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

Veluppillai Pushpanathan (Pushpanathan Veluppillai) *Appellant*

v.

The Minister of Citizenship and Immigration *Respondent*

and

The Canadian Council for Refugees *Intervener*

Indexed as: Pushpanathan *v.* Canada (Minister of Citizenship and Immigration)

File No.: 25173.

1997: October 9; 1998: June 4.

Present: L'Heureux-Dubé, Sopinka,* Gonthier, Cory, McLachlin, Major and Bastarache JJ.

on appeal from the federal court of appeal

Administrative law -- Standard of review -- Immigration and Refugee Board -- Standard of review applicable to Board's decision.

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* Sopinka J. took no part in the judgment.

Immigration -- Convention refugee -- Exclusion -- Refugee Convention not applicable to those who are "guilty of acts contrary to the purposes and principles of the United Nations" -- Individual guilty of serious narcotics offence in Canada claiming refugee status -- Whether claim for refugee status should be denied -- Meaning of phrase "guilty of acts contrary to the purposes and principles of the United Nations" -- Convention Relating to the Status of Refugees, Can. T.S. 1969 No. 6, Art. 1F(c) .

In 1985, the appellant claimed refugee status under the UN *Convention Relating to the Status of Refugees* ("Convention"), as implemented by the *Immigration Act*, but his claim was never adjudicated as he was granted permanent residence status in Canada under an administrative program. The appellant was later arrested in Canada and charged with conspiracy to traffic in a narcotic. At the time of his arrest, he was a member of a group in possession of heroin with a street value of some $10 million. He pleaded guilty and was sentenced to eight years in prison. In 1991, the appellant, then on parole, renewed his claim for Convention refugee status. Employment and Immigration Canada subsequently issued a conditional deportation order against him under ss. 27(1)(*d*) and 32.1(2) of the Act. Since the deportation pursuant to those sections is conditional upon a determination that the claimant is not a Convention refugee, the appellant's claim was referred to the Convention Refugee Determination Division of the Immigration and Refugee Board. The Board decided that the appellant was not a refugee by virtue of the exclusion clause in Art. 1F(c) of the Convention, which provides that the provisions of the Convention do not apply to a person who "has been guilty of acts contrary to the purposes and principles of the United Nations". The Federal Court, Trial Division dismissed the appellant's application for judicial review and certified the following as a serious question of general importance for consideration: Is it an error of law for the Refugee Division to interpret Art. 1F(c) of the Convention to exclude from refugee status an individual guilty of a serious narcotics offence

committed in Canada? The Federal Court of Appeal answered "no" and upheld the judgment of the Trial Division.

Held (Cory and Major JJ. dissenting): The appeal should be allowed.

Per L'Heureux-Dubé, Gonthier, McLachlin and Bastarache JJ.: A pragmatic and functional analysis of the *Immigration Act* leads to the conclusion that, in this case, the correctness standard should be applied to the Board's decision. The use of the words "a serious question of general importance" in s. 83(1) of the Act is the key to the legislative intention as to the standard of review. The general importance of the question -- that is, its applicability to numerous future cases -- warrants the review by a court of justice. Moreover, the purpose of Art. 1F(c) of the Convention is to protect human rights and the Board appears to enjoy no relative expertise in that matter. The Board's expertise is in accurately evaluating whether the criteria for refugee status have been met and, in particular, in assessing the nature of the risk of persecution faced by the applicant if returned to his country of origin. The relationship between the Board's expertise and Art. 1F(c) is thus remote. Nor is there any indication that the Board's experience with previous factual determinations of risk of persecution gives it any added insight into the meaning or desirable future development of that provision. The legal principle here is easily separable from the undisputed facts of the case and would undoubtedly have a wide precedential value. The factual expertise enjoyed by the Board does not aid it in the interpretation of this general legal principle. Furthermore, the Board itself is not responsible for policy evolution. Finally, the absence of a strong privative clause is another factor militating against deference.

Since the purpose of the *Immigration Act* incorporating Art. 1F(c) is to implement the underlying Convention, an interpretation consistent with Canada's

obligations under the Convention must be adopted. The wording of the Convention and the rules of treaty interpretation are therefore applicable to determine the meaning of Art. 1F(c) in domestic law. The general words "purposes and principles of the United Nations" in Art. 1F(c) are not so unambiguous as to foreclose examination of other indications of the proper scope of the provision. The purpose and context of the Convention as a whole, as well as the purpose of the individual provision in question as suggested by the *travaux préparatoires*, provide helpful interpretative guidelines.

The Convention has a human rights character. While Art. 1 of the Convention defines who is a refugee, the general purpose of Art. 1F is to exclude *ab initio* those who are not *bona fide* refugees at the time of their claim for refugee status. The purpose of Art. 33 of the Convention, by contrast, is to allow for the *refoulement* of a *bona fide* refugee to his native country where he poses a danger to the security of the country of refuge, or to the safety of the community. Although all of the acts described in Art. 1F could presumably fall within the grounds for *refoulement* described in Art. 33, the two are distinct. Article 1F(c) is not limited to acts performed outside the country of refuge. The relevant criterion under Art. 1F(c) is the time at which refugee status is obtained and any act performed before a person has obtained that status must be considered relevant pursuant to Art. 1F(c). The rationale of Art. 1F of the Convention is that those who are responsible for the persecution which creates refugees should not enjoy the benefits of a convention designed to protect those refugees. In the light of the general purposes of the Convention and the indications in the *travaux préparatoires* as to the relative ambit of Arts. 1F(a) and 1F(c), the purpose of Art. 1F(c) is to exclude those individuals responsible for serious, sustained or systemic violations of fundamental human rights which amount to persecution in a non-war setting. Article 1F(c) may be applicable to non-state actors. Although it may be more difficult for a non-state actor to perpetrate human rights violations on a scale amounting to persecution without the

state thereby implicitly adopting those acts, the possibility should not be excluded *a priori*.

Article 1F(c) will thus be applicable where there is consensus in international law that particular acts constitute sufficiently serious and sustained violations of fundamental human rights as to amount to persecution, or are explicitly recognized as contrary to the UN purposes and principles. First, where a widely accepted international agreement or UN resolution explicitly declares that the commission of certain acts is contrary to the UN purposes and principles, then there is a strong indication that those acts will fall within Art. 1F(c). Where such declarations or resolutions represent a reasonable consensus of the international community, then that designation should be considered determinative. A second category of acts which fall within the scope of Art. 1F(c) are those which a court is able, for itself, to characterize as serious, sustained and systemic violations of fundamental human rights constituting persecution. Where the rule which has been violated is very near the core of the most valued principles of human rights and is recognized as immediately subject to international condemnation and punishment, then even an isolated violation could lead to an exclusion under Art. 1F(c). The status of a violated rule as a universal jurisdiction offence would be a compelling indication that even an isolated violation constitutes persecution. A serious and sustained violation of human rights amounting to persecution may also arise from a particularly egregious factual situation, including the extent of the complicity of the claimant.

Conspiring to traffic in a narcotic is not a violation of Art. 1F(c). Even though international trafficking in drugs is an extremely serious problem that the UN has taken extraordinary measures to eradicate, in the absence of clear indications that the international community recognizes drug trafficking as a sufficiently serious and

sustained violation of fundamental human rights as to amount to persecution, either through a specific designation as an act contrary to the UN purposes and principles, or through international instruments which otherwise indicate that trafficking is a serious violation of fundamental human rights, individuals should not be deprived of the essential protections contained in the Convention for having committed those acts. Article 33 of the Convention and its counterparts in the *Immigration Act*, ss. 53 and 19, are designed to deal with the expulsion of individuals who present a threat to Canadian society, and the grounds for such a determination are wider and more clearly articulated. The Minister, therefore, is not precluded from taking appropriate measures to ensure the safety of Canadians. Lastly, the presence of Art. 1F(b), which excludes from the protection of the Convention a person who has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee, suggests that even a serious non-political crime such as drug trafficking should not be included in Art. 1F(c).

Per Cory and Major JJ. (dissenting): What constitutes an act "contrary to the purposes and principles of the United Nations" for the purposes of the Convention is a question of law. While the Immigration and Refugee Board must be accorded some deference in its findings of fact, that deference should not be extended to a finding on a question of law. The Board cannot be said to have any particular expertise in legal matters. Therefore the issue is whether the Board's decision on the question of law was correct.

The category of acts contrary to the UN purposes and principles should not be restricted to those expressly declared to be so. A domestic tribunal is entitled, upon considering the relevant material, to find that the phrase includes other types of acts. While not every UN initiative is so central to its purposes and principles that any act

which violates or undermines those initiatives is contrary to the UN purposes and principles, some problems have been recognized by the international community as being so serious and of such a nature that they pose a threat to the entire international community and the principles of its social order. Conduct which directly or significantly contributes to these problems or which violates agreed principles or obligations with respect to them should, in appropriate cases, be regarded as contrary to the UN purposes and principles.

While serious or systematic violation of human rights would be conduct that is contrary to the UN purposes and principles, it is not the only conduct that should be considered in interpreting Art. 1F(c) of the Convention. The determination of what constitutes an act contrary to the UN purposes and principles need not be limited to the consideration of one purpose notwithstanding the fact that it is important and that the Convention is a human rights instrument. Although the purpose of the instrument will be taken into account in interpreting its provisions, it must not restrict the content of the exclusion so as to limit it to conduct relating directly to human rights. All of the UN purposes and principles should be considered. Furthermore, some types of conduct may indirectly but significantly contribute to the violation of human rights.

The Convention should be interpreted in a manner consistent with the contemporary context. As international law develops, the content of a phrase such as "acts contrary to the purposes and principles of the United Nations" must be capable of development. Courts should recognize that the guidance provided by interpretive aids such as the *travaux préparatoires* and subsequent practice must be considered in the light of the current state of the law and international understandings. The *travaux préparatoires* should be taken into account, yet this does not mean that courts are restricted to a precise interpretation of that material. Rather, consideration should be

given to the underlying principles and concerns that they express with the aim of giving them a contemporary meaning. Similarly, with regard to state practice, some consistency should be maintained with the line of interpretation revealed by the practice of state parties, but that interpretation must be adjusted to take into account evolving ideas and principles in international law.

Although traditionally it was thought that the UN purposes and principles, like international law generally, are addressed only to states, and can be violated only by state actors, it is now generally accepted that an individual acting in his private capacity can commit acts which constitute violations of international law.

Significant trafficking in a dangerous illicit drug can constitute an act which is contrary to the UN purposes and principles and would thus form the basis of exclusion from refugee status pursuant to Art. 1F(c). The rationale for including illicit drug trafficking in Art. 1F(c) is the reality that this activity is recognized, both legally and practically, as an activity that not only is a domestic criminal offence, but occasions very serious and significant harm in the international community. The categorization of an act as an international crime or crime of international concern is not determinative of the question. The additional factor which distinguishes illicit drug trafficking from some other "crimes of international concern" or UN initiatives is the nature and gravity of the harm to people in countries around the world and to the international community as a whole that results from this activity. The harm caused by the illicit traffic in drugs is of the utmost severity. This illicit traffic takes a dreadful toll on the lives of individuals, families and communities. It destabilizes and retards the development of whole nations and regions. Drug trafficking now also threatens peace and security at a national and international level. It affects the sovereignty of some states, the right of self-determination and democratic government, economic, social and political stability

and the enjoyment of human rights. Many of the UN purposes and principles are undermined, directly or indirectly, by the international trade in illicit drugs. It is on this basis that at least some individuals who participate in and contribute to this activity must be considered to be committing acts contrary to the UN purposes and principles.

The statements on this subject by the international community, including the relevant conventions and General Assembly resolutions, reflect an acute awareness of the nature and gravity of the problem, and a severe condemnation of the activities that give rise to the problem. While the UN has never specifically declared that drug trafficking is contrary to its purposes and principles, it has clearly and frequently recognized and denounced the evils of this activity. There are also many statements reflecting an awareness that trafficking threatens essential aspects of the UN purposes and principles. The statements of the UN and of the international community lead inexorably to the conclusion that those engaged in trafficking in illicit drugs are responsible, directly or indirectly, for harms that are so widespread and so severe that they undermine the very purposes and principles upon which the UN is based. It follows that their actions must be considered "acts contrary to the purposes and principles of the United Nations" and thus come within the exclusion set out in Art. 1F(c). However, not all acts within the broad category of illicit drug trafficking constitute acts contrary to the UN purposes and principles. Distinctions must be drawn based on the type and scale of activities. It is those actually engaged in trafficking who reap most of the profits, cause the greatest harm and therefore bear the greatest responsibility for perpetuating the illicit trade. Those who are merely consumers are often victims themselves and do not bear the same responsibility.

Here, the appellant was an important participant in a major drug operation with an organized group trafficking in heroin. He trafficked on a large scale in the most

debilitating of drugs. While not every domestic narcotics offence will provide a basis for exclusion under Art. 1F(c), in light of the seriousness of the appellant's crime he should, as a result of his actions, be excluded.

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By Bastarache J.

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Lorne Waldman and *Jaswinder Singh Gill*, for the appellant.

Urszula Kaczmarczyk and *Bonnie Boucher*, for the respondent.

David Matas and *Sharryn Aiken*, for the intervener.

The judgment of L'Heureux-Dubé, Gonthier, McLachlin and Bastarache JJ. was delivered by

//*Bastarache J.*//

1 BASTARACHE J. — This appeal raises two important questions relating to who may be admitted to Canada as a refugee: first, the proper standard of judicial review over decisions of the Immigration and Refugee Board; second, the meaning of the exclusion from refugee status of those who are "guilty of acts contrary to the purposes and principles of the United Nations". That exclusion, in Article 1F(c) of the United Nations *Convention Relating to the Status of Refugees*, Can. T.S. 1969 No. 6, is incorporated into Canadian law by s. 2(1) of the *Immigration Act*, R.S.C., 1985, c. I-2, requiring a definition of that phrase with respect to the domestic law of Canada.

I. Factual Background

2 The relevant facts in this case are not the subject of dispute. The appellant, Veluppillai Pushpanathan, left his native Sri Lanka in 1983 and spent time in India and France before arriving in Canada, via Italy, on March 21, 1985. He claimed Convention refugee status under the *Immigration Act* (formerly *Immigration Act, 1976*, S.C. 1976-77, c. 52). The basis of the claim was that he had previously been detained by the Sri Lankan authorities for his political activities and would likely suffer persecution if returned to his country of citizenship. This claim was never adjudicated, however, as the appellant was granted permanent residence status in May 1987 under an administrative program, and was entitled to remain in Canada on that basis.

3 In December 1987, the appellant was arrested along with seven others on charges of conspiracy to traffic in a narcotic under s. 423(1)(*d*) of the *Criminal Code*, R.S.C. 1970, c. C-34, and s. 4(1) of the *Narcotic Control Act*, R.S.C. 1970, c. N-1. The appellant pleaded guilty to the offence and was among five of the group who were convicted. The appellant himself sold brown heroin to an RCMP officer on at least three occasions; at the time of the arrest, the group to which Mr. Pushpanathan belonged

possessed heroin with a street value of some $10 million. Mr. Pushpanathan was sentenced to eight years in prison, while his co-conspirators received between four- and ten-year terms each.

