

## UNHCR NOTE

We would be very pleased to receive comments on this paper from those who will not be able to participate in the Roundtable. Comments should be sent to Ms. Kate Jastram, Senior Legal Officer, preferably via e-mail at [jastram@unhcr.org](mailto:jastram@unhcr.org) or by fax on +41-22-739-7354.

# CURRENT ISSUES IN THE APPLICATION OF THE EXCLUSION CLAUSES<sup>1</sup>

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<sup>1</sup> This paper was commissioned by UNHCR as a background paper for an expert roundtable discussion on exclusion organised as part of the Global Consultations on International Protection in the context of the 50<sup>th</sup> anniversary of the 1951 Convention relating to the Status of Refugees.

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This paper benefited greatly from the discussion with HCR staff at a meeting on *Asylum, Terrorism and Extradition* held at UNHCR HQ Geneva on 10 November 2000. Particular thanks are owed to Irene Khan, Volker Türk, Nathalie Karsenty, Kim Mancini, Ron Mponda, Sanda Kimbimbi, Anja Klug, Andrew Painter and Rick Towle; thanks are also due to Françoise Hampson, Nigel Rodley and Maurice Sunkin, colleagues at Essex. Needless to add, the views expressed and any errors are mine alone. The position outlined in this paper is accurate on the basis of the materials available as at 1 January 2001. At time of writing, a special issue of the *International Journal of Refugee Law*, Autumn 2000, is due out on *Exclusion from Protection: Article 1F of the UN Refugee Convention and Article 1[5] of the OAU Convention in the Context of Armed Conflict, Genocide and Restrictionism*. See also, J. Hathaway and C. Harvey, *Framing Refugee Protection in the New World Disorder*, forthcoming, 34:2 *Cornell International Law Journal*.

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## INTRODUCTION

Those applicants found to fall within Article 1F of the Convention Relating to the Status of Refugees 1951<sup>3</sup> are excluded from refugee status<sup>1</sup>. As a consequence, *non-refoulement* protection under Article 33 of the 1951 Convention is unavailable. In addition, however, a 1951 Convention refugee will lose protection from *refoulement* if s/he falls within paragraph 2 of Article 33:

“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.”

This paper will explore the content of exclusion, the relationship between Articles 1F and 33.2, and residuary guarantees where Convention protection does not avail. The last topic necessarily involves examining the relationship between *non-refoulement*, conventional and customary, and human rights guarantees, as well as those instances where only human rights provisions prevent return. Part of the problem, however, is that international refugee law is analyzed and expanded upon in domestic tribunals relying on domestic constitutions and legislation which might not incorporate the 1951 Convention in its original form, but combine different Articles into one provision in a manner possibly contrary to the Convention, and without there being an ‘International Refugee Tribunal’ to which to appeal for an authoritative ruling on the meaning of the 1951 Convention. Nevertheless, it is futile to bewail the absence of an ‘International Refugee Tribunal’ fifty years after the conclusion of the Convention, and since States’ obligations are set out in the 1951 Convention, it is the proper meaning of the Convention that provides the correct measure of the degree of fulfilment achieved by domestic legislation and jurisprudence; States cannot rely on domestic laws to justify failure to meet treaty obligations.

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<sup>3</sup> Convention Relating to the Status of Refugees 1951, 189 UNTS 150

“**Article 1F**

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.”

As amended by the 1967 Protocol, 606 UNTS 267.

See also, 1950 Statute of the United Nations High Commissioner for Refugees, UNGA Res.428(V) Annex, UNGAOR Supp. (No.20) 46, UN Doc.A/1775, 14 December 1950, Paragraph 7(d):

“Provided that the competence of the High Commissioner as defined in paragraph 6 above shall not extend to a person:

- (d) In respect of whom there are serious reasons for considering that he has committed a crime covered by the provisions of treaties of extradition or a crime mentioned in article VI of the London Charter of the International Military Tribunal or by the provisions of article 14, paragraph 2, of the Universal Declaration of Human Rights.”

## NATURE AND FUNCTION OF ARTICLE 1F

Article 1F excludes the applicant from refugee status. The guarantees of the 1951 Convention are not available. Reference to the *travaux préparatoires*<sup>4</sup> shows that the exclusion clauses sought to achieve two aims. The first recognizes that refugee status has to be protected from abuse by prohibiting its grant to undeserving cases. Due to serious transgressions committed prior to entry, the applicant is not deserving of protection as a refugee - there is an intrinsic link “between ideas of humanity, equity and the concept of refuge”.<sup>5</sup> The second aim of the drafters was to ensure that those who had committed grave crimes in World War II, other serious non-political crimes or who were guilty of acts contrary to the purposes and principles of the United Nations did not escape prosecution.<sup>6</sup> Nevertheless, given that Article 1F represents a limitation on a humanitarian provision, it needs to be interpreted restrictively. It only applies to pre-entry acts by the applicant. Given the potential consequences of excluding someone from refugee status, Article 1F must be applied sparingly and only where extreme caution has been exercised.<sup>7</sup>

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<sup>4</sup> For the travaux, see UNHCR’s *Refworld* CD, 8th ed. 1999, Goodwin-Gill, *The Refugee in International Law*, 2nd ed. 1996, esp. pp.95-114 and 147-50, and Weis, *The Refugee Convention, 1951: the Travaux Préparatoires Analysed with a Commentary* (1995). See also, Shah, *Taking the ‘political’ out of asylum: the legal containment of refugees’ political activism*, in Nicholson and Twomey, *Refugee Rights and Realities*, 1999, pp.130 *et seq.*

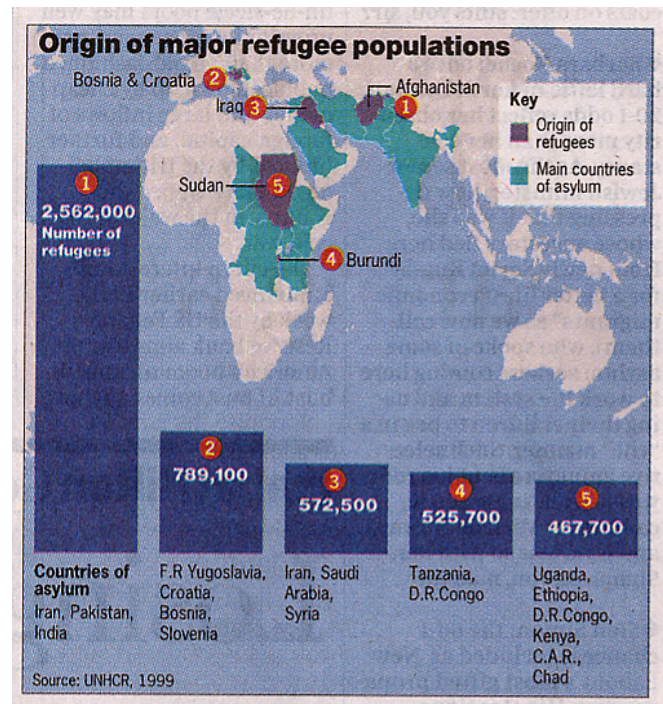
<sup>5</sup> See Standing Committee *Note on the Exclusion Clauses*, 8th Meeting, 30 May 1997, paragraph 3. However, care must be taken to ensure that no appearance of partiality develops - the difference in treatment received in some Western States by members of an armed group fighting one country and the members of another armed group fighting another country in the Middle East has led to criticism from some quarters.

<sup>6</sup> Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Twenty-fourth Meeting, A/CONF.2/SR.24, 27 November 1951, statements of Herment, Belgium, and Hoare, United Kingdom. However, there was a degree of confusion between the fear that asylum might confer immunity upon serious international criminals and the issue of priority between extradition treaties and the 1951 Convention, although that was inevitable where extradition was the sole method of bringing perpetrators of such serious crimes before a court with jurisdiction to prosecute - see A/CONF.2/SR.24, SR.29 and SR.35, Item 5(a), 27 and 28 November and 3 December 1951, Conference of the Plenipotentiaries. See also, Weis, *supra n.*, at p.332. Cf. SCIP Interim Report on Implementation of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, EC/SCP/66, 22 July 1991. “54 Most States which have replied permit the extradition of refugees in accordance with relevant legislation and/or international arrangements if the refugee is alleged to have committed an extraditable offence in another country. A number of States, however, exclude the extradition of a refugee if, in the requesting State, he or she would be exposed to persecution on the grounds mentioned in Article 1 of the Convention, if he or she would not be given a fair trial (Article 6 of the European Human Rights Convention) or would be exposed to inhuman and degrading treatment (ibid, Article 3). One State generally prohibits the extradition of a refugee to his/her country of origin. In two States, the extradition of a refugee is specifically excluded: in one because refugees, as regards extradition, are treated as nationals of the country and, therefore, by definition, cannot be extradited; in the other because refugees are protected against extradition by the constitution. Two States, on the other hand, permit the extradition of a refugee to a ‘safe third country’, *ie.* a country other than the country of origin.”

<sup>7</sup> See paragraph 149 of the 1979 UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*.

