7 to the European Convention on Human Rights, Article 1(1); 1969 American Convention on Human Rights, Article 22(6); 1981 African Charter on Human and Peoples’ Rights, Article 12(4); 1954 Convention relating to the Status of Stateless Persons, Article 31.

<sup>105</sup> See Articles 50, 51, 130 and 147 of the first, second, third and fourth Geneva Conventions respectively.

1949 Geneva Conventions, which deals with the basic humanitarian principles applicable in all armed conflicts. These include murder, the taking of hostages and outrages on personal dignity of persons not taking an active part in the hostilities. Article 4 of the **ICTR Statute** defines war crimes by reference to serious violations of common Article 3 of the 1949 Geneva Conventions and Additional Protocol II (both of which deal with non-international armed conflicts).

Amongst the acts designated as war crimes by Article 8 of the **ICC Statute** are intentional attacks against the civilian population or objects; intentional attacks against humanitarian personnel; killing or wounding a combatant who has surrendered; employing prohibited weapons (such as poisonous gases); committing rape and other forms of sexual violence; using starvation as a method of warfare; and conscripting children under the age of fifteen years. Differentiation is made in the Statute between acts constituting war crimes in the context of an international armed conflict and those arising in non-international armed conflicts.

### **ANNEX C: Instruments defining crimes against humanity**

Article 6(c) of the **London Charter** defines crimes against humanity as murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Article 5 of the **ICTY Statute** defines its responsibility for crimes against humanity as encompassing murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial and religious grounds, and other inhumane acts when committed in armed conflict and directed against any civilian population.

Article 3 of the **ICTR Statute** refers to crimes committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds and lists the same crimes as Article 5 of the ICTY Statute.

The relevant **ICC Statute** provisions are set out in paragraph 36 above.

### **ANNEX D: Instruments pertaining to terrorism**

#### **International**

The text of these international instruments can be found at <http://untreaty.un.org/English/Terrorism.asp> .

1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft (in force 4 December 1969)

- 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (in force 14 October 1971)
- 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (in force 26 January 1973)
- 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (in force 20 February 1977)
- 1979 International Convention against the Taking of Hostages (in force 3 June 1983)
- 1980 Convention on the Physical Protection of Nuclear Material (in force 8 February 1987)
- 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (in force 6 August 1989)
- 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (in force 1 March 1992)
- 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (in force 1 March 1992)
- 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection (in force 21 June 1998)
- 1997 International Convention for the Suppression of Terrorist Bombings (in force 23 May 2001)
- 1999 International Convention for the Suppression of the Financing of Terrorism (in force 10 April 2002)

Draft documents:

2001 Draft Comprehensive Convention on International Terrorism

**Regional**

- 1971 Organisation of American States Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance (in force 16 October 1973) (see <http://www.oas.org/> )
- 1977 European Convention on the Suppression of Terrorism (in force 4 August 1978) (see <http://conventions.coe.int> )
- 1987 South Asian Association for Regional Cooperation (SAARC) Regional Convention on the Suppression of Terrorism (in force 22 August 1988) (see <http://untreaty.un.org/English/Terrorism.asp> )
- 1998 Arab Convention on Combating Terrorism (in force 7 May 1999)
- 1999 African Union (formerly Organisation of African Unity) Convention on the Prevention and Combating of Terrorism (not yet in force) (see [http://www.africa-union.org/Official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/Algiers\\_conv%20on%20Terrorism.pdf](http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Algiers_conv%20on%20Terrorism.pdf) )
- 1999 Treaty on Cooperation among States Members of the Commonwealth of Independent States in Combating Terrorism (in force)
- 1999 Convention of the Organisation of the Islamic Conference on Combating International Terrorism (not yet in force) (see <http://untreaty.un.org/English/Terrorism.asp> )

- 2001, 19 September, Council of Europe, Recommendation of the Commissioner for Human Rights concerning the rights of aliens wishing to enter a Council of Europe member State and the enforcement of expulsion orders, CommDH/Rec(2001)1 (see [http://www.coe.int/T/E/Commissioner\\_H.R/Communication\\_Unit/](http://www.coe.int/T/E/Commissioner_H.R/Communication_Unit/) )
- 2002, 3 June, Inter-American Convention against Terrorism, AG/RES. 1840 (XXXII-O/02) (not yet in force) (see <http://www.oas.org/> )
- 2002, 11 July, Council of Europe, Committee of Ministers, Guidelines on human rights and the fight against terrorism (see [http://www.coe.int/t/e/human\\_rights/pdfs/PDF\\_H\(2002\)004%20E%20Guidelines%20terrorism.pdf](http://www.coe.int/t/e/human_rights/pdfs/PDF_H(2002)004%20E%20Guidelines%20terrorism.pdf) )
- 2003, 15 May, Council of Europe, Protocol amending the European Convention on the Suppression of Terrorism (see <http://conventions.coe.int/Treaty/EN/cadreprojets.htm>)

Among the numerous recent European Union (EU) regulations, decisions and common positions (available on <http://europa.eu.int/eur-lex/en/index.html>) on combating terrorism and related measures are:

- 2001, 27 December, Council Regulation (2001/2580/EC) on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, Official Journal L 344/70, 28 December 2001
- 2001, 27 December, Council Decision (2001/927/EC) establishing the list provided for in Article 2(3) of Council Regulation (EC) No. 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, OJ L 344/83, 28 December 2001 (updated by Council Decisions Nos. 2002/334/EC of 2 May 2002, 2002/460/EC of 17 June 2002, 2002/848/EC of 28 October 2002, 2002/974/EC of 12 December 2002, 2003/480/EC of 27 June 2003)
- 2001, 27 December, Council Common Position (2001/931/CFSP) on the application of specific measures to combat terrorism, OJ L 344/93, 28 December 2001 (updated by Council Common Positions Nos. 2002/340/CFSP of 2 May 2002, 2002/462/CFSP of 17 June 2002, 2002/847/CFSP of 28 October 2002, 202/976/CFSP of 12 December 2002, 2003/402/CFSP of 5 June 2003, 2003/482/CFSP of 27 June 2003)
- 2002, 27 May, Council Regulation (2002/881/EC) imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No. 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, OJ L 139/9, which by 31 July 2003 had been amended 20 times
- 2002, 13 June, Council Framework Decision on combating terrorism, OJ L 164/3, 22 June 2002
- 2002, 13 June, Council Framework Decision on the European arrest warrant and the surrender procedures between Member States, OJ L190/1, 18 July 2002

Draft documents:

- 2002, 7 November, Draft OSCE Charter on Preventing and Combating Terrorism