4 On September 23, 1991, the appellant, then on parole, renewed his claim to Convention refugee status under the United Nations *Convention Relating to the Status of Refugees* (the "Convention"), as implemented by the *Immigration Act* (the "Act"). I describe the application as a renewal because it is unclear that the initial claim made in March 1985 was ever abandoned. On June 22, 1992, a conditional deportation order was issued by Employment and Immigration Canada against Mr. Pushpanathan under s. 27(1)(*d*) and s. 32.1(2) of the Act, which provide that a permanent resident who has been convicted of an offence for which a sentence of more than six months' imprisonment has been imposed, may be deported. Since the deportation pursuant to those sections is conditional upon a determination that the claimant is not a Convention refugee, Mr. Pushpanathan's claim to Convention refugee status was referred to the Convention Refugee Determination Division of the Immigration and Refugee Board. The Board decided that the appellant was not a Convention refugee. The Federal Court, Trial Division and the Federal Court of Appeal refused to reverse that decision on an application for judicial review. Mr. Pushpanathan appeals to this Court.

II. Statutory Framework

5 Section 2(1) of the Act defines a "Convention refugee" as:

> . . . any person who
>
> (*a*) by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

> (i) is outside the country of the person's nationality and is unable or, by reason of that fear, is unwilling to avail himself of the protection of that country . . .
>
> but does not include any person to whom the Convention does not apply pursuant to section E or F of Article 1 thereof, which sections are set out in the schedule to this Act;

6 That article of the Convention reads:

> ARTICLE 1
>
> *Definition of the Term "Refugee"*
>
> . . .
>
> F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

7 Persons described in these paragraphs cannot benefit from any of the protections of the Convention. They are denied refugee status from the outset.

8 The importance of the exclusions found in Article 1 can only be understood in the context of other sections of the Convention which describe the limited conditions under which *bona fide* refugees may be denied the benefits of their status:

> ARTICLE 33
>
> *Prohibition of Expulsion or Return ("Refoulement")*

> 1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

9 The precise circumstances in which Article 33(2) is satisfied are defined with greater particularity in the Act:

> **53.** (1) Notwithstanding subsections 52(2) and (3) [which describe the Minister's deportation power], no person who is determined under this Act or the regulations to be a Convention refugee . . . shall be removed from Canada to a country where the person's life or freedom would be threatened for reasons of race, religion, nationality, membership in a particular social group or political opinion unless
>
> (*a*) the person is a member of an inadmissible class described in paragraph 19(1)(*c*) or subparagraph 19(1)(*c*.1)(i) and the Minister is of the opinion that the person constitutes a danger to the public in Canada; or
>
> (*b*) the person is a member of an inadmissible class described in paragraph 19(1)(*e*), (*f*), (*g*), (*j*), (*k*) or (*l*) and the Minister is of the opinion that the person constitutes a danger to the security of Canada.

10 The paragraph potentially applicable to the appellant's situation is 19(1)(*c*):

> EXCLUSION AND REMOVAL
>
> *Inadmissible Classes*
>
> **19.** (1) No person shall be granted admission who is a member of any of the following classes:
>
> . . .

> (*c*) persons who have been convicted in Canada of an offence that may be punishable under any Act of Parliament by a maximum term of imprisonment of ten years or more;

11 Other grounds justifying the *refoulement* of a refugee described in s. 19 include: conviction outside of Canada for an offence which, if committed in Canada, would be subject to a maximum term of imprisonment of ten years or more (19(1)(*c*.1)(i)); previous acts of terrorism, espionage, or subversion of democratic government, or grounds to believe that such acts will be committed in the future (19(1)(*e*) and (*f*)); grounds to believe that an individual will engage in violence in Canada (19(1)(*g*)); commission of war crimes or crimes against humanity (19(1)(*j*)); persons who constitute a danger to the security of Canada (19(1)(*k*)); and, membership or participation in a government engaged in terrorism, systematic or gross human rights violations, or war crimes or crimes against humanity (19(1)(*l*)).

12 Where one of these grounds is found to exist, the Minister must then make the added determination that the person poses a danger to the safety of the public or to the security of the country under s. 53(1)(*a*) or (*b*) respectively in order to justify *refoulement*.

13 By contrast, persons falling within Article 1F of the Convention are automatically excluded from the protections of the Act. Not only may they be returned to the country from which they have sought refuge without any determination by the Minister that they pose a threat to public safety or national security, but their substantive claim to refugee status will not be considered. The practical implications of such an automatic exclusion, relative to the safeguards of the s. 19 procedure, are profound.

14 It is against this background that the interpretation of the exclusion contained in Article 1F(c) of the Convention must be considered.

III. Judicial History

A. *The Immigration and Refugee Board*

15 The panel of the Immigration and Refugee Board ruled that Mr. Pushpanathan was not a refugee by virtue of the exclusion clause in Article 1F(c): [1993] C.R.D.D. No. 12 (QL) (*sub nom. D. (N.U.) (Re)*). It also found that by trafficking in narcotics, the appellant had committed a crime against humanity under Article 1F(a). The parties agree that this finding was in error and have not argued the point in any of the appeals.

16 Citing numerous United Nations conventions, the panel considered it "clear that for many years the United Nations has devoted a great deal of time and energy to the suppression of illicit traffic in drugs". The panel accepted that suppression of this traffic is one of the purposes and principles of the United Nations, and that trafficking in heroin was an action against those purposes and principles. It also rejected the assertion that Article 1F(c) should apply only to state agents, or only to crimes committed outside the country of refuge.

B. *Application for Judicial Review to the Federal Court, Trial Division*

17 An application for judicial review under s. 82.1(1) of the Act was made to the Federal Court, which dismissed the application: [1993] F.C.J. No. 870 (QL). McKeown J. found that the Board had "reasonably concluded" and that there were

"serious reasons for considering" that the appellant was excluded by Article 1F(c) of the Convention. First, the court held that it was reasonable to conclude that initiatives to counter drug trafficking could be construed as part of the United Nations' purposes and principles, although it suggested that, in some instances, the article might not apply because of the nature of the violation. Second, the court rejected the claim that Article 1F(c) should only apply to state actors. Third, the court found there was no room under Article 1F(c) for the weighing of the nature of the offence committed against the risk of persecution faced by the applicant.

18 Notwithstanding these findings, the court did certify "that a serious question of general importance is involved", giving the applicant a right of appeal to the Federal Court of Appeal under s. 83(1) of the Act. The court formulated the question in the following terms: "Is it an error of law for the Refugee Division [of the Immigration and Refugee Board] to interpret section F(c) of Article I of the United Nations Convention relating to the Status of Refugees to exclude from refugee status an individual guilty of a serious Narcotic Control Act offence committed in Canada?"

C. *Certified Question in the Federal Court of Appeal*

19 The Federal Court of Appeal unanimously upheld the decision of the Trial Division: [1996] 2 F.C. 49. It resolved the question before the court into four issues (at p. 57):

> (1) Does Article 1F(c) of the Convention apply to acts committed by a refugee claimant in the country of refuge after his arrival there?
>
> (2) Can Article 1F(c) apply to a person already convicted of such acts?
>
> (3) Can Article 1F(c) apply to a person in respect of acts not committed on behalf of a state or government?

> (4) Is the act of conspiring to traffic in narcotics an act contrary to the purposes and principles of the United Nations?

20 Strayer J.A., speaking for the court, began his analysis by considering the rules of interpretation which ought to apply in determining the scope of Article 1F(c). He observed that treaty interpretation rules may be used as an aid where, as here, a statute incorporates a treaty. He found that, in any event, since the treaty article is adopted verbatim in the statute, treaty interpretation rules certainly apply. Under this standard, he held that those "arguably more relaxed rules" allow for consideration of such factors as other provisions of the treaty, even those not implemented in, or incorporated by, the statute, and the *travaux préparatoires*. However, Strayer J.A. observed that "none of the rules of interpretation of statutes or treaties authorize a court to ignore completely the express terms of the language finally adopted in the treaty or the statute, in favour of vague expressions of intention derived from extrinsic sources which fail to demonstrate ambiguity in the text of the treaty or adopting statute" (p. 59). Finding the *travaux préparatoires* confusing and reflecting the intentions of only a small number of signatories, the court rejected their use as an interpretative guide, preferring to "place the most emphasis on the final text as approved" (p. 60). Moreover, he assumed that, like statutes, individual treaty provisions have some distinct purpose and meaning unless it is impossible to ascribe one. Finally, in considering the proper interpretative approach to the exclusions from refugee status, Strayer J.A. asserted that there was to be no presumption in favour of a narrow construction simply because the treaty was a human rights instrument. Rather, exceptions to "the extraordinary right of refuge" were to be construed in a manner "most agreeable to justice and reason" (p. 61).

21 With this approach in place, the court found, first, that Article 1F(c) can apply to acts committed in the country of refuge; second, that it may apply to a person

previously convicted for these acts; third, that it may apply to a person not acting on behalf of a state or government; and, fourth, that conspiring to traffic in narcotics is an act contrary to the purposes and principles of the United Nations. The appellant was therefore not a refugee under the exclusion clause contained in Article 1F(c).

IV. Issues

22 Three issues must be addressed for the determination of this appeal. First, what is the standard of review to be applied to the decision of the Immigration and Refugee Board? Second, how do the rules of treaty interpretation apply to the determination of the meaning of Article 1F(c)? Third, does the appellant's act of drug trafficking fall within the definition of "acts contrary to the purposes and principles of the United Nations"?

V. Analysis

A. *Standard of Review*

23 Neither in the decisions below, nor in the written submissions before this Court, was the issue of the proper standard of review of the decision of the Convention Refugee Determination Division of the Immigration and Refugee Board addressed. McKeown J., at the Trial Division level, did find that the Board had "reasonably concluded" and that there were "serious reasons for considering" that the appellant was excluded by Article 1F(c) of the Convention, implying a standard of reasonableness. However, in certifying the question to be posed to the Court of Appeal, he asked whether the Board's determination was an "error of law", suggesting a standard of correctness. The Court of Appeal confined itself to answering the certified question. The court did

not consider what standard of review had been applied below, nor whether that was the correct standard.

24 Nevertheless, s. 83(1) requires such an inquiry. It states:

> **83.** (1) A judgment of the Federal Court — Trial Division on an application for judicial review . . . may be appealed to the Federal Court of Appeal only if the Federal Court — Trial Division has at the time of rendering judgment certified that a serious question of general importance is involved and has stated that question. [Emphasis added.]

25 The certification of a "question of general importance" is the trigger by which an appeal is justified. The object of the appeal is still the judgment itself, not merely the certified question. One of the elements necessary for the disposition of an application for judicial review is the standard of review of the decision of the administrative tribunal whose decision is being reviewed, and that question is clearly in issue in this case. Reluctant as this Court is to decide issues not fully argued before it, determining the standard of review is a prerequisite to the disposition of this case.

26 The central inquiry in determining the standard of review exercisable by a court of law is the legislative intent of the statute creating the tribunal whose decision is being reviewed. More specifically, the reviewing court must ask: "[W]as the question which the provision raises one that was intended by the legislators to be left to the exclusive decision of the Board?" (*Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890, at para. 18, *per* Sopinka J.).

27 Since *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, this Court has determined that the task of statutory interpretation requires a weighing of several different factors, none of which are alone dispositive, and each of which provides an

indication falling on a spectrum of the proper level of deference to be shown the decision in question. This has been dubbed the "pragmatic and functional" approach. This more nuanced approach in determining legislative intent is also reflected in the range of possible standards of review. Traditionally, the "correctness" standard and the "patent unreasonableness" standard were the only two approaches available to a reviewing court. But in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, a "reasonableness *simpliciter*" standard was applied as the most accurate reflection of the competence intended to be conferred on the tribunal by the legislator. Indeed, the Court there described the range of standards available as a "spectrum" with a "more exacting end" and a "more deferential end" (para. 30).

28 Although the language and approach of the "preliminary", "collateral" or "jurisdictional" question has been replaced by this pragmatic and functional approach, the focus of the inquiry is still on the particular, individual provision being invoked and interpreted by the tribunal. Some provisions within the same Act may require greater curial deference than others, depending on the factors which will be described in more detail below. To this extent, it is still appropriate and helpful to speak of "jurisdictional questions" which must be answered correctly by the tribunal in order to be acting *intra vires.* But it should be understood that a question which "goes to jurisdiction" is simply descriptive of a provision for which the proper standard of review is correctness, based upon the outcome of the pragmatic and functional analysis. In other words, "jurisdictional error" is simply an error on an issue with respect to which, according to the outcome of the pragmatic and functional analysis, the tribunal must make a correct interpretation and to which no deference will be shown.

(1) <u>Factors to Be Taken into Account</u>

29 The factors to be taken into account in determining the standard of review have been canvassed in a number of recent decisions of this Court, and may be divided into four categories.

(i) *Privative Clauses*

30 The absence of a privative clause does not imply a high standard of scrutiny, where other factors bespeak a low standard. However, the presence of a "full" privative clause is compelling evidence that the court ought to show deference to the tribunal's decision, unless other factors strongly indicate the contrary as regards the particular determination in question. A full privative clause is "one that declares that decisions of the tribunal are final and conclusive from which no appeal lies and all forms of judicial review are excluded" (*Pasiechnyk*, *supra*, at para. 17, *per* Sopinka J.). Unless there is some contrary indication in the privative clause itself, actually using the words "final and conclusive" is sufficient, but other words might suffice if equally explicit (*United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, at pp. 331 and 333). At the other end of the spectrum is a clause in an Act permitting appeals, which is a factor suggesting a more searching standard of review.

31 Some Acts will be silent or equivocal as to the intended standard of review. The Court found in *Bradco* that the submission of a dispute to a "final settlement" of an arbitrator was "somewhere between a full privative clause and a clause providing for full review by way of appeal" (pp. 331 and 333). Sopinka J. went on to examine other factors to determine that some degree of deference was owed to the arbitrator's ruling. In essence, a partial or equivocal privative clause is one which fits into the overall

process of evaluation of factors to determine the legislator's intended level of deference, and does not have the preclusive effect of a full privative clause.

(ii) *Expertise*

32 Described by Iacobucci J. in *Southam*, *supra*, at para. 50, as "the most important of the factors that a court must consider in settling on a standard of review", this category includes several considerations. If a tribunal has been constituted with a particular expertise with respect to achieving the aims of an Act, whether because of the specialized knowledge of its decision-makers, special procedure, or non-judicial means of implementing the Act, then a greater degree of deference will be accorded. In *Southam*, the Court considered of strong importance the special make-up and knowledge of the *Competition Act* tribunal relative to a court of law in determining questions concerning competitiveness in general, and the definition of the relevant product market in particular.

33 Nevertheless, expertise must be understood as a relative, not an absolute concept. As Sopinka J. explained in *Bradco*, *supra*, at p. 335: "On the other side of the coin, a lack of <u>relative expertise</u> on the part of the tribunal *vis-à-vis* the particular issue before it as compared with the reviewing court is a ground for a refusal of deference" (emphasis added). Making an evaluation of relative expertise has three dimensions: the court must characterize the expertise of the tribunal in question; it must consider its own expertise relative to that of the tribunal; and it must identify the nature of the specific issue before the administrative decision-maker relative to this expertise. Many cases have found that the legislature has intended to grant a wide margin for decision-making with respect to some issues, while others are properly subject to a correctness standard.