## CONTEMPORARY CONTEXT OF ARTICLE 1F

The past decade has seen ever more restrictive responses to asylum seekers trying to obtain refugee status in western Europe and North America.<sup>8</sup> The increased interest in Article 1F can be seen as part of that trend. Only ‘deserving’ refugees should be granted Convention status. The consequence is that Article 1F is becoming more intrinsic to status determination with the concomitant danger that all applicants are perceived as potentially excludable.<sup>9</sup> The past decade, however, has also seen an increased interest in prosecuting international criminals arising out of the conflicts in, *inter alia*, the former Yugoslavia and Rwanda. Many of the perpetrators of gross violations of the laws of war and crimes against humanity fled abroad and sought refugee status. The coincidence of a more restrictive approach to the interpretation of the 1951 Convention in general and the increased preponderance of war criminals in Europe,<sup>10</sup> has re-emphasised the two aims of the drafters of the 1951 Convention, protection of only the ‘deserving’ refugee and the need to ensure that serious international criminals do not escape punishment.<sup>11</sup>



On the other hand, international criminal law has progressed since 1951. Extradition to the *locus delicti* is no longer the only practical way to ensure that offenders are punished. At a particular level, those who committed crimes within the geographical and temporal remits of the International Criminal Tribunal for the former Yugoslavia (ICTY)<sup>12</sup> and the International Criminal Tribunal for Rwanda (ICTR)<sup>13</sup> established by the Security Council, which crimes would fall within Article 1F, can be prosecuted away from the *locus delicti*. In part, this is to ensure a fair and effective trial, but it also removes the fear of persecution. In the future, the International Criminal Court will have a

<sup>8</sup> See Alan Travis, *Analysis*, The Guardian p.19, 5 January 2001. At the same time, the vast majority of refugees have remained in neighbouring countries to those from which they fled and have rarely reached W.Europe or N.America - see Figure 1.

<sup>9</sup> States would argue that the General Assembly and the Security Council have both recently exhorted them to ensure that refugee status is not granted to ‘terrorists’. See the Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism 49/60 of December 9 1994, annexed to UNGA Res.51/210 (16 January 1997) - paragraph 3 reaffirms that States should take appropriate measures before granting refugee status so as to ensure “the asylum-seeker has not participated in terrorist acts”. See also, UNSC Res.1269 (1999), 19 October 1999, paragraph 4, and the comments of the French member of the Security Council, Alain Dejammet, on the refusal of asylum to terrorists; and, UNGA Res.50/53 (11 December 1995).

<sup>10</sup> Alleged perpetrators of the Rwandese genocide have been found in Belgium and the United Kingdom.

<sup>11</sup> See van Krieken, *Article 1F: An Introduction*, Lecture 1 at the Amsterdam Seminar, 8-9 June 2000, *Article 1F and Afghan Asylum Seekers: towards a Common Strategy*, organised by the Dutch Immigration and Naturalisation Service on behalf of a High Level Working Group of the EU.

<sup>12</sup> *Infra* n.30

<sup>13</sup> *Infra*.n. 30.

broader, more general jurisdiction over a swathe of crimes all of which would fall within Article 1F, although its effectiveness will depend on the number of ratifying States. Most interestingly, the use of universal jurisdiction in domestic courts for serious international crimes has burgeoned in recent years. The *Pinochet* cases,<sup>14</sup> if ill-health had not halted the extradition process, reveal English courts prepared to surrender the senator to Spain for torture committed in Chile. The Dutch Supreme Court has ruled that Dutch courts have jurisdiction over war crimes and related offences committed in a war in which The Netherlands did not take part.<sup>15</sup> The Amsterdam Seminar on *Article 1F and Afghan Asylum Seekers*<sup>16</sup> also concluded that if an applicant is excluded from refugee status, national and international law imposes a legal obligation to proceed to prosecution. In Germany, the Supreme Court of Bavaria convicted a Bosnian Serb of abetting murder and attempted murder with respect to the death of fourteen Bosnian Muslims in 1992;<sup>17</sup> he was not convicted of any genocide related offence for lack of *mens rea*, but, when the ICTY expressed no interest in his transfer to The Hague, the German court assumed jurisdiction to prosecute on the ground that Germany was internationally so obliged because of its commitments under the Fourth Geneva Convention 1949 and the First Additional Protocol 1977.<sup>18</sup>

In the same way, international extradition law has developed since 1951. Where a serious international crime has been perpetrated, multilateral conventions now provide a duty to extradite or prosecute (*aut dedere, aut judicare*) and act as a surrogate extradition treaty if no other arrangement exists between the affected States.<sup>19</sup> Equally, however, extradition law has built in guarantees for requested fugitives - these multilateral anti-terrorist conventions all provide that extradition should be refused where there are substantial grounds for believing that s/he might be prosecuted, punished or prejudiced on account of her/his race, religion, nationality or political opinion.<sup>20</sup> The two most recent United Nations multilateral anti-

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<sup>14</sup> The final decision of the House of Lords on 24 March 1999, *R v Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet; R v Evans and Another and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet (On Appeal from a Divisional Court of the Queen's Bench Division)*, can be found at [1999] 2 WLR 827; see also, *Pinochet 1* [1998] 3 WLR 1456, and *Pinochet 2*, [1999] 2 WLR 272, where it was held that Lord Hoffman should have recused himself in *Pinochet 1* and that decision was set aside.

<sup>15</sup> Criminal Division, 11 November 1997, No.3717 AB, cited in Dutch State Secretary of Justice, *Section 1F of the Convention on Refugees*, 6302011/97/DVB, 19 November 1997, at fn.2.

<sup>16</sup> *Supra.* n. 11 *Conclusion and Recommendation §5, Legal/ Criminal Proceedings to be applied if Article 1F is applied.*

<sup>17</sup> *Public Prosecutor v Djaji 'c* No.20/96, May 23 1997, excerpted in 1998 *Neue Deutsche Wochenschrift* 392 - this analysis is based on the case summary by C. Safferling, 92 AJIL 528 (1998). A Danish court has convicted a Bosnian Muslim of gross violence and murder for crimes committed in a camp near Mostar - *The Times* p.13, 23 November 1994

<sup>18</sup> 75 UNTS 31-417 (1950); and, 1125 UNTS 3-608 (1979), 16 ILM 1391 (1977).

<sup>19</sup> See the Tokyo Convention of 1963 on Offences and Certain Other Acts Committed on Board Aircraft, UKTS 126 (1969); Cmnd 4230; the Convention for the Suppression of the Unlawful Seizure of Aircraft, done at the Hague, 16 December 1970, 10 ILM133 (1971), and the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, done at Montreal, 23 September 1971, 10 ILM 1151 (1971); the New York Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons including Diplomatic Agents, 13 ILM 42 (1974); the Hostages Convention, 18 ILM1456 (1979); the Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, I.M.O.Doc SUA/CON/15, 10 March 1988, 27 ILM 668 (1988); the Convention on the Physical Protection of Nuclear Materials, Cmnd 8112; the International Convention for the Suppression of Terrorist Bombings, 1998, 37 ILM 249 (1998); the International Convention for the Suppression of the Financing of Terrorism, Annex to UNGA Res.54/109, 25 February 2000. See also, the Draft comprehensive convention on international terrorism, UN Doc. A/C.6/55/1

<sup>20</sup> See also, Art 5 Council of Europe's 1977 European Convention for the Suppression of Terrorism, ETS 90, 15 ILM 1272 (1976). In addition, see the Report of the United Nations High Commissioner for Refugees, General Assembly Official Records: Thirty-sixth Session, Supplement No. 12 (A/36/12), 28 August 1981, paragraph 24.

terrorist conventions, on the Suppression of Terrorist Bombings and the Financing of Terrorism, both incorporate a non-persecution clause and extend it to “ethnic origin”.<sup>21</sup>

For the contemporary context of Article 1F, though, it is essential to pay due regard to the developments in international human rights law since 1951. The intervening fifty years have seen the recognition of various rights as peremptory norms,<sup>22</sup> most clearly freedom from torture. At least in so far as *non-refoulement* is based on the protection of the individual from torture, and maybe more broadly, it too reflects an *erga omnes* obligation.

While increased interest in exclusion is part of a wider policy to limit refugee status in general, there is a need to review its present application in the light of developments in international criminal law, international extradition law and international human rights law. Article 1F is not obsolete, for there are situations where the crimes are so heinous that balancing them against the fear of persecution does compromise the nature of refugee status,<sup>23</sup> and the perpetrator can be informally protected if the State of refuge is concerned, but Article 1F, particularly subparagraph (b), has to be reconsidered in the light of developments since 1951.

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<sup>21</sup> Article 12 Bombings Convention and Article 15 Financing of Terrorism Convention, both *supra* n. 19. **NB.** Membership of a particular social group is not listed as one of the grounds for persecution that would justify refusing extradition - *cf.* Article 1 1951 Convention.

<sup>22</sup> See *Barcelona Traction, Light and Power Co. Case, (Belgium v Spain)*, ICJ Rep. 1970 p.3 at paragraph 34.

<sup>23</sup> UNHCR recognizes, for instance, that Article 1F should be applied in Rwanda-type situations - Sub-Committee on Administrative and Financial Matters of EXCOM, EC/1995/SC.2/CRP.21/Rev.1, 23 June 1995, *Lessons Learnt from the Rwanda Emergency*, paragraph 10(i):

“10. The profile of Rwandese arriving in the United Republic of Tanzania in April 1994 and Zaire in July 1994 was unique and reflected the genocide and conflict that preceded the exodus. This was not a typical refugee flight, but for the most part an orchestrated and organized mass population movement executed under coherent military and political control. From the nature of this movement, the following conclusions can be drawn:

(i) despite all the problems of identification and security involved, UNHCR must continue to encourage efforts by host Governments and the international community to ensure, under Article 1F of the 1951 Convention, that persons whom there are serious grounds for considering as perpetrators of atrocities should be removed from refugee camps, excluded from refugee status and deprived of international protection and assistance. The international community should provide the necessary support and funds to assist host Governments at their request in removing criminal elements from refugee camps and in disarming armed militias;”

See also, UNHCR Note, *supra* n. 5 paragraphs 22 *et seq.*, and the Report of the Eighth Meeting of the Standing Committee of the EXCOM, Protection Issues: Exclusion Clauses, A/AC.96/888, paragraph 15, 9 September 1997.