Those cases are discussed in the fourth section below, the "*Nature of the Problem*". The criteria of expertise and the nature of the problem are closely interrelated.

34 Once a broad relative expertise has been established, however, the Court is sometimes prepared to show considerable deference even in cases of highly generalized statutory interpretation where the instrument being interpreted is the tribunal's constituent legislation. In *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, the B.C. Securities Commission's definition of the highly general question of what constituted a "material change" under the *Securities Act* was subjected to an unreasonableness standard. Iacobucci J. stated that "[c]ourts have also enunciated a principle of deference that applies not just to the facts as found by the tribunal, but also to the legal questions before the tribunal in the light of its role and expertise" (p. 590). This can include the interpretation of a statute which requires recourse to the treaty which it was intended to implement, as was the case in *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, where a patently unreasonableness test was applied to the interpretation of a treaty provision because the regulatory and economic nature of the determination counselled deference notwithstanding the generality of its application.

35 In short, a decision which involves in some degree the application of a highly specialized expertise will militate in favour of a high degree of deference, and towards a standard of review at the patent unreasonableness end of the spectrum.

(iii) *Purpose of the Act as a Whole, and the Provision in Particular*

36 As Iacobucci J. noted in *Southam*, *supra*, at para. 50, purpose and expertise often overlap. The purpose of a statute is often indicated by the specialized nature of the

legislative structure and dispute-settlement mechanism, and the need for expertise is often manifested as much by the requirements of the statute as by the specific qualifications of its members. Where the purposes of the statute and of the decision-maker are conceived not primarily in terms of establishing rights as between parties, or as entitlements, but rather as a delicate balancing between different constituencies, then the appropriateness of court supervision diminishes. Thus, in *National Corn Growers*, *supra*, at p. 1336, Wilson J. characterized the function of the board in question as one of "management", partially because of the specialized knowledge of the members of the board, but also because of the range of remedies available upon a determination, including the imposition of countervailing duties by the Minister (at p. 1346). In *Southam*, the Court found (at para. 48) that the "aims of the Act are more 'economic' than they are strictly 'legal'" because the broad goals of the Act "are matters that business women and men and economists are better able to understand than is a typical judge". This conclusion was reinforced by the creation in the statute of a tribunal with members having a special expertise in those domains. Also of significance are the range of administrative responses, the fact that an administrative commission plays a "protective role" *vis-à-vis* the investing public, and that it plays a role in policy development; *Pezim*, *supra*, at p. 596. That legal principles are vague, open-textured, or involve a "multi-factored balancing test" may also militate in favour of a lower standard of review (*Southam*, at para. 44). These considerations are all specific articulations of the broad principle of "polycentricity" well known to academic commentators who suggest that it provides the best rationale for judicial deference to non-judicial agencies. A "polycentric issue is one which involves a large number of interlocking and interacting interests and considerations" (P. Cane, *An Introduction to Administrative Law* (3rd ed. 1996), at p. 35). While judicial procedure is premised on a bipolar opposition of parties, interests, and factual discovery, some problems require the consideration of numerous interests simultaneously, and the promulgation of

solutions which concurrently balance benefits and costs for many different parties. Where an administrative structure more closely resembles this model, courts will exercise restraint. The polycentricity principle is a helpful way of understanding the variety of criteria developed under the rubric of the "statutory purpose".

(iv) *The "Nature of the Problem": A Question of Law or Fact*?

37 As mentioned above, even pure questions of law may be granted a wide degree of deference where other factors of the pragmatic and functional analysis suggest that such deference is the legislative intention, as this Court found to be the case in *Pasiechnyk*, *supra*. Where, however, other factors leave that intention ambiguous, courts should be less deferential of decisions which are pure determinations of law. The justification for this position relates to the question of relative expertise mentioned previously. There is no clear line to be drawn between questions of law and questions of fact, and, in any event, many determinations involve questions of mixed law and fact. An appropriate litmus test was set out in *Southam*, *supra*, at para. 37, by Iacobucci J., who stated:

> Of course, it is not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future.

This principle was also articulated by L'Heureux-Dubé J. in *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at pp. 599-600, who sought to clarify the limitations of distinctions based on this criterion:

> In general, deference is given on questions of fact because of the "signal advantage" enjoyed by the primary finder of fact. Less deference is warranted on questions of law, in part because the finder of fact may not have developed any particular familiarity with issues of law. While there is merit in the distinction between fact and law, the distinction is not always so clear. Specialized boards are often called upon to make difficult findings of both fact and law. In some circumstances, the two are inextricably linked. Further, the "correct" interpretation of a term may be dictated by the mandate of the board and by the coherent body of jurisprudence it has developed. In some cases, even where courts might not agree with a given interpretation, the integrity of certain administrative processes may demand that deference be shown to that interpretation of law.

Her dissent in that case was founded essentially on her disapproval of the views of the majority on the characterization of the human rights tribunal as enjoying no expertise relative to courts in the understanding and interpretation of human rights Acts. Nevertheless, the principles discussed in the above quotation correctly state the law. This was confirmed in *Pasiechnyk*, at paras. 36 to 42, where the broad expertise of the Workers' Compensation Board to determine all aspects of "eligibility" under that system was considered sufficiently broad to include the determination that the term "employer" included claims against the government for its alleged negligence in regulating the works of two companies which had led to workers' injuries. Claims against the government as regulator were thus barred by virtue of the determination in issue. To allow such a claim "would undermine the purposes of the scheme" which was to "solve . . . the problem of employers becoming insolvent as a result of high damage awards" (para. 42). Such a finding falls squarely within Iacobucci J.'s description of a question of law: a finding which will be of great, even determinative import for future decisions of lawyers and judges. The creation of a legislative "scheme" combined with the creation of a highly specialized administrative decision-maker, as well as the presence of a strong privative clause was sufficient to grant an expansive deference even over extremely general questions of law.

38 Keeping in mind that all the factors discussed here must be taken together to come to a view of the proper standard of review, the generality of the proposition decided will be a factor in favour of the imposition of a correctness standard. This factor necessarily intersects with the criteria described above, which may contradict such a presumption, as the majority of this Court found to be the case in *Pasiechnyk*, *supra*. In the usual case, however, the broader the propositions asserted, and the further the implications of such decisions stray from the core expertise of the tribunal, the less likelihood that deference will be shown. Without an implied or express legislative intent to the contrary as manifested in the criteria above, legislatures should be assumed to have left highly generalized propositions of law to courts.

(2) The *Immigration Act*

39 Jurisdiction is granted to the Convention Refugee Determination Division of the Immigration and Refugee Board in the following terms:

> **67.** (1) The Refugee Division has, in respect of proceedings under sections 69.1 and 69.2, sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction.
>
> **82.1** (1) An application for judicial review under the *Federal Court Act* with respect to any decision or order made, or any matter arising, under this Act or the rules or regulations thereunder may be commenced only with leave of a judge of the Federal Court — Trial Division.
>
> **83.** (1) A judgment of the Federal Court — Trial Division on an application for judicial review with respect to any decision or order made, or any matter arising, under this Act or the rules or regulations thereunder may be appealed to the Federal Court of Appeal only if the Federal Court — Trial Division has at the time of rendering judgment certified that a serious question of general importance is involved and has stated that question.

(3) Previous Jurisprudence on the Standard of Review

40 This is the first time this Court has had the opportunity of considering the standard of review over decisions of the Immigration and Refugee Board. There is surprisingly scant discussion of the issue in previous Federal Court decisions. In most cases, a patent unreasonableness or "perverse or capricious" standard is applied. Those cases involved reviews of findings of credibility of witnesses by the Board: *Yuen v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 1045 (QL) (C.A.); *Franco v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 1011 (QL) (C.A.); *Sornalingam v. Canada (Minister of Citizenship and Immigration)* (1996), 107 F.T.R. 128, *per* MacKay J.; *Vetter v. Canada (Minister of Employment and Immigration)* (1994), 89 F.T.R. 17, *per* Gibson J.; *Ismaeli v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 573 (QL) (T.D.), *per* Cullen J. In only one case was a correctness standard applied: *Connor v. Canada (Minister of Citizenship and Immigration)* (1995), 95 F.T.R. 66, *per* Reed J.

41 In the thorough decision of Richard J. in *Sivasamboo v. Canada (Minister of Citizenship and Immigration)*, [1995] 1 F.C. 741 (T.D.), however, the question before this Court is directly addressed. The case involved a Board determination that the applicants were not refugees because they had an "internal flight alternative". Richard J. examines s. 82.1 of the *Immigration Act* and s. 18.1 of the *Federal Court Act*, which set out the possibility of an application for judicial review of a Board decision, and the grounds upon which such a decision may be reversed. He considers many of the controlling authorities of the day, including *Pezim* and *Bradco*. Although conceding that s. 67(1) of the *Immigration Act* is not a strong privative clause, he points out that many cases rely more on the specialized nature of the tribunal in question than on the presence or absence of a privative clause and notes: (a) that there is a limited structure for applying for judicial review; (b) that appeals from the Trial Division may only be taken when certified as a "serious question of general importance" under s. 83(1) of the

Immigration Act; (c) that the structure of refugee determination is not typically adversarial in nature, and that members of the Board have wide powers as to production of evidence and fact-finding; (d) that there is no adverse party; (e) that the international law context, and the implementation of the Refugee Convention in Canadian law is highly complex and therefore requires specialized knowledge; (f) that the members of the Board are experts in their field and draw upon detailed, expert reports from the Documentation Centre of Employment and Immigration Canada. He relies extensively on a commentary by Professor James Hathaway on the Refugee Division, including, at p. 758, the following excerpt:

> These evidentiary and contextual concerns make departure from traditional modes of adjudication imperative. We need expert, engaged, activist decision-makers who will pursue substantive fairness rather than technocratic justice. We must not view refugee claimants as opponents or threats, but rather as persons seeking to invoke a right derived from international law. It is the commitment to this kind of flexibility and sensitivity which led Parliament to abolish the previous court of record charged with refugee status determination, and to replace it with an expert tribunal with inquisitorial, non-adversarial jurisdiction.

Finally, he distinguishes this Court's decision in *Mossop*, *supra*, contending that the position of a human rights tribunal is different because its "determination is unrelated to issues of expertise or specialized knowledge and does not require a high degree of deference". He goes on to say: "The questions at issue here are not broad questions involving general principles of statutory interpretation and legal reasoning, but the interpretation of a statutory definition within a specific international law and regulatory framework." He concludes from all these considerations that the standard is patent unreasonableness, and that standard ought to apply even to "legal questions before it" (p. 761). On this basis, Richard J. rejected the application for judicial review, finding that the determination of "internal flight alternative" was not patently unreasonable.

(4) The Proper Standard: Correctness

42 Richard J.'s judgment in *Sivasamboo*, described above in some detail, presents admirably the case for a high level of deference to the decision of the Board. In my judgment, however, applying the pragmatic and functional analysis to the Act indicates that the decision of the Board in this case should be subjected to a standard of correctness.

43 First, s. 83(1) would be incoherent if the standard of review were anything other than correctness. The key to the legislative intention as to the standard of review is the use of the words "a serious question of general importance" (emphasis added). The general importance of the question, that is, its applicability to numerous future cases, warrants the review by a court of justice. Would that review serve any purpose if the Court of Appeal were obliged to defer to incorrect decisions of the Board? Is it possible that the legislator would have provided for an exceptional appeal to the Court of Appeal on questions of "general importance", but then required that despite the "general importance" of the question, the court accept decisions of the Board which are wrong in law, even clearly wrong in law, but not patently unreasonable? The only way in which s. 83(1) can be given its explicitly articulated scope is if the Court of Appeal — and inferentially, the Federal Court, Trial Division — is permitted to substitute its own opinion for that of the Board in respect of questions of general importance. This view accords with the observations of Iacobucci J. in *Southam*, *supra*, at para. 36, that a determination which has "the potential to apply widely to many cases" should be a factor in determining whether deference should be shown. While previous Federal Court decisions, including, arguably, the dispute in *Sivasamboo*, involve significant determinations of facts, or at the highest, questions of mixed fact and law, with little or no precedential value, this case involves a determination which could disqualify

numerous future refugee applicants as a matter of law. Indeed, the decision of the Board in this case would significantly narrow its own role as an evaluator of fact in numerous cases.

44 In short, s. 83(1) of the Act grants a statutory right of appeal based upon the criterion of "generality". The principle described in *Southam* and applied in many other cases, which is really no more than an assumption as to legislative intent, is reinforced by explicit statutory inclusion.

45 Moreover, the Board appears to enjoy no relative expertise in the matter of law which is the object of judicial review here. A clear majority of this Court has found in a number of cases that deference should not be shown by courts to human rights tribunals with respect to "general questions of law" (*Mossop*, *supra*, at p. 585), even legal rules indisputably at the core of human rights adjudication. The categorical nature of this rule has been mitigated by observations in other cases, however. As La Forest J. stated for the entire Court in *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, at para. 29:

> That having been said, I do not think the fact-finding expertise of human rights tribunals should be restrictively interpreted, and it must be assessed against the backdrop of <u>the particular decision the tribunal is called upon to make</u>. . . . A finding of discrimination is impregnated with facts, facts which the Board of Inquiry is in the best position to evaluate. . . . Given the complexity of the evidentiary inferences made on the basis of the facts before the Board, it is appropriate to exercise a relative degree of deference to the finding of discrimination, in light of the Board's superior expertise in fact-finding, a conclusion supported by the existence of words importing a limited privative effect into the constituent legislation. [Emphasis added.]

A similar approach is adopted by the majority in *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353, at p. 370.

46 Although the precise degree of deference which should be accorded to a human rights tribunal may still be open to question, the factors militating against deference in those cases apply with much greater force to the issues here. In those cases, the relationship relevant for considering the proper standard of review was that between a tribunal with specific expertise and experience in human rights adjudication, and provisions whose purpose is to protect human rights. The provision in question here shares that purpose. In *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, at p. 733, La Forest J. found the purpose underlying the Convention to be "the international community's commitment to the assurance of basic human rights without discrimination". As I will explain in the course of the next section, Article 1F(c) is at the core of this human rights purpose.

47 But the Board's expertise in matters relating to human rights is far less developed than that of human rights tribunals. The expertise of the Board is in accurately evaluating whether the criteria for refugee status have been met and, in particular, assessing the nature of the risk of persecution faced by the applicant if returned to his or her country of origin. Unlike the situation of a human rights tribunal, the relationship between the expertise and the provision in question here is remote. Only 10 percent of the members of the Board are required to be lawyers (s. 61(2)) and there is no requirement that there be a lawyer on every panel. While this may not be a liability for the purposes of assessing the risk of persecution of an applicant if returned to his or her country of nationality, it renders unthinkable reposing the broad definition of a basic human rights guarantee exclusively in the hands of the Board. Nor is there any indication that the Board's experience with previous factual determinations of risk of persecution gives it any added insight into the meaning or desirable future development of the provision in question here. Unlike many cases involving determinations by human

rights tribunals, this case does not involve any significant "impregnation" of legal principle with fact, as demonstrated by the ease with which the reviewing court was able to extract a question of general importance for the purposes of s. 83(1). Here, the legal principle is easily separable from the undisputed facts of the case and would undoubtedly have a wide precedential value. It bears repeating that with this determination, the tribunal is in fact seeking to stifle the application of its own expertise, rather than exercise it. The factual expertise enjoyed by this administrative decision-maker does not aid it in the interpretation of this general legal principle.