## ARTICLE 1F

Although consideration of Article 1F is divided between the three sub-paragraphs, in reality an applicant for refugee status might well be excludable under more than one of them - a crime against humanity would be within Article 1F(a), but could also be a serious non-political crime and an act contrary to the purposes and principles of the United Nations.

### Article 1F(a)<sup>24</sup>

“1F. 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.”

This is a more general provision than is to be found in paragraph 7(d) of the Statute of UNHCR<sup>25</sup> which refers to crimes “mentioned in article VI of the London Charter of the International Military Tribunal”.<sup>26</sup> However, interpretation of Article 1F is therefore not fixed in the 1946 definition, although the London Charter crimes are certainly included within sub-paragraph (a). In addition, regard should be had to the Geneva Conventions of 1949 and the Additional Protocols of 1977,<sup>27</sup> the 1948 Genocide Convention,<sup>28</sup> the Draft Code of Crimes Against the Peace and Security of Mankind,<sup>29</sup> the Statutes of the ICTY and the ICTR<sup>30</sup> and their jurisprudence,<sup>31</sup> and the Statute of the International Criminal Court.<sup>32</sup> What is clear is that there is no one accepted definition of the Article 1F(a) crimes, although the later documents, the Statutes of the *ad hoc* tribunals and the I.C.C., carry weight as a consequence of the more recent analysis made for their preparation. Although the definition for the two *ad*

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<sup>24</sup> See paragraphs 19-48 of UNHCR, *The Exclusion Clauses: Guidelines on their Application*, 1 December 1996.

<sup>25</sup> See *supra* n. 3.

<sup>26</sup> Cited in the International Military Tribunal at Nuremberg's Judgement, which may be found in vol.XXII, pp.413-14, of Trial of the Major War Criminals before the International Military Tribunal (1948). See also 41 AJIL 172 (1947). “(a) Crimes against Peace: namely, planning, preparation initiation or waging a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing:

(b) War Crimes: namely, violations of the laws and customs of war. Such violations shall include, but shall not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages or devastation not justified by military necessity:

(c) Crimes against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”

<sup>27</sup> *Supra* n. 18.

<sup>28</sup> 78 UNTS 277 (1951).

<sup>29</sup> To the extent that the ILC's Code reflects customary international law, its definition of aggression, genocide, crimes against humanity, crimes against United Nations and associated personnel and war crimes is another authoritative source - A/51/332 (1996).

<sup>30</sup> The Statute of the ICTY was adopted UNSC Res.827 (1993) and may be found in 32 ILM 1192 (1993); the Statute of the ICTR is to be found in UNSC Res.935 and 955 (1994), reprinted in 5 Crim.LF 695 (1994).

<sup>31</sup> See, *Duško Tadić, a.k.a. 'Dule', Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction before the Appeals Chamber of ICTY*, Case No.IT-94-1-AR72 (1995), *per* Cassese J., at paragraph 134. See also, *The Prosecutor v Kupreskic*, Case No.:IT-95-16-T, 14 January 2000.

<sup>32</sup> Done at Rome, 17 July 1998, 37 ILM 999 (1998) - as corrected by the *procès-verbaux* of 10 November 1998 and 12 July 1999. See also, Lee, *The International Criminal Court: The Making of the Rome Statute* (1999).

*hoc* tribunals is very general by comparison with Articles 6 to 8 of the Rome Statute, their jurisprudence will inform the interpretation of the specific clauses in the latter instrument once the I.C.C. is sitting. Nevertheless, the differences to be found in those instruments, partly as a consequence of the differing circumstances with which each tribunal is or will be tasked, highlights the fact that the meaning of war crimes in international law should receive a dynamic interpretation.

That being said, it leaves crimes against peace in an uncertain state as a crime that an individual can commit. While the crime of aggression is listed in Article 5 of the Rome Statute, subparagraph 2 goes on to state that:

“The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.” Under Articles 121 and 123, a review conference to consider, *inter alia*, the ‘crime of aggression’ can only be held seven years after the entry into force of the Statute. In the meantime, it is clear that there is no accepted definition of the crime of aggression giving rise to individual criminal responsibility.<sup>33</sup> There is debate as to whether only those in a position of high authority in a State can be responsible for a crime against peace, but if individual responsibility for the crime against peace is to be consistent with the 1974 Resolution on the Definition of Aggression,<sup>34</sup> then, as well as the leaders of a State, it might include leaders of rebel groups in non-international armed conflicts which seek secession, but few if any others.

Crimes against humanity in international law are not defined as precisely as domestic criminal laws are, but differences in interpretation seem to be limited to discrete judicial subsystems. Part of crimes against humanity under Article 1F is the crime of genocide which has not been altered from its 1948 Convention definition in any of the recent Statutes,<sup>35</sup> although case law from the Tribunals has interpreted its meaning.<sup>36</sup> Beyond genocide, however, the content of crimes against humanity is less uniform. Article 5 of the ICTY Statute<sup>37</sup> lays down that crimes

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<sup>33</sup> International responsibility for aggression is defined in the 1974 Resolution on the Definition of Aggression, 14 December 1974, UNGA Res.3314 (XXIX), 69 AJIL 480 (1975), as “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.”

<sup>34</sup> *Supra* n. 33.

<sup>35</sup> ICTY (Article 4), ICTR (Article 2), both *supra* n. 30, and the International Criminal Court (Article 6), *supra* n 32.

<sup>36</sup> *Eg. The Prosecutor v Jean-Paul Akayesu*, Case No. ICTR-96-4-T, 2 September 1998.

<sup>37</sup> *Supra* n. 30.

**“Article 5**

**Crimes against humanity**

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation;
- (e) imprisonment;
- (f) torture;
- (g) rape;
- (h) persecutions on political, racial and religious grounds;
- (i) other inhumane acts.”

against humanity take place in armed conflict. The modern view is that crimes against humanity can take place in peacetime,<sup>38</sup> a fact recognized in the statutes of the ICTR<sup>39</sup> and the International Criminal Court.<sup>40</sup> The latter two instruments require that crimes against humanity

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And see, *Tadić* supra n. 31, *Kupreskic*, supra n. 31, and *The Prosecutor v Furundzija* Case No. IT-95-17/1-T 10, 10 December 1998.

<sup>38</sup> Acknowledged by Cassese J. in *Tadić*, supra n. 31, at paragraphs 140-41. See also, Bassiouni, *Crimes Against Humanity: The Need for a Specialized Convention*, 31 Colum.J Transnat'l L 457 (1994).

<sup>39</sup> *Supra* n. 30.

**“Article 3**

**Crimes against humanity**

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

- (a) Murder.
- (b) Extermination.
- (c) Enslavement.
- (d) Deportation.
- (e) Imprisonment.
- (f) Torture.
- (g) Rape.
- (h) Persecutions on political, racial and religious grounds.
- (i) Other inhumane acts.”

<sup>40</sup> *Supra* n. 32.

**“Article 7**

**Crimes against humanity**

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

- (a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
- (b) "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
- (c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
- (d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
- (e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;
- (f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;
- (g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

be part of a widespread or systematic attack against any civilian population,<sup>41</sup> and that is the more current interpretation rather than restricting crimes against humanity to time of armed conflict. As such, given that crimes against humanity can be committed under the Rome Statute of the International Criminal Court by an organization,<sup>42</sup> they could include terrorism.<sup>43</sup> There is further divergence as to the place of “persecution” in crimes against humanity in the three instruments.<sup>44</sup> While the Statutes of the ICTY and ICTR list a separate crime of persecution in identical terms, the opening paragraph of Article 3 of the Statute of the ICTR requires that all the listed crimes must be part of a widespread or systematic attack against a civilian population “on national, political, ethnic, racial or religious grounds” - persecution is a prerequisite of all ICTR crimes against humanity rather than simply a separate crime. The Rome Statute is much more detailed and, while persecution is a separate crime, it is parasitic, having to be perpetrated in connection with one of the other crimes in Article 7 or Articles 6 or 8. With respect to persecution, the ICTY Statute best reflects current thinking. Furthermore, while the Rome Statute is not geographically or temporally limited and has been agreed by States in international conclave, it is narrower than the customary international law of crimes against humanity.<sup>45</sup> The Article 1F definition should not be limited by the recent Statutes, although given the specific remit of the two *ad hoc* tribunals, UNHCR should take the Rome Statute as reflecting an understanding more broadly agreed within the international community and the one which will continue to develop as cases come before the I.C.C.

As for war crimes, the various Statutes are equally as divergent, although given the non-international character of the Rwanda conflict, this was inherent. What is clear as a consequence of the Statutes and the jurisprudence of the two *ad hoc* tribunals is that, as well as grave breaches of the Geneva Conventions and Additional Protocol 1 in international armed conflicts,<sup>46</sup> violation of the laws and customs of war, in international and non-international conflicts, can give rise to individual criminal responsibility.<sup>47</sup> Furthermore, individual criminal responsibility attaches to breaches of common Article 3 of the 1949 Geneva Conventions in non-international armed conflicts. Referring to the international interest in the prohibition of serious breaches of customary rules and principles in internal conflicts, various military

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(h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above."

41 Article 7.2(a) of the Rome Statute defines such attacks as:-

“a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack ....”

Given that crimes against humanity have been explicitly removed from the sphere of armed conflicts, ‘attack’ could not be restricted to the meaning ascribed in Article 49 Protocol 1, 1977, *supra* n. 18.

42 Article 7.2(a) and (i), *supra* n. 32.

43 See below on Article 1F(b).

44 For the traditional analysis of the place of persecution in crimes against humanity, see Fenrick, *The Prosecution of War Criminals in Canada*, 12 Dalhousie LJ 256 at pp.266 *et seq.* (1989).

45 See Cassese J. at paragraphs 140-41 of *Tadić*, *supra* n. 31. And see *Fédération Nationale des Déportés et Internés Résistants et Patriotes et al. v Barbie*, 78 ILR 125 (1985).

46 Respectively, Articles 49 (I); 50 (II); 129 (III); 146 (IV); and 85 Protocol 1, *supra* n. 18.

47 *Tadić*, *supra* n. 18 at paragraphs 89 and 96 *et seq.*, *per* Cassese J.

manuals, domestic legislation in the former Yugoslavia and Belgium, and two Security Council Resolutions,<sup>48</sup> Cassese J. held in paragraph 134 of his judgment that

“[all] of these factors confirm that customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.”

If it had been limited to parts of common Article 3 and specified provisions of Additional Protocol II, then it would have been uncontroversial,<sup>49</sup> but Cassese’s robust approach from 1995 has been followed in part in Article 8 of the Rome Statute.<sup>50</sup> The situation now is that breaches of the laws of war are always unlawful but not necessarily criminalised - custom prescribes that some give rise to individual criminal responsibility and the Rome Statute provides a narrower list of crimes over which the International Criminal Court will exercise jurisdiction.<sup>51</sup> Article 1F of the 1951 Convention would exclude those committing crimes as prescribed by customary international law and is more in line with Cassese’s analysis.

It should also be borne in mind that according to Article 27 of the Statute of the International Criminal Court, official capacity, even as Head of State, is no excuse.<sup>52</sup> Furthermore, command responsibility includes military and civilian commanders and superior orders will only be an excuse in the rarest of cases.<sup>53</sup> The net is drawn widely, therefore, around those who have “committed” Article 1F(a) crimes.

#### Article 1F(b)

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<sup>48</sup> *Tadić*, *supra* n. 18 at paragraphs 129-33, *per* Cassese J.

<sup>49</sup> There would not appear to be the required degree of specificity to create crimes in Common Article 3 as a whole. The principle of *nullem crimen sine lege* argues against such a broad understanding of the criminal scope of Common Article 3. See also, the *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City Case*. “Instead of applying a penal law equally clear to both the judge and the party accused, ..., there is the possibility under the new decrees that a man may find himself placed on trial and punished for an act which the law did not enable him to know was an offence, because its criminality depends entirely on the appreciation of the situation by the Public Prosecutor and by the judge. Accordingly, a system in which the criminal character of an act and the penalty attached to it will be known to the judge alone replaces a system in which this knowledge was equally open to both the judge and the accused.” (1935), Series A/B, No.65 at pp.52-53.

*Cf.* The *Border Guards Prosecution Case*, 100 ILR 364 (German Federal Supreme Court), where the court rejected a defence claim based on *nullem crimen sine lege* on the basis that the Guards should have known that the defence they relied on under the former East German law was contrary to the human rights obligations of East Germany itself and that “the act, when committed, was criminal according to the general principles of law recognized by the international community” (at 389). The court used human rights as set out in the ICCPR to strike down the defence.

<sup>50</sup> *Supra* n. 32, which lists 50 crimes, 34 with respect to international armed conflicts and 16 specifically applying in non-international armed conflicts. See also the ICRC’s forthcoming review of the Customary International Law of Armed Conflict.

<sup>51</sup> In some cases, the Rome Statute may have gone further than custom in the imposition of individual criminal responsibility, but this is not the norm. *Eg.* Article 8.2(b)(xxvi). “2. For the purpose of this Statute, ‘war crimes’ means: (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.”

See also, Articles 4 and 5, Hague Convention V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 1907, 2 AJIL Supp.117 (1908); Article 38 Convention on the Rights of the Child 1990, UNGA Res.44/25, annex, 44 UNGAOR Supp. (No.49) at 167, UN Doc.A/44/49 (1989). It is arguable that custom did not even render recruitment of under-15s unlawful, let alone criminal.

<sup>52</sup> The *Pinochet* cases, *supra* n. 14, hold only that former Heads of State can be prosecuted for acts not within their official capacity.

<sup>53</sup> Articles 28 and 33, Rome Statute, *supra* n. 32. See also, Article 86 Protocol 1, *supra* n. 18.

“1F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;”

While the complex provisions of Article 1F(b) are fleshed out below, there are some basic issues that influence all elements of the interpretation. Given that a status determination hearing can never replicate a full criminal trial of the issues, it is nevertheless fundamental to the decision-making process that exclusion is on the basis that there are serious reasons for considering that the applicant has committed a serious non-political crime. Therefore, the hearing should assume the applicant innocent until ‘proven guilty’, the benefit of the doubt must be accorded to the applicant given the very serious consequences, and there should be no automatic presumptions, each case must be viewed on its own facts.

There are various issues concerning the traditional interpretation of Article 1F(b) that need to be addressed in this context. With respect to ‘terrorism’, an initial problem is that international law provides no definition,<sup>54</sup> although the United Nations has outlawed several crimes deemed ‘terrorist’ in the popular perception.<sup>55</sup> Labelling something as terrorism is a matter of political choice rather than legal analysis, distinguishing it in some indecipherable way from the more ‘acceptable’ conduct of the so-called freedom fighter.<sup>56</sup> It is a buzz-word, a blanket term for violent crimes and, as such, too imprecise to assist critical analysis. Furthermore, the United Nations has done little to clarify the issue<sup>57</sup> - originally, any reference to terrorism was accompanied by a reaffirmation of the right of ‘peoples’ to use any means to achieve self-determination from colonial or racist regimes;<sup>58</sup> terror is terror:

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<sup>54</sup> Equally, most countries in Western Europe have not managed to define ‘terrorism’ for the purposes of their domestic criminal law *cf.* the British Terrorism Act 2000, which is not to say, however, that the British definition answers all possible questions.

<sup>55</sup> See the conventions listed at *supra* n. 19. On the amorphous nature of terrorism, see Gilbert, *The “Law” and “Transnational Terrorism”*, 26 *Neth.Yb.Int’l L* 3 (1995), and *Transnational Fugitive Offenders* (1998), esp. pp.251-61. See also, UNHCR Guidelines, *supra* n. 24, at paragraph 66.

<sup>56</sup> Reminding one of Humpty Dumpty’s views on the meaning of words in Lewis Carroll’s *Through the Looking Glass. And What Alice Found There*, p.190 (1872: rep.1998). “When I use a word, . . . , it means just what I choose it to mean - neither more nor less.” Even perpetrators of serious international crimes, such as hijacking, have been protected from *refoulement* in the past - see *Antonin L v F.R.G.* 80 ILR 673 (Sup.Admin.Ct of Bavaria, 1979), where it was held that an asylum application could be accepted from a person who was about to be prosecuted for hijacking, a serious international crime. The court decided that the applicant had hijacked the plane to flee the then Czechoslovakia to escape persecution for his political opinions. (NB. In *Abdul Hussain*, unreported, 17 December 1998, the English Court of Appeal acquitted hijackers who fled Iraq on the basis that they had acted under duress).

<sup>57</sup> See Green, *International Crimes and the Legal Process*, 29 ICLQ 567 at p.582 (1980).

<sup>58</sup> UNGA Res.3034 (XXVII), 1972. “The General Assembly

1. Expresses deep concern over increasing acts of violence which endanger or take innocent human lives or jeopardize fundamental freedoms;

2. Urges States to devote their immediate attention to finding just and peaceful solutions to the underlying causes which give rise to such acts of violence;

3. Reaffirms the inalienable right of self-determination and independence of all peoples under colonial and racist regimes and other forms of alien domination and upholds the legitimacy of their struggle, in particular the struggle of national liberation movements, in accordance with the purposes and principles of the Charter and the relevant resolutions of the organs of the United Nations;

4. Condemns the continuation of repressive and terrorist acts by colonial, racist and alien regimes in denying peoples their legitimate right to self-determination and independence and other human rights and fundamental freedoms;

5. Invites States to become parties to the existing international conventions which relate to various aspects of the problem of international terrorism.”