48 Nor can the Board be characterized as performing a "managing" or "supervisory" function, as was found in *Southam* and *National Corn Growers*. The Board itself is not responsible for policy evolution. The purpose of the Convention — and particularly that of the exclusions contained in Article 1F — is clearly not the management of flows of people, but rather the conferral of minimum human rights' protection. The context in which the adjudicative function takes place is not a "polycentric" one of give-and-take between different groups, but rather the vindication of a set of relatively static human rights, and ensuring that those who fall within the prescribed categories are protected.

49 Added to these indications of the intent of the legislator with regard to the development of general legal principles, is the absence of a strong privative clause. Indeed, read in the light of s. 83(1), it appears quite clear that the privative clause, such as it is, is superseded with respect to questions of "general importance". As has been emphasized above, the "pragmatic and functional" approach allows differing standards of deference even within different sections of the same Act, and with regard to different types of decisions taken by the tribunal in question. Here, the wording of the privative clause goes hand in hand with the fourth factor of the functional and pragmatic analysis,

namely, that determinations of abstract principles with wide application is a factor militating against deference.

50 I conclude that a correctness standard applies to determinations of law by the Board. *Sivasamboo* dealt with review of a question of a significantly different nature and I wish to emphasize that I make no comment about the correctness of that decision, specific as it is to the facts presented there.

B. *Principles of Treaty Interpretation: Determining the Purpose of Article 1F(c)*

51 Although some non-governmental organizations advocated the determination of exclusion under Article 1F(c) of the Convention by the United Nations High Commissioner for Refugees, it was ultimately decided that each contracting state would decide for itself when a refugee claimant is within the scope of the exclusion clause (J. C. Hathaway, *The Law of Refugee Status* (1991), at pp. 214-15). Since the purpose of the Act incorporating Article 1F(c) is to implement the underlying Convention, the Court must adopt an interpretation consistent with Canada's obligations under the Convention. The wording of the Convention and the rules of treaty interpretation will therefore be applied to determine the meaning of Article 1F(c) in domestic law (*Ward*, *supra*, at pp. 713-16).

52 Those rules are succinctly articulated in the *Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37 ("Vienna Convention"), which states:

ARTICLE 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

ARTICLE 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

53 These rules have been applied by this Court in two recent cases, one involving direct incorporation of treaty provisions (*Thomson v. Thomson*, [1994] 3 S.C.R. 551) and another involving a section of the *Immigration Act* intended to implement Canada's obligations under the Convention (*Ward*, *supra*). In the latter case,

La Forest J. makes use of several interpretative devices: the drafting history of, and preparatory work on the provision in question; the United Nations High Commissioner for Refugees' *Handbook on Procedures and Criteria for Determining Refugee Status* ("UNHCR Handbook"), and previous judicial comment on the purpose and object of the treaty. Indeed, at p. 713, La Forest J. was willing to consider submissions of individual delegations in the *travaux préparatoires*, although he recognized that, depending on their content and on the context, such statements "may not go far" in supporting one interpretation over another.

54 Although these rules of interpretation were accepted in general terms in the courts below and by the parties, there is substantial disagreement as to precisely what those rules mean in the context of Article 1F(c) of the Convention as incorporated by s. 2(1) of the Act. In deciding on the relative weight to be accorded the various interpretative sources made available under the Vienna Convention, Strayer J.A. found that the terms "purposes and principles of the United Nations" were relatively clear. He was also of the opinion that the *travaux préparatoires* were confused, ambiguous, or unrepresentative, and therefore, "completely unhelpful". The UNHCR Handbook, which was accepted as a valid source under Article 31(3)(b) of the Vienna Convention, was considered "far from emphatic" as to the meaning of Article 1F(c). Finally, the categorization of the purpose of the Convention as a "'human rights' instrument" did not favour the applicant. Indeed, Strayer J.A. tacitly rejected this purpose as an interpretative guide by adopting the words of Robertson J.A. in *Moreno v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 298 (C.A.), at p. 307:

> As persuasive as the commentaries may be, I am bound to approach the application of the exclusion clause, first, by reference to the existing jurisprudence of this Court and, second, by reference to the clear intent of the signatories to the Convention. Where, however, there is an unresolved

> ambiguity or issue, the construction most agreeable to justice and reason must prevail.

55 In my view, the Federal Court of Appeal erred in dismissing the objects and purposes of the treaty, and in according virtually no weight to the indications provided in the *travaux préparatoires.* As will be seen later, the legislative history of Article 1F indicates that the signatories to the Convention wished to ascribe a special meaning to the words "purposes and principles of the United Nations" in the context of the Convention. In *Ward*, La Forest J. carefully used each of these interpretative tools as a means of understanding the objects and purposes of the Convention as a whole, and the particular provisions being interpreted. The extremely general words in Article 1F(c) are not so unambiguous as to foreclose examination of other indications of the proper scope of the provision. An examination of the purpose and context of the treaty as a whole, as well as the purpose of the individual provision in question as suggested by the *travaux préparatoires*, provide helpful interpretative guidelines.

56 The starting point of the interpretative exercise is, first, to define the purpose of the Convention as a whole, and, second, the purpose and place of Article 1F(c) within that scheme. In *Ward*, La Forest J., speaking for the entire Court at p. 709, stated that:

> International refugee law was formulated to serve as a back-up to the protection one expects from the state of which an individual is a national. It was meant to come into play only in situations when that protection is unavailable, and then only in certain situations. The international community intended that persecuted individuals be required to approach their home state for protection before the responsibility of other states becomes engaged. For this reason, James Hathaway refers to the refugee scheme as "surrogate or substitute protection", activated only upon failure of national protection; see *The Law of Refugee Status* (1991), at p. 135.

Using a textual analysis of the Convention itself, and taking account of the views of commentators, La Forest J., at p. 733, defines the purpose of the Convention with reference to the specific issue of the definition of refugee, which is precisely the issue in this case as well:

> Underlying the Convention is the international community's commitment to the assurance of basic human rights without discrimination. This is indicated in the preamble to the treaty as follows:
>
> > CONSIDERING that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination.
>
> This theme outlines the boundaries of the objectives sought to be achieved and consented to by the delegates. It sets out, in a general fashion, the intention of the drafters and thereby provides an inherent limit to the cases embraced by the Convention. Hathaway, *supra*, at p. 108, thus explains the impact of this general tone of the treaty on refugee law:
>
> > The dominant view however, is that refugee law ought to concern itself with actions which deny human dignity in any key way, and that the sustained or systemic denial of core human rights is the appropriate standard.
>
> This theme sets the boundaries for many of the elements of the definition of "Convention refugee".

57 The human rights character of the Convention is further confirmed by the "Objectives" section of the Act:

> **3.** It is hereby declared that Canadian immigration policy and the rules and regulations made under this Act shall be designed and administered in such a manner as to promote the domestic and international interests of Canada recognizing the need
>
> . . .
>
> (*g*) to fulfil Canada's international legal obligations with respect to refugees <u>and to uphold its humanitarian tradition with respect to the displaced and the persecuted</u>; [Emphasis added.]

This overarching and clear human rights object and purpose is the background against which interpretation of individual provisions must take place.

58 The purpose of Article 1 is to define who is a refugee. Article 1F then establishes categories of persons who are specifically excluded from that definition. The purpose of Article 33 of the Convention, by contrast, is not to define who is and who is not a refugee, but rather to allow for the *refoulement* of a *bona fide* refugee to his or her native country where he or she poses a danger to the security of the country of refuge, or to the safety of the community. This functional distinction is reflected in the Act, which adopts Article 1F as part of s. 2, the definitional section, and provides for the Minister's power to deport an admitted refugee under s. 53, which generally incorporates Article 33. Thus, the general purpose of Article 1F is not the protection of the society of refuge from dangerous refugees, whether because of acts committed before or after the presentation of a refugee claim; that purpose is served by Article 33 of the Convention. Rather, it is to exclude *ab initio* those who are not *bona fide* refugees at the time of their claim for refugee status. Although all of the acts described in Article 1F could presumably fall within the grounds for *refoulement* described in Article 33, the two are distinct. This reasoning must also be applied when considering whether the acts falling under Article 1F(c) must be acts performed outside the country of refuge, as argued by the appellant. In my opinion, the *refoulement* provisions cannot be invoked to read into Article 1F(c) any such limitation. Where geographical limitations were required, the Convention specifically provided for them, as evidenced by the terms of Article 1F(b). The relevant criterion here is the time at which refugee status is obtained. In other words, Article 1F(c) being referable to the recognition of refugee status, any act performed before a person has obtained that status must be considered relevant pursuant to Article 1F(c).

59 Some light may be shed on the purpose of Article 1F(c) as distinct from Article 1F(a) and F(b) from the *travaux préparatoires* and from the contemporaneous meaning of the terms used. The precursor of Article 1F stated:

> ARTICLE I
>
> DEFINITION OF THE TERM "REFUGEE"
>
> D. No contracting State shall apply the benefits of this Convention to any person who in its opinion has committed a crime specified in article VI of the London Charter of the International Military Tribunal or any other act contrary to the purposes and principles of the Charter of the United Nations. [Emphasis added.]
>
> (UN Doc. E/L. 82)

The inclusion of the underlined words, which eventually were incorporated as Article 1F(c), generated considerable discussion in the Social Committee of the Economic and Social Council where the Convention was being negotiated. The Canadian, Chilean, and Pakistani delegates all expressed concern that the vague and potentially overbroad exclusionary clause would undermine the primary purpose of the Convention, and give states a means to easily reject individuals who deserved protection. The French delegate responded that the provision was aimed at "certain individuals who, though not guilty of war crimes, might have committed acts of similar gravity against the principles of the United Nations, in other words, crimes against humanity" (UN Doc. E/AC.7/SR.166, 22 August 1950, at p. 4). He was concerned that acts criminalized by the London *Charter of the International Military Tribunal*, 82 U.N.T.S. 280, would only be found to exist where a war had actually taken place. This would allow all manner of atrocities to be committed without the London Charter being violated simply because of the absence of military, interstate conflict. The reference to the London Charter alone, therefore, would fail to include

> tyrants . . . guilty of acts contrary to the purposes and principles of the Charter, who had by such acts helped to create the fear from which the refugees had fled. The fact that they had themselves become suspect to their superiors and were in their turn a prey to the fear which they had themselves created, would . . . certainly not [entitle them] to the automatic benefit of the international protection granted to refugees.
>
> (E/AC.7/SR.166, at p. 6)

60 While a statement such as this one is far from authoritative in determining the purpose of what emerged as Article 1F(c), two points may be taken from these statements. The first is that the London Charter, in addition to describing crimes against the peace and war crimes, also described "crimes against humanity" such 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" (as quoted in H. M. Kindred et al., *International Law Chiefly as Interpreted and Applied in Canada* (1993)), at p. 448 (emphasis added). As articulated in the London Charter, then, a crime against humanity was tied to the punishment of crimes of war and crimes in times of peace. Although as it finally emerged, Article 1F(a) actually spelled out the individual offences contained in the London Charter, including "a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes", there is a clearly articulated concern by the French delegate, of which he persuaded the other delegations, that the crimes against humanity described in the London Charter were confined to those related to the occurrence of a war. Though initially one of the objectors who considered the provision dangerously vague, the Canadian delegate eventually agreed that the individuals caught by Article 1F(c) and not otherwise identified by the London Charter were those "persons who had abused positions of authority by committing crimes against humanity, other than war

crimes" (E/AC.7/SR.166, at p. 10 (emphasis added)). In short, the delegates whose minds were changed by the statement of the French delegate believed that they were identifying non-war-related crimes against humanity and that this was a distinct concept worthy of a separate provision, even if the acts falling into that category could not be clearly enumerated at that time.

61 It must also be noted that the principle of exclusion by reason of acts contrary to the purposes and principles of the United Nations was found in embryonic form in the International Refugee Organization Constitution which also sought to exclude "those who, since the end of the Second World War, had participated in any organization seeking the overthrow by armed force of a government of a UN member State, or in any terrorist organization; or who were leaders of movements hostile to their government or sponsors of movements encouraging refugees not to return to their country of origin" (G. S. Goodwin-Gill, *The Refugee in International Law* (2nd ed. 1996), at p. 108). This is consistent with the position of the British representative who stated that acts contrary to the purposes and principles of the UN comprised the subversion and overthrow of democratic regimes. Other participants were opposed to this interpretation, however, because it was seen to conflict with the right to self-determination (Hathaway, *supra*, at p. 228). The confusion probably explains why the UNHCR Handbook, at paras. 162-63, does not consider that Article 1F(c) introduces "any specific new element".

62 Of course, the purposes and principles of the United Nations are set out in the Preamble and Articles 1 and 2 of the *Charter of the United Nations*, Can. T.S. 1945 No. 7. But the statement found there is principally organizational; its general wording also allows for a dynamic interpretation of state obligations, which must be adapted to the changing international context. The principles set out in the UN Charter are in fact

often developed in other international instruments and in decisions of the International Court of Justice, as well as in the jurisprudence of signatory states. Hathaway, *supra*, at p. 227, concludes that the multiple interpretations of Article 1F(c) "mirror its confused drafting history". The article is a residual clause which the UNHCR Handbook suggests, "due to its very general character, should be applied with caution" (para. 163). In reading the *travaux préparatoires,* one is easily convinced that the delegates participating in the Social Committee meetings intended to give the words "purposes and principles of the United Nations" a narrower and more focused meaning than that which would naturally be inferred by reading the UN Charter. The work of the drafting subcommittee and the resolutions of various bodies that followed are evidence of an effort to create a consensus on the special meaning to be given to the terms used in Article 1F(c).

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

64 This brings me back to the second point to be taken from the declarations of the French delegate referred to earlier. In the light of the general purposes of the Convention, as described in *Ward*, and elsewhere, and the indications in the *travaux préparatoires* as to the relative ambit of Article 1F(a) and F(c), the purpose of Article 1F(c) can be characterized in the following terms: to exclude those individuals responsible for serious, sustained or systemic violations of fundamental human rights which amount to persecution in a non-war setting.

C. *What Acts Are "Contrary to the Purposes and Principles of the United Nations"*?

65 Determining the precise content of this phrase is significantly easier having defined a discrete purpose which Article 1F(c) was intended to play within the structure and purposes of the Convention. The parties before us presented various alternatives as to what should be included within the section and sought to do so with a high degree of particularity. In my view, attempting to enumerate a precise or exhaustive list stands in opposition to the purpose of the section and the intentions of the parties to the Convention. There are, however, several types of acts which clearly fall within the section. The guiding principle is that where there is consensus in international law that particular acts constitute sufficiently serious and sustained violations of fundamental human rights as to amount to persecution, or are explicitly recognized as contrary to the purposes and principles of the United Nations, then Article 1F(c) will be applicable.

66 Several categories of acts fall within this principle. First, where a widely accepted international agreement or United Nations resolution explicitly declares that the commission of certain acts is contrary to the purposes and principles of the United Nations, then there is a strong indication that those acts will fall within Article 1F(c). The *Declaration on the Protection of All Persons from Enforced Disappearance* (GA

Res. 47/133, 18 December 1992, Article 1(1)), the *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (GA Res. 3452 (XXX), 9 December 1975, Article 2), and the *Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism* (GA Res. 51/210, 16 January 1997, Annex, Article 2), all designate acts which are contrary to the purposes and principles of the United Nations. Where such declarations or resolutions represent a reasonable consensus of the international community, then that designation should be considered determinative.