See also, UNGA Res.31/102, 1976; UNGA Res.32/147, 1977; UNGA Res.34/145, 1979; UNGA Res.36/109, 1981; UNGA Res.38/130, 1983; UNGA Res.61/40, 1985; UNGA Res.44/29, 1989; UNGA Res.46/51, 1991; cf. UNGA Res.48/122,

“What [terrorist groups seeking self-determination] and other, less structured terrorist groups have in common is far more significant in applying the political offence exemption than the ways in which they may differ. All these groups exhibit a willingness to engage in the indiscriminate killing of people to achieve political ends.”<sup>59</sup>

Even those fighting for self-determination should at minimum obey Common Article 3 of the Geneva Conventions 1949.<sup>60</sup> The United Nations has spoken more clearly against terrorism in recent years. The Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism 49/60 of December 9 1994<sup>61</sup> provides no definition of terrorism, but holds in paragraph 2 that the methods and practices of terrorism are contrary to the purposes and principles of the United Nations<sup>62</sup> - while it is questionable whether the General Assembly through an annexed declaration can restate the purposes and principles of the United Nations, the Declaration goes on to encourage States to deem terrorist crimes non-political for the purposes of extradition law.<sup>63</sup> Furthermore, paragraph 3 reaffirms that States should take appropriate measures before granting refugee status so as to ensure “the asylum-seeker has not participated in terrorist acts”.<sup>64</sup> The 1998 International Convention for the Suppression of Terrorist Bombings<sup>65</sup> eschews a definition of terrorism, but Article 2 outlaws those international bombings in public places causing death or serious bodily injury or extensive destruction resulting in major economic loss. A similar stance of listing violent crimes but providing no definition of terrorism can be seen in the Council of Europe’s much earlier 1977 European Convention for the Suppression of Terrorism.<sup>66</sup> Two more recent UN documents have attempted to define terrorism:<sup>67</sup> UNGA Res.53/108<sup>68</sup> on Measures to Eliminate International Terrorism declares in paragraph 2 that “criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of political, philosophical, ideological, racial, ethnic, religious or other nature that might invoked to justify them”. Thus, it is crimes intended to inculcate terror in the population for political

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1993. For a full review of the United Nations’ response to terrorism in the period after 1972, see Kofa, *Preliminary Report on Terrorism and Human Rights*, E/CN.4/Sub.2/1999/27 (7 June 1999), paragraphs 6-15.

<sup>59</sup> Prepared statement of Judge Sofaer, Legal Adviser, US State Department, at the Senate Hearing on the Anglo-US Supplementary Extradition Treaty, S.HRG 99-703 re TR.DOC.99-8, 1 August 1985, at p.263.

<sup>60</sup> On the other hand, UNHCR is equally prepared to engage in these fine distinctions. Inter-Office Memorandum 78/88, Field Office Memorandum 71/88, 1 June 1988, states that where the applicant was engaged in a United Nations recognized struggle for national liberation, that is a mitigating factor to be taken into account before exclusion - paragraphs 21 and 22.

<sup>61</sup> See *supra* n. 9.

<sup>62</sup> See below on Article 1F(c).

<sup>63</sup> *Supra* n. 9, paragraph 6.

<sup>64</sup> See also, UNSC Res.1269 (1999), paragraph 4, and the comments of the French member of the Security Council, Alain Dejammet, on the refusal of asylum to terrorists, *supra* n. 9.

<sup>65</sup> *Supra* n. 19.

<sup>66</sup> *Supra* n. 20. The Parliamentary Assembly of the Council of Europe provided a definition in Recommendation 1426, 20 September 1999, although some of the language is imprecise.

“5. The Assembly considers an act of terrorism to be ‘any offence committed by individuals or groups resorting to violence or threatening to use violence against a country, its institutions, its population in general or specific individuals which, being motivated by separatist aspirations, extremist ideological conceptions, fanaticism or irrational and subjective factors, is intended to create a climate of terror among official authorities, certain individuals or groups in society, or the general public’.”

<sup>67</sup> Moreover, the Special Rapporteur on Terrorism and Human Rights, L.K. Kofa, *supra* n. 58 at para.43, has promised to elaborate on “acts of terrorism” in future reports.

<sup>68</sup> 26 January 1999.

purposes. The International Convention for the Suppression of the Financing of Terrorism<sup>69</sup> defines terrorism in part by reference to other UN anti-terrorist conventions<sup>70</sup> and additionally as:

“*Article 2(1)(b)* Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict,<sup>71</sup> when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or international organization to do or abstain from doing any act.” Although Article 2(1)(b) is much more specific than paragraph 2 of Resolution 53/108, in practice they will cover the same sort of crimes, those intended to promote political change or conservatism by means of violent intimidation. In sum, although there has been some movement towards providing terrorism with specificity, there is as yet no internationally agreed definition and the attempts so far are still vague and open-ended.

To be excluded, the applicant must have committed a serious non-political crime. In what circumstances will someone have committed such a crime? There does not need to be proof sufficient for a criminal trial, but there should be serious reasons for considering that the applicant did commit a serious non-political crime. Obviously, as well as perpetrating the completed offence, it includes inchoate offences such as attempts, conspiracies and incitement. Where difficulties arise is where the applicant is a member of a group that engages in serious non-political crimes. Is mere membership of a group adequate to exclude?<sup>72</sup> Are all members complicit?<sup>73</sup> Is constructive knowledge adequate to impose individual criminal responsibility? Under Article 28 of the Rome Statute of the International Criminal Court,<sup>74</sup> a commanding officer or person in an equivalent position shall be responsible:

“where: (a) ... (i) That military commander or person either knew or, owing to the circumstances at the time, *should have known* that the forces were committing or about to commit such crimes; and

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<sup>69</sup> *Supra* n. 19 And see *Secretary of State for the Home Department v Rehman* [2000] 3 All ER 778.

<sup>70</sup> *Supra* n. 19 The OAU Draft Convention on the Prevention and Combating of Terrorism, CAB/LEG/24.14/Vol.1, adopts a similar approach in Article 1, with a partial definition in subparagraph 2:

“**Article 1.2** ‘Terrorist act’ means any act or threat of act committed with a terrorist intention or objective directed against the nationals, property, interests or services of any State Party or against the foreign nationals living on its territory and which is prohibited by its legislation, as well as any act which is aimed at financing, encouraging, providing training for or otherwise supporting terrorism. The term terrorist act also includes, but is not limited to, any act of violence or threat of violence, irrespective of the reasons or objectives, carried out individually or collectively, calculated or intended to provoke a state of terror in general public, a group of persons or particular persons in the territory of any one of the States Parties.”

**NB.** Article 3.1 provides that armed struggle for self-determination will not count as terrorism - *viz. supra* n. 58

See also, the Draft comprehensive convention on international terrorism, *supra* n. 19:

“Article 2.1. Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally, does an act intended to cause:

(a) Death or serious bodily injury to any person; or

(b) Serious damage to a State or government facility, a public transportation system, communication system or infrastructure facility with the intent to cause extensive destruction of such a place, facility or system, or where such destruction results or is likely to result in major economic loss;

when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act.”

Article 3 excludes crimes taking place wholly within one State which were committed by a national of that State in most cases.

<sup>71</sup> **Author’s footnote:** *Quaere*, what of the position of a police officer in a situation not reaching the level of an armed conflict according to Common Article 3 of the Geneva Conventions 1949?

<sup>72</sup> See below, § **Standard of proof for Article 1F and membership of the group.**

<sup>73</sup> For example, see Article 3(e) Genocide Convention 1948, *supra* n. 28

<sup>74</sup> *Supra* n. 32



(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

and where:

(b) ... (i) The superior either knew, *or consciously disregarded information which clearly indicated*, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.” (emphasis added)

Nevertheless, Article 1F(b) only excludes from refugee status those who have committed a serious non-political crime and the international law of armed conflict has a highly developed understanding of command responsibility not to be found in ordinary criminal law to which Article 1F(b) applies. According to the UNHCR Guidelines,<sup>75</sup> membership *per se*, whether of a repressive government or of an organization advocating violence, should not be enough to exclude under Article 1F(b).<sup>76</sup> Seniority within the government or organization might provide ‘serious reasons for considering’ that the applicant was a party to the preparation of a serious non-political crime perpetrated by others. However, given that Article 1F(b) represents a limitation on an individual right, *non-refoulement*, it should be interpreted restrictively and, without evidence of involvement in a specific serious non-political crime, it would be contrary to the spirit and intent, if not the very language of the 1951 Convention to exclude someone in that position for mere membership. To the extent that the *ad hoc* tribunals have found civilians to be liable for war crimes based on their position in the command hierarchy,<sup>77</sup> however, senior members of a government or an organization which carries out Article 1F(b) crimes could be found to have constructive knowledge adequate for the purpose of exclusion. United States practice, though, is not to exclude on the grounds of membership alone; on the other hand, Canada and Germany will exclude simply for membership.<sup>78</sup>

The next issue concerns the non-political character of the crime and how closely interrelated the application of Article 1F(b) should be with the law of extradition, particularly the political offence exemption.<sup>79</sup> First, for the purposes of extradition law, there are very few crimes specifically designated non-political. Some older extradition treaties exclude from the political offence exemption attempts on the life of the Head of State in *attentat* clauses.<sup>80</sup> Before the

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<sup>75</sup> *Supra* n. 24 paragraphs 40 and 45 *et seq.*

<sup>76</sup> See also, IOM/FOM, *supra* n. 60 at paragraphs 14 *et seq.*

<sup>77</sup> *Viz Akayesu*, *supra* n. 36

<sup>78</sup> See meeting on *Asylum, Terrorism and Extradition*, *supra* n. 2. See also, for example, s19(1) Canadian Immigration Act.

<sup>79</sup> See the Supreme Court of Canada in *Attorney-General v Ward* [1993] 2 SCR 689. See in general, Gilbert 1998, *supra* n. 55 Chapter 6.

<sup>80</sup> See Shearer, *Extradition in International Law*, at p.185, (1971). The corollary must be that otherwise such crimes would be within the protection of the exemption. For a modern example of the *attentat* clause, see Annex 1 to The Scheme Relating to the Rendition of Fugitive Offenders within the Commonwealth, LMM(90)32.

#### "ANNEX 1

##### *Discretion as to definition of political offences*

1. It may be provided by a law in any part of the Commonwealth that certain acts shall not be held to be offences of a political character including -

(a) an offence against the life or person of a Head of State or a member of his immediate family or any related offence ....

Conventions on Terrorist Bombings<sup>81</sup> and the Financing of Terrorism,<sup>82</sup> multilateral anti-terrorist treaties did not exclude the political offence exemption. The somewhat especial Genocide and Anti-Apartheid conventions did render their proscribed crimes non-political,<sup>83</sup> but there were no other universal treaties excluding the political offence exemption.<sup>84</sup> In Europe, the 1977 ECST<sup>85</sup> adopted an approach of declaring non-political for the purposes of extradition between parties to that Convention crimes under certain United Nations multilateral anti-terrorist conventions. In addition, it excluded from the exemption other crimes that would usually be associated with terrorist attacks.<sup>86</sup> Furthermore, it gave parties the discretion to exclude a much broader range of *soi-disant* 'terrorist' crimes.<sup>87</sup> Nevertheless, the ECST has not been a wholehearted success,<sup>88</sup> and represents a regional response whereas the 1951 Convention is universal. The next question pertaining to the interrelationship between Article 1F(b) and extradition law is the fact that it contains no reference to extradition, unlike paragraph 7(d) of the 1950 Statute.<sup>89</sup> There are those who, drawing on

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(b) an offence against the life or person of a Head of Government, or of a Minister of a Government, or any related offence  
....

(c) murder, or any related offence as aforesaid

(d) an act declared to constitute an offence under a multilateral international convention whose purpose is to prevent or repress a specific category of offences and which imposes on the parties thereto an obligation either to extradite or to prosecute the person sought.

2. Any part of the Commonwealth may restrict the application of any of the provisions made under paragraph 1 to a request from a part of the Commonwealth which has made similar provisions in its laws."

81 *Supra* n. 19

82 *Supra* n. 19

83 Convention on the Prevention and Punishment of the Crime of Genocide, 1948, Art.VII, 78 UNTS 277; Convention on Suppression and Punishment of the Crime of Apartheid 1973, Art. XI(2), 13 ILM 50 (1974).

84 Indeed, hijackers have been held to have committed a political offence based on the nature of the regime they had fled - see *R v Governor of Brixton Prison, ex parte Kolczynski et al.* [1955] 1 QB 540, and *In re Kavic, Bjelanovic and Arsenijevic* 19 ILR 371 (Swiss Fed. Trib.) 1952.

85 *Supra* n. 20

86 **European Convention on the Suppression of Terrorism, Article 1**

For the purposes of extradition between Contracting States, none of the following offences shall be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives:

a an offence within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970;

b an offence within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971;

c a serious offence involving an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents;

d an offence involving kidnapping, the taking of a hostage or serious unlawful detention;

e an offence involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons;

f an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence.

87 **European Convention on the Suppression of Terrorism, Article 2**

1. For the purpose of extradition between Contracting States, a Contracting State may decide not to regard as a political offence or as an offence connected with a political offence or as an offence inspired by political motives a serious offence involving an act of violence, other than one covered by Article 1, against the life, physical integrity or liberty of a person.

2. The same shall apply to a serious offence involving an act against property, other than one covered by Article 1, if the act created a collective danger for persons.

3. The same shall apply to an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence.

See also, Annex 1 to the Commonwealth Scheme, *supra* n. 80.

88 See Gilbert 1995, *supra* n. 55. Recommendation 1426, *supra* n., calls for a modification of the European Convention on Extradition 1957 so that the political offence exemption does not provide a right to asylum for terrorists - paragraph 15.

89 *Supra* n. 3.

parts of the *travaux préparatoires* to the 1951 Convention, assert that Article 1F(b) only applies to those unprosecuted for their crimes who are, thus, extraditable. There is nothing on the face of the Convention to that end and Article 1F(a) and Article 1F(c), *mutatis mutandis*, are not so limited. Article 1F(b) could be used where a person had been convicted of a serious (even if not “particularly” serious) crime and has already served her/his sentence if one simply has regard to the text.<sup>90</sup> Even if one does restrict Article 1F(b) to cases where the applicant would be extraditable under the receiving State’s law, then extradition law allows for the surrender of convicted fugitives who have yet to serve out their full sentence.<sup>91</sup> Furthermore, if the drafters were tying Article 1F(b) to extradition law, why did they not adopt the language of paragraph 7 of the 1950 Statute<sup>92</sup> or just say: “**Article 1F(b)**: He would be extraditable under the asylum State’s extradition laws”. Such a provision would effectively incorporate the political offence exemption. As it stands, Article 1F(b) does not link denial of refugee status with impending extradition - thus, an applicant could have committed a serious non-political crime in a third State with which the receiving State has no extradition treaty, and the only State to which s/he could be returned following denial of refugee status under Article 1F(b) would be her/his country of origin where s/he would face persecution.<sup>93</sup> In addition, if Article 1F(b) is to be tied to extraditability, would there be a different approach where the crime was one of universal jurisdiction? And what about a serious non-political crime that had no equivalent in the receiving State’s laws, thus failing the requirement of double criminality, or if the applicant could claim immunity for the crimes? There cannot be that direct a link between Article 1F(b) and the law of extradition.<sup>94</sup>

On the other hand, Article 1F(b) should be ‘related to’,<sup>95</sup> although not limited by, the jurisprudence developed with respect to the political offence exemption. It needs to be borne in mind that the political offence exemption is only about 150 years old, there have not been that many cases in extradition law where its meaning could be developed, and its interpretation is dynamic. The United States approach focuses on the existence of a political uprising and then whether the crime for which the fugitive is requested is part of that uprising. As such, it has even protected Nazi war criminals.<sup>96</sup> The United Kingdom approach used to be based solely on the remoteness of the crime from the ultimate goal of the fugitive’s organization.<sup>97</sup>

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<sup>90</sup> *Tenzen Dhayakpa v Minister for Immigration and Ethnic Affairs* (1995) 62 FCR 556. See also, UNHCR Guidelines, *supra* n. 24, at paragraph 56.

<sup>91</sup> It is interesting to postulate upon the situation where an offender is released on parole but ordered to remain in the country. If ex-convicts, who might be deemed to constitute a particular social group, suffer discrimination in the employment market and the State does not protect them, following *Gashi and Nikshiqi v Secretary of State for the Home Department*, (unreported IAT, Appeal No.HX/ 75677/95, (13695), 22 July 1996), would Article 1F(b) deny her/him refugee status that would otherwise be accorded?

<sup>92</sup> *Supra* n. 3.

<sup>93</sup> *Viz.* UNHCR Guidelines, *supra* n. 24, paragraph 57.

<sup>94</sup> See also the Yugoslav representative at the Conference of Plenipotentiaries, *supra* n. 6: “Mr. BOZOVIC (Yugoslavia) said that the point at issue was whether criminals should be granted refugee status, not the problem of extradition.”

<sup>95</sup> For those who grew up where the English education system held sway, it is a three-legged race - extradition law and refugee law advance the jurisprudence relating to political offences in tandem. For those from other education systems, on school sports days at primary schools in England, there will always be the ‘three-legged race’ where two children, their adjacent legs tied together at the ankle, run down the course as one person with ‘three’ legs. The trick is to keep pace with each other, for if one’s strides are far longer, they both fall over. It is a symbiotic relationship.

<sup>96</sup> *In the Matter of Artukovic*, 140 F.Supp 245 (1956); 247 F.2d 198 (1957); 355 US 393 (1958); 170 F.Supp 383 (1959). NB Artukovic was eventually extradited thirty years later - 628 F.Supp.1370 (1985); 784 F.2d 1354 (1986).

<sup>97</sup> *Cheng v Pentonville Prison Governor* [1973] AC 931, *per* Lord Diplock at 945.

The Swiss approach, to which the United Kingdom now also subscribes, adopts the predominance test, that is, having regard to the ultimate goal of the fugitive's organization and the act's proximity thereto, was it proportionate or was the crime too heinous.<sup>98</sup> The case of *T v Secretary of State for the Home Department*,<sup>99</sup> a case concerning an application for refugee status, refined the United Kingdom test. There, the applicant, as a member of FIS, an organization seeking to overthrow the Algerian government, had been involved in the planning of a bomb attack on Algiers Airport as a result of which ten people had been killed, and in a raid on a military depot in which one person had been killed. The majority of the House of Lords held that in determining whether there is a sufficiently close and direct link between the crime and the organization's goal, one had to have regard to the means used and to the target of the offence, whether, on the one hand it was a military or government target or, on the other, whether it was a civilian target, "and in either event whether it was likely to involve the indiscriminate killing or injuring of members of the public."<sup>100</sup>

*T* highlights the symbiotic relationship between extradition law and Article 1F(b) - political offence cases are so rare that judges cannot let the law ossify when a refugee case presents an ideal opportunity to refine legal understanding.<sup>101</sup>

Not all non-political crimes fall within Article 1F(b), only serious ones. The Handbook<sup>102</sup> states it should be a capital crime or a very grave punishable act, but without authority in domestic or international law for this particular assertion - in some States, the death penalty is available with respect to a wide list of crimes, so capital crimes may not in and of itself be a sufficient test, but offences of the seriousness to attract very long periods of custodial punishment might suffice to guide States as to what might fulfil the Article 1F(b) criteria. van Krieken, on the other hand, equally without rigorous authority, implies that all extradition crimes are serious.<sup>103</sup> Those crimes that are within United Nations multilateral anti-terrorist conventions<sup>104</sup> can safely be assumed to be serious. However, theft of \$1 million is a serious crime, theft of a bar of chocolate is not. It is probably easier to conclude that minor crimes do not exclude, even if the applicant for refugee status was a regular re-offender.<sup>105</sup> Furthermore, the seriousness of certain offences varies from State to State.<sup>106</sup> Each case must be viewed on

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98 *Watin v Ministère Public Fédéral*, 72 ILR 614 (Swiss Fed.Trib. 1964); *Ktir v Ministère Public Fédéral*, 34 ILR 143 (1961); *In re Pavan* [1927–28] Ann.Dig.347 at 349. "Homicide, assassination and murder, is one of the most heinous crimes. It can only be justified where *no other method* exists of protecting the final rights of humanity."