67 Similarly, other sources of international law may be relevant in a court's determination of whether an act falls within Article 1F(c). For example, determinations by the International Court of Justice may be compelling. In the case *United States Diplomatic and Consular Staff in Tehran*, I.C.J. Reports 1980, p. 3, at para. 91, the court found:

> Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights.

The International Court of Justice used even stronger language in the advisory opinion concerning the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, I.C.J. Reports 1971, p. 16, at para. 131, finding that the policy of apartheid "constitute[s] a denial of fundamental human rights [and] is a flagrant violation of the purposes and principles of the Charter".

68 Another important aspect of the exclusion under Article 1F(c) is the inference that violators of the principles and purposes of the UN must be persons in positions of power. This inference is drawn by the UNHCR Handbook at paras. 162-63 and in particular by the Canadian delegate to the Social Committee meetings of 1950 and 1951. While many commentators share this view (Hathaway, *supra*, at p. 229; A. Grahl-Madsen, *The Status of Refugees in International Law* (1966), vol. 1, at p. 286; and Kälin, Köfner and Nicolaus, in Goodwin-Gill, *supra*, at p. 110, note 162), the jurisprudence of signatory states is evolving along a different stream. Goodwin-Gill reports in his treatise, at p. 113, that the *Tehran* decision was the basis of the exclusion of a refugee under Article 1F(c) by Australian immigration authorities, indicating that it may be possible for non-state actors to be excluded by the provision. He contrasts this approach with that in France and Germany which appear to require that the acts be clothed in the authority of the state. Although it may be more difficult for a non-state actor to perpetrate human rights violations on a scale amounting to persecution without the state thereby implicitly adopting those acts, the possibility should not be excluded *a priori*. As mentioned earlier, the Court must also take into consideration that some crimes that have specifically been declared to contravene the purposes and principles of the United Nations are not restricted to state actors.

69 In this case, we are concerned with drug trafficking. There is no indication in international law that drug trafficking on any scale is to be considered contrary to the purposes and principles of the United Nations. The respondent submitted evidence that the international community had developed a co-ordinated effort to stop trafficking in illicit substances through numerous UN treaties, declarations, and institutions. It has not, however, been able to point to any explicit declaration that drug trafficking is contrary to the purposes and principles of the United Nations, nor that such acts should be taken into consideration in deciding whether to grant a refugee claimant asylum. Such an

explicit declaration would be an expression of the international community's judgment that such acts should qualify as tantamount to serious, sustained and systemic violations of fundamental human rights constituting persecution.

70 The second category of acts which fall within the scope of Article 1F(c) are those which a court is able, for itself, to characterize as serious, sustained and systemic violations of fundamental human rights constituting persecution. This analysis involves a factual and a legal component. The court must assess the status of the rule which has been violated. Where the rule which has been violated is very near the core of the most valued principles of human rights and is recognized as immediately subject to international condemnation and punishment, then even an isolated violation could lead to an exclusion under Article 1F(c). The status of a violated rule as a universal jurisdiction offence would be a compelling indication that even an isolated violation constitutes persecution. To that end, if the international community were ever to adopt the *Draft Statute of the International Criminal Court*, UN Doc. A/CN.4/L.491/Rev.2, which currently includes trafficking in narcotics within its jurisdiction, along with war crimes, torture and genocide, then there would be a much greater likelihood of a court being able to find a serious violation of human rights by virtue of those activities.

71 A serious and sustained violation of human rights amounting to persecution may also arise from a particularly egregious factual situation, including the extent of the complicity of the applicant. Assessing the factual circumstances of a human rights violation as well as the nature of the right violated would allow a domestic court, for example, to determine on its own that the events in the Tehran hostage-taking warrant exclusion under Article 1F(c).

72 In this case there is simply no indication that the drug trafficking comes close to the core, or even forms a part of the corpus of fundamental human rights. The respondent sought to bring the Court's attention to a novel category of international offence devised by M. C. Bassiouni called "crimes of international concern" (*International Criminal Law*, vol. 1, *Crimes* (1986), at pp. 135-63). Those "crimes" evince certain characteristics indicating that the international community does view their violation as particularly serious and worthy of immediate sanction; however, the bar appears to be set too low, including such categories of offence as "interference with submarine cables" and "environmental protection", as well as drug trafficking and eight other categories.

73 It is also necessary to take account of the possible overlap of Article 1F(c) and F(b) with regard to drug trafficking. It is quite clear that Article 1F(b) is generally meant to prevent ordinary criminals extraditable by treaty from seeking refugee status, but that this exclusion is limited to serious crimes committed before entry in the state of asylum. Goodwin-Gill, *supra*, at p. 107, says:

> With a view to promoting consistent decisions, UNHCR proposed that, in the absence of any political factors, a presumption of serious crime might be considered as raised by evidence of commission of any of the following offences: homicide, rape, child molesting, wounding, arson, drugs trafficking, and armed robbery.

The parties sought to ensure that common criminals should not be able to avoid extradition and prosecution by claiming refugee status. Given the precisely drawn scope of Article 1F(b), limited as it is to "serious" "non-political crimes" committed outside the country of refuge, the unavoidable inference is that serious non-political crimes are not included in the general, unqualified language of Article 1F(c). Article 1F(b) identifies non-political crimes committed outside the country of refuge, while Article

33(2) addresses non-political crimes committed within the country of refuge. Article 1F(b) contains a balancing mechanism in so far as the specific adjectives "serious" and "non-political" must be satisfied, while Article 33(2) as implemented in the Act by ss. 53 and 19 provides for weighing of the seriousness of the danger posed to Canadian society against the danger of persecution upon *refoulement*. This approach reflects the intention of the signatory states to create a humanitarian balance between the individual in fear of persecution on the one hand, and the legitimate concern of states to sanction criminal activity on the other. The presence of Article 1F(b) suggests that even a serious non-political crime such as drug trafficking should not be included in Article 1F(c). This is consistent with the expression of opinion of the delegates in the *Collected Travaux Préparatoires of the 1951 Geneva Convention Relating to the Status of Refugees* (1989), vol. III, at p. 89.

74 There is no rational connection between the objectives of the Convention and the objectives of the limitation on Article 1F(c) as stated by the respondent. Until the international community makes clear its view that drug trafficking, in one form or another, is a serious violation of fundamental human rights amounting to persecution, then there can be no rationale for counting it among the grounds of exclusion. The connection between persecution and the international refugee problem is what justifies the definitional exclusions in Article 1F(a) and F(c). Acts which fall short of persecution may well warrant *refoulement* under Article 33, and the Act has provided a procedure for determination of the merits of that issue. The *a priori* denial of the fundamental protections of a treaty whose purpose is the protection of human rights is a drastic exception to the purposes of the Convention as articulated in *Ward*, *supra*, and can only be justified where the protection of those rights is furthered by the exclusion.

VI. Disposition

75 Even though international trafficking in drugs is an extremely serious problem that the United Nations has taken extraordinary measures to eradicate, in the absence of clear indications that the international community recognizes drug trafficking as a sufficiently serious and sustained violation of fundamental human rights as to amount to persecution, either through a specific designation as an act contrary to the purposes and principles of the United Nations (the first category), or through international instruments which otherwise indicate that trafficking is a serious violation of fundamental human rights (the second category), individuals should not be deprived of the essential protections contained in the Convention for having committed those acts. Article 33 and its counterparts in the Act are designed to deal with the expulsion of individuals who present a threat to Canadian society, and the grounds for such a determination are wider and more clearly articulated. It is therefore clear that my determination of the scope of Article 1F(c) of the Convention, as incorporated in domestic law by s. 2(1) of the Act, does not preclude the Minister from taking appropriate measures to ensure the safety of Canadians.

76 In my view, the appellant's conspiring to traffic in a narcotic is not a violation of Article 1F(c).

77 I would allow the appeal and return the matter to the Convention Refugee Determination Division for consideration under Article 33 of the Convention, and ss. 19 and 53 of the Act, if the respondent chooses to proceed.

The reasons of Cory and Major JJ. were delivered by

78 CORY J. (dissenting) -- Mr. Pushpanathan was a member of a group convicted of trafficking in heroin with a street value of $10 million. Obviously this

trafficking was on a large scale. He was sentenced to eight years which confirmed his role as one of the ringleaders.

79 The United Nations considers heroin to be the most dangerous of illicit drugs. Trafficking in that drug is indeed a despicable crime. It will be demonstrated that its consumption leads consumers, almost inexorably, to commit crimes to satisfy their addiction. The potential profits are so high that it frequently leads to criminal activity and money laundering. It can lead to corruption of customs officials, police and judicial officers. It is a crime with such grievous consequences that it tears at the very fabric of society.

80 Thus it is apparent that Pushpanathan was convicted of a very serious crime that has devastating consequences. The grave nature of the crime cannot be readily discounted and forgotten. However even the basest criminal is entitled to exercise all the rights to which he is entitled.

81 It is necessary to review and consider the effects of drug trafficking in Canada and the world, but before doing so I wish to confirm my agreement with Bastarache J. that the applicable standard of review is one of correctness.

I. Standard of Review

82 What constitutes an act contrary to the purposes and principles of the United Nations for the purposes of the *Convention Relating to the Status of Refugees*, Can. T.S. 1969 No. 6 ("*Refugee Convention*"), is a question of law. While the Immigration and Refugee Board must be accorded some deference in its findings of fact, that deference should not be extended to a finding on a question of law. The Board cannot be said to

have any particular expertise in legal matters. Therefore the issue is whether the Board's decision on the question of law was correct.

II. Illicit Drug Trafficking: Background

A. *Impact in Canada*

(1) Incidence of Illicit Drug Use and Trafficking in Canada

83 Illicit drug use and trafficking is a serious problem in Canada and those that traffic in dangerous drugs must be a very real concern for all Canadians. Recent information shows that there has been an increase both in the use of illicit drugs and in the incidence of drug offences. According to a report of the Canadian Centre on Substance Abuse, illicit drug use increased substantially from 1993 to 1994: cannabis from 4.2 to 7.4 percent; cocaine from 0.3 to 0.7 percent; LSD, speed or heroin from 0.3 to 1.1 percent (D. McKenzie, *Canadian Profile: Alcohol, Tobacco & Other Drugs* (1997), at p. 91).

84 The number of drug-related incidents reported annually has increased in each of the past several years. In 1993, 56,811 incidents were reported (Canadian Centre for Justice Statistics, *Canadian Crime Statistics 1993*, at p. 52); in 1994, that number had increased to 60,594 (Canadian Centre for Justice Statistics, *Canadian Crime Statistics 1994*, at p. 16). The latest reports show another increase from 1995 to 1996; there were 65,106 drug-related incidents in 1996, which represented a 4.4 percent increase over the previous year (*Juristat*, vol. 17, No. 8, 1997, at p. 10). At the end of 1996, there were 2,899 drug offenders incarcerated in federal institutions, constituting 21.3 percent of the federal prison population (L. L. Motiuk and R. L. Belcourt, Research Branch,

Correctional Service of Canada, *Homicide, Sex, Robbery and Drug Offenders in Federal Corrections: An End-of-1996 Review*, at p. 13).

(2) Drugs and Crime

85 Drug offences such as possession and trafficking are only part of the link between the drug trade and criminality. There is an established connection between heavy drug use and crimes motivated by the need to finance a drug habit (*Juristat*, vol. 14, No. 6, 1994, at p. 5). A Canadian survey of federal inmates showed that 40 percent of men were drug users and half of those had engaged in criminal activity to get drugs. For women, the ratio is even greater: 25 percent of female inmates in Canada committed their crimes solely to obtain drugs (*ibid.*, p. 12).

86 In addition, the illegal drug trade is known to involve violence as a means of resolving disputes and maintaining discipline (*ibid.*, p. 9). In 1996, 56 homicides, that is to say one in ten, were reported by police to be drug-related; this was said to be similar to averages for other years (*Juristat*, vol. 17, No. 9, 1997, at p. 10).

87 Finally, it is well established that the consumption of licit and illicit drugs increases the rate of criminality generally, not just offences directly related to drugs. Among a sample of federal male inmates, over half were under the influence of alcohol or other drugs when they committed at least one of their crimes (*Juristat*, vol. 14, *supra*, at p. 11). Seventy-one percent of those of those who had consumed drugs said they would not have committed the crime if they had not taken the drugs (*ibid.*, p. 12). Thus, as might be expected, U.S. research indicates that drug abusers are more likely to be re-arrested than non-abusers (Bureau of Justice Statistics, *Drugs and Crime Facts, 1994*, at p. 26). Furthermore, research indicates that from 30 to 50 percent of those convicted

of drug offences re-offend (*ibid.*; Canadian Centre for Justice Statistics, *An Examination of Recidivism in Relation to Offence Histories and Offender Profiles* (1993), at p. 21).

88 In the face of all of this evidence, it is impossible to underestimate the harm that is done to Canadian society in the form of criminal activity, often violent, by the trafficking of illicit drugs. Unfortunately, there are also other costs associated with illicit drug trafficking and use, which reflect the widespread harm caused by these activities.

(3) Social and Economic Costs of Illicit Drug Use

89 The costs to society of drug abuse and trafficking in illicit drugs are at least significant if not staggering. They include direct costs such as health care and law enforcement, and indirect costs of lost productivity.

90 In Canada, the total cost to society of substance abuse has been estimated to be $18.45 billion annually (Canadian Centre on Substance Abuse, *The Costs of Substance Abuse in Canada: Highlights* (1996), at p. 2). Of this amount, the cost flowing from illicit drugs is $1.4 billion (McKenzie, *supra*, at p. 227). In 1992 there were 732 deaths, 7,095 hospitalizations and 58,571 hospital days in Canada attributable to illicit drugs (*ibid.*, p. 91). Mortality from illicit drugs is less than for alcohol and tobacco, but tends to involve younger victims (*Costs of Substance Abuse in Canada*, *supra*, at p. 6).

91 These significant and often tragic consequences serve to emphasize that the harm caused by trafficking in illicit drugs is very properly a matter of grave concern in Canada, as it is throughout the world.

B. *International Impacts*

(1) Extent of the Problem

92 Global consumption of illicit drugs is difficult to estimate, due to the lack of international information gathering facilities and the difficulty of comparing national data. It is clear, however, that illicit drug consumption increased throughout the world in the 1980s and 1990s, and the upward trend is thought likely to continue (Commission on Narcotic Drugs, *Economic and Social Consequences of Drug Abuse and Illicit Trafficking: An Interim Report*, UN Doc. E/CN.7/1995/3, 9 November 1994, at p. 14). The problem of drug abuse has also been increasing in severity as well as in scope. There has been an increase not only in the absolute number of drug abusers, but also in instances of heroin and amphetamine use, and intravenous drug abuse. Heroin, opium and cocaine are increasingly being injected, with all of the increased health risks that injection entails (Commission on Narcotic Drugs, *Reduction of Illicit Demand for Drugs: Prevention Strategies Including Community Participation -- World situation with respect to drug abuse: Report of the Secretariat*, UN Doc. E/CN.7/1995/5, 10 January 1995, at pp. 3-4). About 20 percent of the world's HIV/AIDS population inject drugs (UN International Drug Control Programme, *World Drug Report* (1997), at p. 91). Especially disturbing are reports of increasing numbers of young people abusing drugs. For example, in Pakistan the proportion of people who began using heroin between the ages of 15 and 20 has doubled to almost 24 percent; in the U.S., use of marijuana and cocaine amongst eighth grade students is reported to have doubled between 1991 and 1994 (*ibid.*, p. 86).