99 [1996] 2 All ER 865. See also, *Ahani v Minister for Employment and Immigration* [1995] 3 FC 669.

100 *Supra* n. 99, at 899. Lord Lloyd, in part, built on the provisions of the European Convention on the Suppression of Terrorism, *supra* n. 20.

101 See also, *Gil v Canada (Minister of Employment and Immigration)* [1995] 1 FC 508; (1994), 174 NR 292; 119 DLR (4th) 497 (1994).

102 Handbook, *supra* n. 7, paragraph 155.

103 *Supra* n. 11, § Extradition. Under the United Kingdom Extradition Act 1989, acting as a fraudulent medium is an extradition crime, but hardly serious!

104 *Supra* n. 19 See also, UNHCR Guidelines, *supra* n. 24, at paragraphs 67 and 68. There may, however, be a special case for hijacking - see UNHCR Guidelines at paragraphs 69 and 70, and *Antonin L and Abdul Hussain*, both *supra* n. 56

105 *Brzezinski v Canada (Minister of Citizenship and Immigration) (TD)* [1998] 4 FC 525, where it was held that shoplifting, no matter how recidivist the applicant might be, was not serious.

106 See Home Affairs Select Committee, Seventh Report, Practical Police Co-operation in the European Community, HCP 363, Volume 1, paragraph 96.

"There are clear problems when laws differ between E.C. countries. Simple examples are the permissive attitude towards cannabis use in the Netherlands, the greater tolerance of certain types of pornography in Germany ... and the absence on

its own facts, which calls into question the very existence of automatic bars to refugee status based on the severity of any penalty already meted out.<sup>107</sup> The UNHCR Guidelines on Exclusion<sup>108</sup> suggest that the worse the persecution feared if the applicant were to be returned, the greater must be the seriousness of the crime committed. While it will be considered below whether the threat of persecution is one of the factors to be considered in an Article 1F determination, it is undoubtedly the case that the seriousness of the crime does provide the courts with a discretion as to whether it is sufficiently so in order to justify exclusion from refugee status.

The final issue pertaining to Article 1F(b) for discussion here is proportionality - should the fear of persecution in the country of origin affect the decision whether or not to exclude from refugee status under Article 1F(b)? The view ordinarily adopted by several States is that whether the applicant would be persecuted if denied refugee status and forced to return to his country of origin is of no consequence when applying Article 1F. Article 1F is the first hurdle an applicant must clear and no protection is to be afforded to anyone falling within subparagraphs (a), (b) or (c).<sup>109</sup> This view can be seen in *Pushpanathan*,<sup>110</sup> a Canadian Supreme Court case from 1998 under Article 1F(c) and dealing with drug smuggling, and in *Aguirre-Aguirre*,<sup>111</sup> a 1999 US Supreme Court case dealing with violent political protest in Guatemala and relying on the domestic law equivalent of Article 1F(b).<sup>112</sup> *Pushpanathan*<sup>113</sup> draws on Article 1F(b), but it is always easier to take the traditional line that there ought to be no balancing when dealing with an obviously non-political offence such as drug smuggling. Terrorism, as stated above, is a matter of political choice and will inevitably produce controversial results.<sup>114</sup>

Moreover, the traditionalists are not as traditional as they claim; Denmark, participating in the drafting process, argued that one needed to balance the seriousness of the crime against the persecution feared.<sup>115</sup> Paragraph 156 of the 1979 Handbook talks of balancing the nature of the crime and the degree of persecution feared.<sup>116</sup> Even if it is accepted that the threat of persecution is a factor account of which must be taken, however, it seems inappropriate to

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the Continent of the English concept of conspiracy.” Belgium legalised the personal use of cannabis in January 2001 - The Guardian p.14, 22 January 2001.

107 *Eg.* The United States category of ‘aggravated felonies’ - see 8 USC §§1101(a)(43), 1251(b)(3)(B)(ii) and 1253(h)(2) and the Antiterrorism and Effective Death Penalty Act 1996, Pub.L 104-132, and the Illegal Immigration Reform and Immigrant Responsibility Act 1996, Pub.L 104-208. See also, *In re Q-T-M-T*, 23 December 1996, BIA Int.Dec.3300, 639-71.

108 *Supra* n. 24, at paragraph 53.

109 Article 1F refers in general to a “person” with respect to whom there are serious reasons for considering s/he has violated subparagraphs (a), (b) or (c), but subparagraph (b) goes on to state that the serious non-political crime was committed before he entered the country “as a refugee”. It may be that a special case can be made for determining refugee status before seeing whether Article 1F(b) excludes the applicant.

110 *Pushpanathan v Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982.

111 *INS v Aguirre-Aguirre*, 526 US 415, 119 S.Ct 1439, 143 L.Ed (2d) 590 (1999); see also, *T*, *supra* n. 99.

112 8 USC §1253(h)(2)(C).

113 *Supra* n. 110.

114 For instance, as mentioned above at footnote 5, care must be taken to ensure that no appearance of partiality develops - the difference in treatment received in some Western States by members of an armed group fighting one country and the members of another armed group fighting another country in the Middle East has led to criticism from some quarters.

115 UN Doc. A/CONF.2/SR.24 at p.13.

116 See also, paragraphs 9 and 53 of the UNHCR Guidelines, *supra* n. 24

balance it against the seriousness of the crime as if a very serious crime might merit a certain degree of persecution. The fear of persecution should prevent *refoulement* no matter what the crime - a very serious crime should be prosecuted in the State where the applicant seeks refugee status.<sup>117</sup>

Furthermore, the nature of public international law is that a purposive interpretation must always be applied to treaty interpretation that supplies flexibility.<sup>118</sup> In *Gonzalez*,<sup>119</sup> the Canadian Federal Court of Appeal, basing itself on Goodwin-Gill but limiting his analysis to Article 1F(b) alone,<sup>120</sup> found that there was room for balancing where the court had to determine whether the applicant had committed a serious non-political crime, but not where s/he was accused of war crimes. In addition, against the initial rigid view must be set the fact that all the United Nations sponsored multilateral, anti-terrorist conventions include a clause permitting the requested State to refuse extradition where the fugitive would be prejudiced or punished on account of his race, religion, nationality or political opinion. That persons suspected of such serious crimes may still be protected from extradition on grounds derived from the 1951 Convention shows that the issue is not at all clear-cut. The judges are being given mixed messages. Article 1F(b) looks to be absolute, yet if it were an extradition request for a crime deemed non-political by convention, the judges could protect the fugitive using principles derived from Article 1A(2) of the 1951 Convention. If extradition law is trying to find a balance between limiting the political offence exemption and the fugitive's fear of persecution in the requesting State, then it is hardly surprising that the same judges use the same principles when applying Article 1F(b). Even the Canadian case of *Gil* implicitly suggests the court could in appropriate circumstances balance the nature of the crime and the fear of persecution.<sup>121</sup> The General Assembly has reaffirmed that all measures to counter terrorism must be in conformity with international human rights standards.<sup>122</sup> Thus, if the serious non-political criminal would face, for example, torture if s/he were to be *refoulé*, then refugee status should still be available with the concomitant guarantee of *non-refoulement*. Article 1F(b) cannot be confined by the *travaux*. It needs to be flexible, dynamic and developed.<sup>123</sup> Article 1F is not obsolete, for there are situations where the crimes are so heinous that balancing them against the fear of persecution does compromise the nature of refugee

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117 Article 1F crimes will often be the subject of permissive universal jurisdiction through multilateral treaty, *supra* n. 19. It is also arguable that by granting asylum, the State is permitted by international law to assume jurisdiction over the previously committed serious crime - see the *Universal Jurisdiction (Austria)* case, *infra* n. 193 and the *Hungarian Deserter (Austria)* case, *infra* n. 194.

118 Although probably not as flexible as the United Kingdom Court of Appeal in *R v Abdul Hussain*, *supra* n. 56, where it was held that duress was a defence to hijacking and fear of potential persecution in Iraq provided that duress. The analogy to Anne Frank stealing a car in Amsterdam ignores the fact that the United Nations has never made car-jacking an international crime - see also, Handbook, *supra* n. 7, at paragraphs 157-61.

119 *Gonzalez v Canada (Minister of Employment and Immigration)* [1994] 3 FC 646 (CA); (1994), 115 DLR (4th) 403 at 410-11. Not cited in *Pushpanathan*.