93 Production of illicit drugs has significantly increased over the past 10 to 15 years. Countries traditionally associated with the production of drugs have also become

major consumers, and are now part of the global expansion of markets for illicit drugs (*World situation with respect to drug abuse*, *supra*, at p. 3). It is estimated that over 300 tonnes of heroin were produced annually in the 1990s, and enough coca leaf was produced in 1996 to yield 1,000 tonnes of cocaine (*World Drug Report*, *supra*, at p. 18).

94 Conservative estimates of the annual global turnover of the illicit drug industry are from US$400 to 500 billion. This is approximately one tenth of total international trade, and seven to eight times the amount spent on official development assistance each year (*Economic and Social Consequences of Drug Abuse and Illicit Trafficking*, *supra*, at p. 8). The drug trade has become increasingly organized, especially for cocaine and heroin, and is controlled by organized groups and in some cases cartels. At the upper levels, control is highly centralized (*World Drug Report*, *supra*, at p. 123).

(2) Economic and Social Costs of Illicit Drug Use and Trafficking

95 The economic costs of drug trafficking and abuse are even greater in countries other than in Canada. They include enforcement, legal, prevention, care and rehabilitation costs. In all parts of the world, drug abuse reduces productivity (*Economic and Social Consequences of Drug Abuse and Illicit Trafficking*, *supra*, at p. 19). In drug-producing countries, some employment is generated, but less than is generally believed (*ibid.*). Drug money is often invested in sectors that create or maintain unproductive jobs (*ibid.*, p. 20).

96 Other economic costs can include inflated costs of food and real estate as a result of drug cultivation and the investment of illicit profits in land (*ibid.*, p. 24). This inflation causes increased hardship for local communities. Furthermore, income

disparities in society are increased by both production and consumption. The hierarchical nature of the illicit drug industry means that profits are received by only a small number of people. At the top level, the entire industry is controlled by a few individuals (*ibid.*, p. 25).

97 In the short term, drug exports appear to be beneficial to some countries by generating much-needed foreign exchange, in some cases as much as half the amount of total legal exports. Despite the short term beneficial effects on local economies, the long term effects are negative. The failure to develop alternative exports creates a dependence on illicit drug exports and a consequent vulnerability (*ibid.*, pp. 25-26).

98 It is estimated that some US$300 to 500 billion per year from the illicit drug industry are available internationally for laundering. These amounts are staggering when compared to the gross national products of many developing countries (*ibid.*, p. 26). Investment of illicit proceeds and laundering results in significant distortions of national economies. In states in transition that are rapidly moving state-owned assets into the private sector, problems occur when those assets become the target of criminal finance. In all parts of the world, the presence of large amounts of illicit drug money invested in an economy makes macro-economic policy and management extremely difficult. Drug trafficking and drug related violence require increases in state budgets for enforcement at the expense of other social needs, and jeopardize foreign investment by creating insecurity (*ibid.*, p. 28).

99 The social impacts of illicit drug use and trafficking are also significant. Substance abuse and the breakdown of families and communities are linked together in a downward spiral. Disintegration of the family contributes to illicit drug abuse, and abuse in turn strains families and tends to make them dysfunctional (*ibid.*, p. 29). In

producing areas, communities are subject to intimidation and brutality from both the criminal organizations and the police or army; tribal, community and co-operative rural organizations are broken down under pressure from traffickers and associated terrorist groups (UN Department of Public Information, *Drug Trafficking and the World Economy* (1990); quoted in M. C. Bassiouni, "Critical Reflections on International and National Control of Drugs" (1990), 18 *Denv. J. Int'l L. & Pol'y* 311, at p. 327).

100 The negative impact of drug abuse on health, including increased mortality and a range of drug-related health problems, is another significant social cost (*Economic and Social Consequences of Drug Abuse and Illicit Trafficking*, *supra*, at pp. 29-30). The demonstrated links between drug addiction, needle-sharing, prostitution, AIDS and other diseases create additional worldwide dangers for health (*ibid.*, p. 32).

101 The use of drugs has a detrimental impact on education; again this is a vicious circle in which drug use results in impaired performance and problems such as the loss of self-esteem from lack of educational achievement contribute to drug consumption (*ibid.*, p. 33).

102 Finally, there is growing evidence of serious detrimental impacts on the environment both from drug cultivation and processing (e.g., the use and dumping of hazardous chemicals), and from efforts to curtail these activities (such as the spraying of herbicides to eradicate illicit cultivation) (*ibid.*, pp. 33-34).

(3) Links to Criminal Activity and Corruption

103 Drug-related crime is a serious problem in producer and consumer countries alike. The incidence of criminal activity increases with drug addiction, as users engage

in property crimes and prostitution to support their habits. Violent conflicts among trafficking groups significantly increase the incidence of violence in some areas (*ibid.*, p. 35).

104 Illicit drug use and trafficking has a two-fold impact on law enforcement. First, it diverts time, energy and resources away from other responsibilities. Second, especially in the case of a well-organized industry, there is a risk of police corruption. Criminal activity and funds related to drug trafficking also have a broader corrupting impact on government and civil society. In some countries the money available from the drug trade seriously undermines the democratic process through the purchasing of protection, influence and votes. There are obvious dangers of corruption in the judicial system as well. Further the presence of large amounts of illegitimate funds also has the potential to destabilize national economies, which in turn renders the political system vulnerable and dependent (*ibid.*, p. 36).

(4) Threats to International Political and Economic Stability

105 The established links between organized crime, terrorist organizations, arms dealing and drug trafficking compound the risks to security in individual countries and in the international community. According to the United Nations International Drug Control Programme, "[i]n situations of armed conflict, illicit drug revenues -- or the drugs themselves -- are regularly exchanged for arms" (*World Drug Report*, *supra*, at p. 17). In some countries, such as Peru, trafficking organizations have formed alliances with guerrilla groups to ensure supplies of materials for processing (*ibid.*, p. 128). The financial and military power of these organizations threatens to undermine the political and economic stability of numerous countries, and indeed the entire international community.

106 The combined effects of the trade in illicit drugs have led one author to conclude that drug profits "do more to corrupt social systems, damage economies and weaken moral and ethical values than the combined effects of all other forms of crime. . . . The corrupting reach into government officials, politicians and the business community further endangers the stability of societies and governmental processes, and ultimately threaten political stability and even world order" (Bassiouni, *supra*, at pp. 323-24).

C. *The United Nations and the Control of Illicit Drugs*

(1) United Nations Activity in the Area of Drug Control

107 The grave concern of the international community relating to the use and trafficking of illicit drugs predated the establishment of the United Nations, and drug control activities have continued since its founding. The consequences of trafficking in opium at the beginning of the century led to cooperative international efforts to control it. The *International Opium Convention*, 8 L.N.T.S. 187, was adopted in 1912. Since that time, over a dozen multilateral instruments as well as many bilateral agreements and innumerable other documents have been developed by the international community, under the auspices first of the League of Nations and then of the United Nations. Indeed actions aimed at controlling the traffic in drugs were taken upon the founding of the United Nations.

108 Recent UN activity in this area demonstrates an ever increasing concern with illicit drug trafficking and its associated ills. There are three major UN bodies that have been established to deal with drug control. The Commission on Narcotic Drugs

("CND"), a commission of the Economic and Social Council established in 1946, is the central policy-making body within the UN on drug-related matters. The United Nations International Drug Control Programme is the UN agency responsible for coordinating activities in this area. The International Narcotics Control Board, established in 1968, is responsible for administering treaties relating to the international control of drugs, overseeing their implementation and promoting compliance.

109 Until the 1980s, the most important international instruments were the *Single Convention on Narcotic Drugs, 1961*, 30 March 1961, 520 U.N.T.S. 204, amended by a Protocol in 1972 (*Protocol Amending the Single Convention on Narcotic Drugs, 1961*, 25 March 1972, 976 U.N.T.S. 3), and the *Convention on Psychotropic Substances*, 21 February 1971, 1019 U.N.T.S. 175. The *Single Convention on Narcotic Drugs, 1961* consolidated most of the previous multilateral treaties on drugs. Both the *Single Convention on Narcotic Drugs, 1961* and the *Convention on Psychotropic Substances* focussed on the supply and movement of drugs, and attempted to establish a network of administrative controls. More than 116 narcotic drugs and 111 psychotropic substances are controlled by these conventions. Canada is a signatory to both conventions (*Multilateral Treaties Deposited with the Secretary-General*, United Nations, New York (ST/LEG/SER.E), as available on http://www.un.org/Depts/Treaty on December 4, 1997).

110 By the 1980s, however, it had become apparent that the seriousness of the problem had continued to increase and that the measures taken up to that time were inadequate:

> . . . as the power of the drug cartels became more pervasive and their methods increasingly sophisticated, the need for new and more stringent international measures became clear. Within the United Nations, the

> Commission on Narcotic Drugs became the focus of efforts to formulate and adopt a more comprehensive, long-range approach to the drug problem at the international level.
>
> (D. P. Stewart, "Internationalizing The War on Drugs: The UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances" (1990), 18 *Denv. J. Int'l L. & Pol'y* 387, at p. 390.)

In 1981, an International Drug Abuse Control Strategy and programme of action were adopted (GA Res. 36/168, 16 December 1981), which targeted both use and trafficking. In 1984, the United Nations General Assembly passed a unanimous resolution asking that the CND be requested to begin preparation of a new convention (GA Res. 39/141, 14 December 1984). The CND began work on the draft convention in the following year (Stewart, *supra*, at p. 390), and this work continued, with the encouragement of the General Assembly, for the next few years (see, e.g., GA Res. 40/120, 13 December 1985).

111 An International Conference on Drug Abuse and Illicit Trafficking attended by delegates from 138 states took place in Vienna in 1987 (*Report of the International Conference on Drug Abuse and Illicit Trafficking*, UN Doc. A/CONF.133/12, at p. 97). Two major documents were adopted at the conference: the conference Declaration and the *Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control* (*ibid.*, pp. 88 and 3). The Outline is a non-binding set of guidelines to be used by member states and organizations in designing a comprehensive approach to the problems of drug abuse and trafficking (*ibid.*, p. 7). It covers prevention and demand reduction, control of supply, suppression of illicit trafficking, and treatment and rehabilitation. The Declaration expressed concern about the effects of drug abuse and called for universal accession to the *Single Convention on Narcotic Drugs, 1961* and the *Convention on Psychotropic Substances*, and the completion and adoption of the new convention.

112 By the following year, the *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, UN Doc. E/Conf.82/15, 19 December 1988 ("*Illicit Traffic Convention*"), was in the final stages of negotiation and drafting. A conference for its adoption was held, with the delegations from 106 states participating (*Final Act of the United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, UN Doc. E/Conf.82/14, at para. 7). The *Illicit Traffic Convention* was adopted on December 19, 1988 and was immediately signed by 44 states, including Canada (D. W. Sproule and P. St-Denis, "The UN Drug Trafficking Convention: An Ambitious Step", in *Canadian Yearbook of International Law 1989*, vol. XXVII, 263, at p. 263); it came into force in November 1990. As of December 1997, 88 states have now signed the *Illicit Traffic Convention* (*Multilateral Treaties Deposited with the Secretary-General*, United Nations, New York (ST/LEG/SER.E), as available on http://www.un.org/Depts/Treaty on December 4, 1997).

113 The *Illicit Traffic Convention* has been described as "one of the most detailed and far-reaching instruments ever adopted in the field of international criminal law" (Stewart, *supra*, at p. 388). Its preamble recognizes "<u>that illicit traffic is an international criminal activity, the suppression of which demands urgent attention and the highest priority</u>", and the eradication of which "<u>is a collective responsibility of all States</u>" (emphasis added). It includes provisions regarding the establishment of criminal offences for trafficking and related activities, the exercise of jurisdiction, confiscation of drugs, other materials and proceeds, extradition, mutual legal assistance and other forms of cooperation, control of substances, materials and equipment used in illicit manufacture, eradication of cultivation, and various other matters relating to the control of trafficking. It covers the narcotic drugs and psychotropic substances listed under the *Single Convention on Narcotic Drugs, 1961* and the *Convention on Psychotropic*

Substances, as well as substances commonly used in the illicit manufacture of these drugs.

114 United Nations concern and activity relating to the control of illicit drug trafficking has continued to intensify throughout the last decade. Various organs and agencies of the United Nations have been addressing the problem of illicit drugs and associated issues such as organized crime, money laundering and terrorism. A special session of the General Assembly to consider the problem of illicit drugs is planned for 8-10 June 1998 (GA Res. 51/64, 28 January 1997), and a high-level political declaration has been proposed for that session (Press Release, GA/SHC/3424, 27 October 1997).

115 The new UN Programme for Reform identifies drug control, crime prevention and combatting international terrorism as a priority area for the UN in the coming years (*Renewing the United Nations: A Programme for Reform*, UN Doc. A/51/950, 14 July 1997, at para. 144). The United Nations International Drug Control Programme and the Crime Prevention and Criminal Justice Division (renamed the Centre for International Crime Prevention) are to be reorganized to strengthen the UN's activities in this area (*ibid*., paras. 144-45). The reform programme recognizes that "transnational networks of crime, narcotics, money-laundering and terrorism" are a threat to government authority, civil society and law and order, and that this is an issue of growing international concern (*ibid*., para. 143).

(2) Statements by the United Nations on Illicit Drug Trafficking

116 Throughout the 1980s and 1990s, international efforts to combat illicit drug trafficking have been included as an item of the General Assembly agenda in every session, and at each session, the General Assembly has adopted resolutions on the

subject. These resolutions are not legally binding upon member states, but they clearly and strongly indicate the views of the United Nations and its members. The resolutions on the control of drug trafficking consistently contain expressions of extreme concern about the problem and of condemnation for those who are responsible for its perpetuation and continued growth.

117 The following excerpts, from a 1986 resolution on the *International campaign against traffic in drugs*, GA Res. 41/127, 4 December 1986, are typical of the tone and content of these statements:

> Conscious of the common concern that exists among peoples of the world regarding the devastating effects of drug abuse and illicit trafficking, which jeopardize the stability of democratic institutions and the well-being of mankind and which therefore constitute a grave threat to the security and an obstacle to the development of many countries,
>
> . . .
>
> Considering that, despite the efforts made, the situation continues to deteriorate, owing, inter alia, to the growing interrelationship between drug trafficking and transnational criminal organizations that are responsible for much of the drug traffic and abuse of narcotic drugs and psychotropic substances and for the increase in violence, corruption and injury to society,
>
> Acknowledging once more that the eradication of this scourge calls for acknowledgement of shared responsibility . . .
>
> 1. Condemns unequivocally drug trafficking in all its illicit forms -- production, processing, marketing and consumption -- as a criminal activity and requests all States to pledge their political will in a concerted and universal struggle to achieve its complete and final elimination. . . . [Emphasis added.]

Subsequent declarations also expressed alarm at the detrimental impact on youth, both in terms of their involvement in production and trafficking, and the increasing numbers of drug addicted children and young people (e.g., GA Res. 43/121, 8 December 1988; GA Res. 44/141, 15 December 1989; GA Res. 46/103, 16 December 1991; GA Res.

49/168, 24 February 1995), and at the increasing connection between drug trafficking and terrorism (e.g., GA Res. 44/142, 15 December 1989; GA Res. 45/149, 18 December 1990; GA Res. 46/103, 16 December 1991; GA Res. 47/102, 16 December 1992; GA Res. 48/112, 20 December 1993).

118 In 1990, a Political Declaration and Global Programme of Action were adopted at the seventeenth special session of the General Assembly, which was devoted to the control of illicit drug use and trafficking. The Political Declaration states:

> We, the States Members of the United Nations,
>
> Assembled at the seventeenth special session of the General Assembly to consider the question of international co-operation against illicit production, supply, demand, trafficking and distribution of narcotic drugs and psychotropic substances,
>
> Deeply alarmed by the magnitude of the rising trend in the illicit demand, production, supply, trafficking and distribution of narcotic drugs and psychotropic substances, which are a grave and persistent threat to the health and well-being of mankind, the stability of nations, the political, economic, social and cultural structures of all societies and the lives and dignity of millions of human beings, most especially of young people,
>
> . . .
>
> Deeply concerned about the violence and corruption generated by the illicit demand, production, trafficking and distribution of narcotic drugs and psychotropic substances and the high human, political, economic and social costs of drug abuse and of the fight against the drug problem, entailing the diversion of scarce resources from other national priorities, which in the case of developing countries includes development activities,
>
> . . .
>
> Recognizing the links between drug abuse and a wide range of adverse health consequences, including the transmission of human immunodeficiency virus (HIV) infection and the spread of acquired immunodeficiency syndrome (AIDS),
>
> Recognizing also that illicit trafficking in narcotic drugs and psychotropic substances is a criminal activity and that its suppression requires a higher priority and concerted action at the national, regional and international levels by all States, . . .

Noting that the large financial profits derived from illicit drug trafficking and related criminal activities enable transnational criminal organizations to penetrate, contaminate and corrupt the structure of Governments, legitimate commercial activities and society at all levels, thereby vitiating economic and social development, distorting the process of law and undermining the foundations of States,

. . .

Alarmed at the growing link between illicit trafficking in narcotic drugs and terrorist activities, which is aggravated by insufficient control of commerce in arms and by illicit or covert arms transfers, as well as by illegal activities of mercenaries,

. . .

Agree on the following:

1. We resolve to protect mankind from the scourge of drug abuse and illicit trafficking in narcotic drugs and psychotropic substances;

2. We affirm that the fight against drug abuse and illicit trafficking in narcotic drugs and psychotropic substances should be accorded high priority by Governments and by all relevant regional and international organizations;

. . .

8. <u>We condemn the crime of illicit drug trafficking in all its forms</u> and reaffirm our political commitment to concerted international action. . . . [Emphasis added.]

(GA Res. S-17/2, 23 February 1990, Annex)

Most recently, a resolution adopted in January 1998 states that the General Assembly is:

<u>Gravely concerned that, despite continued increased efforts by States and relevant international organizations, there is a global expansion of illicit demand for, production of and trafficking in narcotic drugs and psychotropic substances, including synthetic and designer drugs, which threatens the health, safety and well-being of millions of persons, in particular young people, in all countries, as well as the political and socio-economic systems and the stability, national security and sovereignty of an increasing number of States</u>,

Deeply alarmed by the growing and spreading violence and economic power of criminal organizations and terrorist groups engaged in drug trafficking activities and other criminal activities, such as money laundering

> and illicit traffic of arms and precursors and essential chemicals, and by the increasing transnational links between them, . . .
>
> . . .
>
> Fully aware that States, the relevant organizations of the United Nations system and multilateral development banks need to accord a higher priority and political determination to dealing with this scourge, which undermines development, economic and political stability and democratic institutions, and the combat against which entails increasing economic costs for Governments and the irreparable loss of human lives. . . . [Emphasis added.]
>
> (GA Res. 52/92, 26 January 1998)

119 To traffic in dangerous illicit drugs is to commit a very grievous crime with very serious social consequences in Canada and throughout the world. In light of the grave international consequences it would be reasonable to expect the United Nations to have considered and studied the problem. The foregoing review confirms that those expectations have been met. The studies conducted by the United Nations have confirmed the gravity of the crime and the continuing tragedy of its consequences. These studies and the pronouncements of the United Nations concerning drug trafficking indicate that the crime can indeed be considered to be contrary to the purposes and principles of the United Nations.

D. *Application to the Case at Bar: Is Illicit Drug Trafficking an Act Contrary to the Purposes and Principles of the United Nations*?

(1) How Should A Court Or Tribunal Determine What Constitutes An Act Contrary to the Purposes and Principles of the United Nations?

120 On occasion, the United Nations itself has expressly declared a certain activity to be contrary to its purposes and principles. In those cases, the declaration depending on its legal status may compel a domestic court to find that the act is contrary to the purposes and principles of the United Nations, or at least persuade it to make such

a finding. This is the situation which pertains to enforced disappearance, torture and international terrorism. The *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (GA Res. 3452 (XXX), 9 December 1975, Article 2) states that "[a]ny act of torture or other cruel, inhuman or degrading treatment or punishment is an offence to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations. . . ."

121 The *Declaration on the Protection of All Persons from Enforced Disappearance* (GA Res. 47/133, 18 December 1992, Article 1(1)) contains similar language with respect to enforced disappearance. The *Declaration on Measures to Eliminate International Terrorism* (GA Res. 49/60, 17 February 1995, Annex, Article 2) and the *Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism* (GA Res. 51/210, 16 January 1997, Annex, Article 2) both state that the acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations. These declarations are persuasive evidence that the acts stated to be contrary to the purposes or principles of the United Nations should be treated as such, *inter alia*, for the purposes of the *Refugee Convention*.

122 It does not follow, however, that the category of acts contrary to the purposes and principles of the United Nations should be restricted to those expressly declared to be so. A domestic tribunal is entitled, upon considering the relevant material, to find that the phrase includes other types of acts. On this appeal two other categories were put forward as an indication of the kind of acts which should also be considered contrary to the purposes and principles of the United Nations: namely international crimes and "crimes of international concern". While these categories may be useful guides, they

should not, I think, be considered to be conclusive in determining the scope of acts which should be included.

123 The category of acts which are agreed to be true international crimes is, at least at the present time, a very limited one. These crimes would be considered acts contrary to the purposes and principles of the United Nations, but I do not think they constitute the only acts contravening the UN's purposes and principles. On the other hand, the category of "crimes of international concern", which it is suggested includes those crimes which are the subject of international conventions providing for international cooperation in prosecuting offenders, is a very broad one. (See, e.g., M. C. Bassiouni, *International Criminal Law*, vol. 1, *Crimes* (1986), at pp. 135-36.) He would include some activity which it would be inappropriate to label as "contrary to the purposes and principles of the United Nations". Actions which do come within this description will have serious consequences. It follows that in the context of defining the scope of exclusions to the *Refugee Convention*, they should not be too broadly defined.

124 Similarly, it cannot be that every initiative of the United Nations is so central to its purposes and principles that any act which violates or undermines those initiatives is "contrary to the purposes and principles of the United Nations". It is true that one of the purposes of the United Nations as expressed in its Charter is "[t]o achieve international cooperation in solving international problems" (*Charter of the United Nations*, Can. T.S. 1945 No. 7, Article 1(3)). However in light of the expansive, and expanding scope of the areas in which agencies of the United Nations are active, it would not be appropriate to use this wide range of activity to define the exclusion at issue here.

125 Nevertheless, there are some matters which are the subject of such grave concern and such intense and continuing activity that it may be inferred that they are

fundamentally connected to the goals of the UN. It is not merely the extent of the concern and activity that will indicate which initiatives are central to the purposes and principles of the UN, but also the nature of the problem and its relationship to the purposes and principles as they are expressed in the Charter. Some problems have been recognized by the international community as being so serious and of such a nature that they pose a threat to the entire international community and the principles of its social order. Conduct which directly or significantly contributes to these problems or which violates agreed principles or obligations with respect to them should, in appropriate cases, be considered as contrary to the purposes and principles of the United Nations. In my view trafficking to a significant extent in a dangerous drug such as heroin should be included in this category of conduct.

126 While I agree with Bastarache J. that serious or systematic violation of human rights would be conduct that is contrary to the purposes and principles of the United Nations, with respect, I do not see that it is the only conduct that should be considered in interpreting Article 1F(c) of the *Refugee Convention*. The promotion of respect for human rights is one of the fundamental purposes of the United Nations. There are, however, other purposes and principles which can be violated by the actions of an individual or a state. It may be useful to review the purposes and principles of the United Nations set out in the Charter:

> *Article 1*
>
> The Purposes of the United Nations are:
>
> 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.

Article 2

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles:

1. The Organization is based on the principle of the sovereign equality of all its Members.

2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.

3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

6. The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.

7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

These principles are reiterated and developed in the *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in*

Accordance with the Charter of the United Nations (GA Res. 2625 (XXV), 24 October 1970, Annex).

127 The determination of what constitutes an act contrary to these purposes and principles need not be limited to the consideration of one purpose, the protection of human rights, notwithstanding the fact that it is important and that the *Refugee Convention* is a human rights instrument. Although the purpose of the instrument will be taken into account in interpreting its provisions, I do not see that in this case it must restrict the content of the exclusion so as to limit it to conduct relating directly to human rights. All of the purposes and principles should be considered. Furthermore, some types of conduct may indirectly but significantly contribute to the violation of human rights; I would include participation in large scale illicit drug trafficking in that category of conduct.

128 The *Refugee Convention* should be interpreted so as to provide the greatest protection of human rights. Yet, it cannot be the case that the interpretation of an exclusion must be forever restricted. As international law develops, the content of a phrase such as "acts contrary to the purposes and principles of the United Nations" must be capable of development. The expansion of the exclusion set out in Article 1F(c) of the *Refugee Convention* should not be undertaken lightly, but where there is compelling evidence suggesting that it should be interpreted in a certain way, a court is not precluded from adopting that interpretation.

129 International law is developing continuously. Courts should recognize that the guidance provided by interpretive aids such as the *travaux préparatoires* and subsequent practice must be considered in the light of the current state of the law and international understandings. The *travaux préparatoires* should be taken into account,

yet this does not mean that courts are restricted to a precise interpretation of that material. Rather, consideration should be given to the underlying principles and concerns that they express with the aim of giving them a contemporary meaning. Similarly, with regard to state practice, some consistency should be maintained with the line of interpretation revealed by the practice of state parties, but that interpretation must be adjusted to take into account evolving ideas and principles in international law. The interpretation of international legal instruments is a dynamic process which must take into account the contemporary conditions. To put it another way, the interpretation must respond to the contemporary context.

(2) Can a Private Individual Be Guilty of Acts Contrary to the Purposes and Principles of the United Nations?

130 The position, that illicit drug trafficking activities may constitute acts contrary to the purposes and principles of the United Nations, assumes that private individuals can commit such acts. Although those involved in trafficking will sometimes hold public office or other positions of power, it is unlikely that they would be engaging in illicit trafficking in their capacity as state actors. More often the traffickers will be private individuals with no direct connection to state authority.

131 To hold that a private person who is not acting on behalf of or as agent of a state, could commit an act that is contrary to the purposes and principles of an international organization of nation states is, admittedly, contrary to the traditional position. Traditionally it was thought that the purposes and principles of the United Nations, like international law generally, are addressed only to states, and can be violated only by state actors. This is the position reflected in the portions of the *travaux*

préparatoires and the United Nations High Commissioner for Refugees' *Handbook on Procedures and Criteria for Determining Refugee Status* referred to by the appellant.

132 However, the status of private individuals in international law has evolved in recent years. It is now generally accepted that an individual acting in his or her private capacity can commit acts which constitute violations of international law. Although the scope of international criminal responsibility for private individuals is limited, it does exist. Some of the acts covered by Article 1F(a) can be committed by individuals who are not acting as officials or agents of a state. It follows that Article 1F(c), could also apply to individuals. For example the actions of a kidnapping or murdering terrorist; the illicit sale of arms by an arms dealer; or the trafficking in heroin in a large scale which might fund the acts of the terrorist or arms dealer could all contravene the aims and principles of the United Nations.

133 Furthermore, some of the acts which have been explicitly recognized as contrary to the purposes and principles of the United Nations are also recognized to be committed, at least in some cases, by private individuals. The *Declaration on Measures to Eliminate International Terrorism* implies that terrorist acts may be committed with or without official state involvement. This is apparent from the Preamble that refers to "acts of international terrorism, <u>including</u> those in which States are directly or indirectly involved" (emphasis added).

134 The position adopted by my colleague, Bastarache J., that "acts contrary to the purposes and principles of the United Nations" should be interpreted, for the purposes of the *Refugee Convention*, as meaning serious violations of human rights or persecution, also implies that private individuals could be guilty of these acts. Indeed this Court held in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, that

persecution could, in some cases, include acts by private individuals without any state involvement (at pp. 713-17).

(3) Is Trafficking in Illicit Drugs an Act Contrary to the Purposes and Principles of the United Nations?

135 In my opinion significant trafficking in a dangerous illicit drug can constitute an act which is contrary to the purposes and principles of the United Nations. It would thus form the basis of exclusion from refugee status pursuant to Article 1F(c) of the *Refugee Convention*. Although I accept the result arrived at by the courts below and suggested by the respondent, I arrive at that result by somewhat different reasoning.

136 At the outset it is important to set out certain propositions which do not form the basis for my position. I do not proceed on the basis that refugee status is a privilege or exceptional entitlement and that therefore any doubt in interpretation may be resolved against the potential claimant. To the extent that this was the basis underlying the reasons of Strayer J.A. in the Court of Appeal, I cannot with respect agree with that view. The right to claim refugee status constitutes an important right, and any exclusions from that right must be interpreted in accordance with accepted principles.

137 Next, the rationale for including illicit drug trafficking in the 1F(c) exclusion is not that Canada should be able to exclude from the refugee determination process persons who might be considered "undesirable" or who have, without more, committed crimes in Canada. These cases must be dealt with, if at all, according to the provisions for *refoulement* as they are incorporated into the *Immigration Act*, R.S.C., 1985, c. I-2.

138 It is also not, as the respondent suggested, a question of helping in some way in the "war against drugs". Canada's obligations do not require it to deny refugee status to those involved in the drug trade. Rather, the interpretation of the exclusion to include drug trafficking reflects the harsh reality that this activity is recognized, both legally and practically, as an activity that not only is a domestic criminal offence, but occasions very serious and significant harm in the international community. It is because it gives rise to such grave consequences that it can and should form the basis of an exclusion. This conclusion arises from the consideration and application of the same rationale that prompted the international community to determine that certain persons should not, because of the nature of their actions, be permitted to make the claim to refugee status that they would otherwise be entitled to make.

(4) Illicit Drug Trafficking as an International Crime

139 Trafficking in illicit drugs is clearly a "crime of international concern". The *Illicit Traffic Convention* explicitly recognizes that "illicit traffic is an international criminal activity, the suppression of which demands urgent attention and the highest priority" (Preamble). It requires all states who are parties to cooperate in the prevention and prosecution of trafficking offences. General Assembly resolutions have also referred to illicit drug trafficking as a criminal activity, which requires international cooperation to suppress (e.g., GA Res. 39/141, 14 December 1984, Annex; GA Res. 41/127, 4 December 1986).

140 The legal status of illicit trafficking as an "international crime" is less clear, in large part because there is little agreement on what constitutes a true international crime (J. F. Murphy, "International Crimes" in C. C. Joyner, ed., *The United Nations and International Law* (1997), 362, at pp. 362-63). According to one author, "[i]n light of

[the *Illicit Traffic Convention*] and the other earlier multilateral efforts a good argument can be made that international drug trafficking is a crime under customary international law" (*ibid*., pp. 369-70). However, it does not yet seem to be established that universal jurisdiction exists for drug trafficking crimes. The latest version of the International Law Commission's *Draft Code of Crimes Against the Peace and Security of Mankind* (*Report of the International Law Commission on the work of its forty-eighth session*, UN Doc. A/51/10, chapter 2) does not contain provisions on narcotics trafficking although they had been included in an earlier draft (*Draft Articles on the Draft Code of Crimes Against the Peace and Security of Mankind*, UN Doc. A/46/405, 11 September 1991, at p. 25). The commentary to the recent draft, however, indicates that this omission is not to be construed as precluding further discussion and perhaps the eventual inclusion of those provisions (*Report of the International Law Commission on the work of its forty-eighth session*, *supra*, at para. 40).

141 All of these elements may be considered in determining whether trafficking in illicit drugs is an act contrary to the purposes and principles of the United Nations. However, I do not think that the categorization of an act as an international crime or crime of international concern is determinative of the question. Rather it is necessary to consider the question in the context of all the relevant factors.

(5) Nature and Gravity of the Harm Caused by Illicit Drug Trafficking

142 The concern of the appellant and the intervener on this appeal was to establish some rational basis for identifying those "crimes of international concern" or activities contrary to some United Nations programme or initiative that could properly be called "acts contrary to the purposes and principles of the United Nations". In my view, the additional factor which distinguishes illicit drug trafficking from some other

"crimes of international concern" or United Nations initiatives is the nature and gravity of the harm to people in countries around the world and to the international community as a whole that results from this activity. An analysis of the nature and severity of the harm provides a rational basis for drawing the necessary distinctions.

143 The insidious and widespread effects of drug use and trafficking have already been described. Beyond any doubt the harm caused by the illicit traffic in drugs is of the utmost severity. This illicit traffic takes a dreadful toll on the lives of individuals, families and communities. It destabilizes and retards the development of whole nations and regions. Clearly the grave concern that has been consistently expressed by the international community is well merited. Nor can there be any doubt that the severity of the problem and the international concern for its consequences is increasing.

144 Drug trafficking has, throughout this century, been an international enterprise and hence an international problem. However, the ever increasing scale of the traffic, the apparent efficiency of organization and sophistication, the vast sums of money involved and the increasing links with transnational organized crime and terrorist organizations constitute a threat which is increasingly serious in both its nature and extent. Illicit drug trafficking now threatens peace and security at a national and international level. It affects the sovereignty of some states, the right of self-determination and democratic government, economic, social and political stability and the enjoyment of human rights. Many of the purposes and principles expressed in the UN Charter, are undermined, directly or indirectly, by the international trade in illicit drugs: for example, international peace and security (Article 1(1)), self-determination (Article 1(2)), solving economic, social, cultural or humanitarian problems (Article 1(3)), protection of human rights (Article 1(3)), sovereignty (Article 2(1)) and refraining from

the use of force (Article 2(4)). It is on this basis that I find that at least some individuals who participate in and contribute to this activity must be considered to be committing acts contrary to the purposes and principles of the United Nations.

(6) Explicit Statements Regarding Illicit Drug Trafficking by the United Nations

145 The statements on this subject by the international community, including the relevant conventions and General Assembly resolutions, reflect an acute awareness of the nature and gravity of the problem, and a severe condemnation of the activities that give rise to the problem. It was contended by the intervener Canadian Council for Refugees that the silence of the United Nations on illicit drug trafficking, in contrast to, for example, torture and international terrorism, indicated that trafficking should not be considered contrary to its purposes and principles. Yet, in reality, the United Nations has been anything but silent with respect to its concerns about the international traffic in illicit drugs and its effects.

146 It is true that, the United Nations has never specifically declared that drug trafficking is "contrary to the purposes and principles of the United Nations". However it has clearly and frequently recognized and denounced the evils of drug trafficking. See for example:

> Trafficking in narcotic drugs or psychotropic substances is a grave international crime against humanity.
>
> (*Draft Convention against Traffic in Narcotic Drugs and Psychotropic Substances and Related Activities*, GA Res. 39/141, 14 December 1984, Annex, Article 2)
>
> [The General Assembly] [c]ondemns unequivocally drug trafficking in all its illicit forms. . . .

(GA Res. 41/127, 4 December 1986, Article 1)

We condemn the crime of illicit drug trafficking in all its forms. . . .

(Political Declaration, GA Res. S-17/2, 23 February 1990, Annex, Article 8)

[The General Assembly] [s]trongly condemns the crime of drug trafficking in all its forms. . . .

(GA Res. 45/149, 18 December 1990, Part I, Article 1; GA Res. 46/103, 16 December 1991, Part I, Article 2)

[The General Assembly] [r]eiterates its condemnation of the crime of drug trafficking in all its forms. . . .

(GA Res. 47/102, 16 December 1992, Part I, Article 2; GA Res. 48/112, 20 December 1993, Part II, Article 1)

147 There are also many statements reflecting an awareness that trafficking threatens essential aspects of the purposes and principles of the United Nations. Drug trafficking has been recognized as a threat to:

health and well-being (e.g., GA Res. 36/132, 14 December 1981; GA Res. 39/141, 14 December 1984, Annex; GA Res. 40/122, 13 December 1985; GA Res. 41/127, 4 December 1986; GA Res. 44/142, 15 December 1989; GA Res. S-17/2, 23 February 1990, Annex; GA Res. 49/168, 24 February 1995; GA Res. 51/64, 28 January 1997; GA Res. 52/92, 26 January 1998);

political, economic, social and cultural structures (e.g., GA Res. 42/113, 7 December 1987; GA Res. 43/122, 8 December 1988; GA Res. 44/141, 15 December 1989; GA Res. 44/142, 15 December 1989; GA Res. S-17/2, 23 February 1990, Annex; GA Res. 45/149, 18 December 1990; GA Res. 49/168, 24 February 1995; GA Res. 51/64, 28 January 1997; GA Res. 52/92, 26 January 1998);

development (e.g., GA Res. 38/122, 16 December 1983; GA Res. 39/141, 14 December 1984, Annex; GA Res. 40/122, 13 December 1985; GA Res. 41/127, 4 December 1986; GA Res. S-17/2, 23 February 1990, Annex; GA Res. 49/168, 24 February 1995; GA Res. 52/92, 26 January 1998);

political and economic stability (e.g., GA Res. 40/122, 13 December 1985; GA Res. 44/142, 15 December 1989; GA Res. 45/149, 18 December 1990; GA Res. 49/168, 24 February 1995; GA Res. 51/64, 28 January 1997; GA Res. 52/92, 26 January 1998);

national security (e.g., GA Res. 36/132, 14 December 1981; GA Res. 38/122, 16 December 1983; GA Res. 40/122, 13 December 1985; GA Res. 41/127, 4 December 1986; GA Res. 42/113, 7 December 1987; GA Res. 43/122, 8 December 1988; GA Res. 44/142, 15 December 1989; GA Res. 45/149, 18 December 1990; GA Res. 49/168, 24 February 1995; GA Res. 51/64, 28 January 1997; GA Res. 52/92, 26 January 1998);

sovereignty (e.g., GA Res. 39/141, 14 December 1984, Annex; GA Res. 40/121, 13 December 1985; GA Res. 44/142, 15 December 1989; GA Res. 45/149, 18 December 1990; GA Res. 49/168, 24 February 1995; GA Res. 51/64, 28 January 1997; GA Res. 52/92, 26 January 1998);

human rights (e.g., GA Res. 44/39, 4 December 1989; GA Res. 49/168, 24 February 1995);

and

democratic institutions (e.g., GA Res. 40/121, 13 December 1985; GA Res. 41/127, 4 December 1986; GA Res. 42/113, 7 December 1987; GA Res. 43/122, 8 December 1988; GA Res. 44/141, 15 December 1989; GA Res. 49/168, 24 February 1995; GA Res. 51/64, 28 January 1997).

148 As a basis for comparison, the Article of the *Declaration on Measures to Eliminate International Terrorism* that declares the acts, methods and practices of terrorism to be contrary to the purposes and principles of the United Nations states that these "may pose a threat to international peace and security, jeopardize friendly relations among States, hinder international cooperation and aim at the destruction of human rights, fundamental freedoms and the democratic bases of society" (Article 2). Since the United Nations has explicitly recognized that the traffic in illicit drugs may pose a similar threat, I think it is reasonable to infer that this activity is also contrary to the purposes and principles of the United Nations.

149 This conclusion is strengthened by the recognition that illicit drug trafficking is, to an increasingly significant extent, linked to other acts which are contrary to the purposes and principles of the United Nations. That organization has recognized that trafficking in illicit drugs is directly and indirectly responsible for grave human rights violations. Its growing links to international terrorism clearly indicate that drug money

is used to support terrorist activity. The international community has recently recognized this in the *Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism* by stating that:

> 2. The States Members of the United Nations reaffirm that acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations; they declare that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations. . . . [Emphasis added.]

150 The statements of the United Nations and the international community lead inexorably to the conclusion that those engaged in trafficking in illicit drugs are responsible, directly or indirectly, for harms that are so widespread and so severe that they undermine the very purposes and principles upon which the United Nations is based. It follows that their actions must be considered "acts contrary to the purposes and principles of the United Nations" and thus come within the exclusion set out in Article 1F(c) of the *Refugee Convention*.

151 There remains the problem of distinguishing which acts within the broad category of illicit drug trafficking constitute acts contrary to the purposes and principles of the United Nations. The UN General Assembly has condemned "drug trafficking in all its illicit forms", including production, processing, marketing and consumption (e.g., GA Res. 41/127, 4 December 1986). However, I believe it is necessary to draw some distinctions based on the type and scale of activities. It is those actually engaged in trafficking who reap most of the profits, cause the greatest harm and therefore bear the greatest responsibility for perpetuating the illicit trade. Those who are merely consumers are often victims themselves and do not bear the same responsibility. The *Illicit Traffic Convention* recognizes this distinction by treating production, processing, distribution

and sale differently from possession, purchase or cultivation for personal consumption for the purposes of offences and sanctions (Article 3).

152 The *Illicit Traffic Convention* also provides some guidance with respect to distinguishing particularly serious trafficking offences. Article 3(5) outlines a number of "factual circumstances which make the commission of the offences established in accordance with paragraph 1 of this article particularly serious":

> (a) The involvement in the offence of an organized criminal group to which the offender belongs;
>
> (b) The involvement of the offender in other international organized criminal activities;
>
> (c) The involvement of the offender in other illegal activities facilitated by commission of the offence;
>
> (d) The use of violence or arms by the offender;
>
> (e) The fact that the offender holds a public office and that the offence is connected with the office in question;
>
> (f) The victimization or use of minors;
>
> (g) The fact that the offence is committed in a penal institution or in an educational institution or social service facility or in their immediate vicinity or in other places to which school children and students resort for educational, sports and social activities;
>
> (h) Prior conviction, particularly for similar offences, whether foreign or domestic, to the extent permitted under the domestic law of a Party.

153 To this list of factors to be considered, I would add the nature and quantity of the drugs involved. The International Law Commission's draft code that included illicit traffic in narcotics as an international crime (*Draft Articles on the Draft Code of Crimes Against the Peace and Security of Mankind*, Article 25(1)) referred to trafficking on a large scale; of course it will be a question of interpretation in each case whether the trafficking at issue is "on a large scale". The commentary of the International Law

Commission on this article distinguishes between "isolated or individual activities of small dealers" and "large-scale, organized operations" (*Report of the International Law Commission on the work of its forty-second session*, UN Doc. A/45/10, in the *Yearbook of the International Law Commission 1990*, vol. II, Part Two, 1, at p. 30).

154 In this case, the appellant was a participant in an organized group trafficking in heroin. Heroin is thought to be the most harmful of illicit narcotic drugs (*World Drug Report*, *supra*). Obviously its use and trafficking are a matter of particularly grave concern. At the time the arrests were made, the group with which the appellant was associated held heroin with a street value of approximately $10 million. This was clearly a major operation, and the appellant was an important participant in that operation. These facts, in my opinion, clearly indicate the seriousness of the appellant's crime. Therefore, while not every domestic narcotics offence will provide a basis for exclusion under Article 1F(c) of the *Refugee Convention*, this appellant should, as a result of his actions, be excluded. He trafficked on a large scale in the most debilitating of drugs. He abused his status in Canada and jeopardized the lives, health and welfare of many. There is no reason why Canadians should be burdened with his continued presence. He has demonstrated his danger to Canadian society and indeed to the international community. He should not remain in Canada.

(7) Remedies Available Prior to Deportation

155 During the appeal, concern was expressed that the appellant or another individual excluded by Article 1F could face a risk of torture, execution or other serious human rights violation upon being deported to his country of origin. It was said that no effective remedy was available to prevent his deportation should such a risk exist. It was suggested that the absence of a remedy, would give rise to a serious injustice and would

involve Canada in a breach of its legal obligations under various international instruments. In particular, Canada would be failing to meet its obligations under the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Can. T.S. 1987 No. 36, not to expel or return a person to a state where there are substantial grounds for believing that he or she would be in danger of being subjected to torture (Article 3(1)) and similar obligations in the *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* (E/RES/1989/65, 24 May 1989, Article 5) and the United Nations *Declaration on the Protection of All Persons from Enforced Disappearance*, Article 8.

156 Although these issues are a valid cause for serious concern, they do not directly arise in this appeal. It was suggested to the Court that these concerns could be dealt with by adopting a "balancing" approach to the exclusion clauses in Article 1F. Such an approach would not be appropriate in light of the nature and wording of that article.

157 In the context of the present appeal, it is neither necessary nor desirable to examine in detail the remedies that are presently available to an individual facing deportation nor to suggest the particular form that such a remedy should take. However, it would be unthinkable if there were not a fair hearing before an impartial arbiter to determine whether there are "substantial grounds for believing" that the individual to be deported would face a risk of torture, arbitrary execution, disappearance or other such serious violation of human rights. In light of the grave consequences of deportation in such a case, there must be an opportunity for a hearing before the individual is deported, and the hearing must comply with all of the principles of natural justice. As well, the individual in question ought to be entitled to have the decision reviewed to ensure that it did indeed comply with those principles. These protections should be available

whether or not the individual is excluded from claiming status as a refugee, to avoid unacceptably harsh consequences arising from the exclusion.

III. Conclusion

158 In the result I would dismiss the appeal.

Appeal allowed, CORY *and* MAJOR JJ. *dissenting.*

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Solicitor for the respondent: George Thomson, Toronto.

Solicitor for the intervener: David Matas, Winnipeg.