120 Citing what is now, Goodwin-Gill 1996, *supra* n. 4, at pp.106-07. It seems to this author that Goodwin-Gill had restricted his views on balancing to Article 1F(b) alone. On the extradition of criminals to face the death penalty, see now, *Burns*, *infra* n.228.

121 119 DLR (4th), *supra* n. 101 at 517 (footnotes omitted).

"[Canada] is apparently prepared to extradite criminals to face the death penalty and, *at least for a crime of the nature of that which the appellant has admitted committing*, I can see no reason why we should take any different attitude to a refugee claimant." (emphasis added).

122 UNGA Res.50/186, 6 March 1996, paragraph 3 and preamble.

123 See Higgins, *Problems and Process: International Law and How We Use It*, 1994.

status,<sup>124</sup> and the perpetrator can be informally protected if the State of refuge is concerned, but Article 1F, particularly subparagraph (b), has to be reconsidered in the light of developments since 1951. While the Convention Against Torture<sup>125</sup> provides an independent means of protection, the interpretation of the 1951 Convention has to reflect the elements of custom bound up therein. The broader understanding of *non-refoulement* needs to be reflected in the interpretation of Article 1F(b) and the traditional attitude should be seen as no longer in line with current international thinking. The obligation within Europe at least towards all those within the jurisdiction of a member State of the Council of Europe not to return them to a State where their rights under Articles 2 (right to life) and 3 (freedom from torture or inhuman or degrading treatment or punishment) of the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>126</sup> might be violated, regardless of all other factors,<sup>127</sup> indicates the ever-increasing importance attached to protection of the individual over the past half century. Even if the fear of persecution was originally irrelevant to the interpretation of the exclusion clause, that can no longer be the case. Secondly, in the near future there will exist a permanent International Criminal Court in The Hague. If impunity was one of the factors that shaped Article 1F, then the establishment of the I.C.C. will ensure that there is a court with jurisdiction over Article 1F crimes<sup>128</sup> and where there is no need to return someone to a place where they would face persecution contrary to the principle of *non-refoulement*. In a similar vein, the last half century has seen the rapid expansion of extraterritorial jurisdiction over crimes of a heinous nature. Where United Nations multilateral anti-terrorist conventions provide ordinarily for extradition of those committing serious non-political crimes, the right to refuse extradition where it is feared the requested person would face persecution on grounds of race, religion, nationality or political opinion is coupled with a duty to submit the case to the State of refuge's prosecutorial authorities - *aut dedere, aut judicare*.<sup>129</sup>

Article 1F(b) already includes one balancing test. Is the non-political crime sufficiently serious so as to justify exclusion? The remaining question is whether there is a double balancing test permitting the applicant to raise the fear of persecution to outweigh exclusion from refugee status. Given that refugee status consists of more than *non-refoulement*, there are good grounds for stating that certain crimes, particularly those within Article 1F(a), should always lead to exclusion no matter how well founded the fear of persecution. However, Article 1F(b) provides in its very wording more scope for the exercise of discretion. In those countries where the courts have refused to apply this proposed double balancing test,<sup>130</sup> there existed the safety net of protection provided by Article 3 of the Convention Against Torture<sup>131</sup> or

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124 *Supra* n. 23 It is hard to conceive of a situation where someone who had committed genocide or grave breaches of the Geneva Conventions or extermination, rape, sexual slavery or torture in connection with persecution based on race, religion, nationality, ethnicity, culture, or gender, ever being granted refugee status.

125 23 ILM 1027 (1984) and 24 ILM 535 (1985).

126 ETS 5 (1950).

127 *Chahal v United Kingdom*, (70/1995/576/662) 15 November 1996.

128 See Articles 6, 7 and 8 of the Rome Statute, *supra* n. 32, which would cover crimes within Article 1F(a) and (c) and, in certain cases, subparagraph (b).

129 In *R v Moussa Membar et al.* [1983] Crim.L Rev.618, although the hijack ended in London giving the English courts jurisdiction under the Hague and Montreal Conventions, the fugitives were not returned to Tanzania where the hijack had commenced.

130 The United States, the United Kingdom and Canada.

131 *Cf. Manickavasagam Suresh v The Minister of Citizenship and Immigration and The Attorney General of Canada*, A-415-99, FCA. January 18, 2000, paragraphs 26 *et seq.* The case is on appeal to the Supreme Court of Canada.

Article 3 of the ECHR. Nevertheless, that does not mean that Article 1F(b) could not be developed, drawing on those self-same ideas as are evidenced in the Torture Convention and the ECHR, to incorporate this second level of balancing where necessary, nor that such would not better reflect the need to reinforce refugee status.

Justification for a reconsideration of the approach to the implementation of Article 1F(b) might be found in Article 62 Vienna Convention on the Law of Treaties.<sup>132</sup> It can be argued that there has been such a fundamental change of circumstances since 1951 in terms of human rights guarantees and restrictions on extradition where persecution is feared in the requesting State, that Article 1F(b) can no longer be deemed absolute with respect to the denial *ab initio* of refugee status. The absurd situation would be reached that if a person committed a serious non-political crime in Arcadia and fled to Ruritania, the Ruritanian authorities could deport that person even if the only State to which s/he could return would be Arcadia where her/his life or freedom would be threatened, but if the Arcadian authorities submitted an extradition request, then Ruritania could refuse surrender on the ground that s/he would fear persecution in Arcadia. Remaining within the realm of international law pertaining to the protection of refugees and displaced persons, as has been seen, there is a strong case to be made that since 1951 *non-refoulement* has become customary international law, indeed, a peremptory norm.<sup>133</sup> If so, then reading Article 64 with Article 44.2 of the Vienna Convention on the Law of Treaties,<sup>134</sup> it can be argued that any provision of the 1951 Convention that would allow for *refoulement* would be void.<sup>135</sup> Nevertheless, that would not permit one to incorporate into Article 1F a balancing test where the nature of prior acts might be outweighed by the fear of persecution if denied refugee status. Article 64 of the Vienna Convention deems the superseded provision void.<sup>136</sup>

In sum, refugee law should not lag behind human rights law and it needs to be more fully recognised that the Preamble to the 1951 Convention speaks of refugees benefitting from international human rights law<sup>137</sup> - in the 21st century, the two systems need to be more greatly harmonised.

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See *infra* n. 230. For a more detailed analysis of Suresh and other related Canadian jurisprudence, see Aiken, *Manufacturing 'Terrorists': Refugees, National Security and Canadian Law – Part II*, forthcoming 19:4 *Refuge*, Canada's Periodical on Refugees (2001).

132 8 ILM 679 (1969), 1155 UNTS 331, especially subparagraph 3 dealing with suspending the operation of a treaty. Reading Article 62 with Article 44.3 VCLT, one can limit the suspension to a particular clause, in this case, Article 1F(b).

133 Eg. Goodwin-Gill, *supra* n. 4, pp.167 *et seq.*

134 *Supra* n. 132.

135 Even accepting that *non-refoulement* is a peremptory norm of international law, questions remain as to its scope. If this peremptory norm has developed out of Article 33 of the 1951 Convention, then one might argue that the customary rule is equally limited to protecting refugees as defined in Article 1 and, as such, those within Article 1F would still not be safeguarded. If one claims that customary *non-refoulement* developed from State practice and is not limited by Article 33, then the evidence of State practice coupled with *opinio juris* is not strikingly apparent.

136 As such, war criminals and other serious criminals might escape justice if there were to be too great a fear of persecution in their country of origin, except in so far as they might be tried before courts in the State of refuge under principles of extraterritorial criminal jurisdiction or before the International Criminal Court.

137 *Supra* n. 3.

“The High Contracting Parties, Considering that [the General Assembly has] affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,

Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms, ....”



## Article 1F(c)<sup>138</sup>

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

(c) He has been guilty of acts contrary to the purposes and principles of the United Nations.”<sup>139</sup>

While paragraphs (a) and (b) specifically refer to crimes, paragraph (c) talks of “acts contrary to the purposes and principles of the United Nations”. Nevertheless, it still requires that the applicant is “guilty” of such acts. Not all purposes and principles of the United Nations, as set out in Articles 1 and 2 of the Charter,<sup>140</sup> give rise to individual criminal responsibility for their violation. It was suggested by the drafters that it would cover violations of human rights that fell short of crimes against humanity.<sup>141</sup> There is a danger that the phrase is so imprecise as to allow States to exclude applicants without adequate justification. Nevertheless, the guiding principle has to be that all limitations on rights have to be interpreted restrictively.<sup>142</sup>

If the acts Article 1F(c) covers are less than clear, there are also questions as to who can perpetrate them. On the basis that the Charter applies to States, the argument is made that only people extremely high in the hierarchy of the State can be guilty of acts contrary to the purposes and principles of the United Nations.<sup>143</sup> Nevertheless, although the application of Article 1F(c) is rare, it has been the basis for decisions against a wider group than those in high office. The UNHCR Guidelines refer to its use in the 1950s against persons who had denounced individuals to the occupying authorities with extreme consequences including death.<sup>144</sup> In the *Georg K* case,<sup>145</sup> refugee status was denied under Article 1F(c) to someone who had carried out a bombing campaign to reunite South Tyrol with Austria; an individual whose actions affect the relations of nations, in this case Austria and Italy, could be in breach of the United Nations Charter. van Krieken argues that one of the main issues for international law is the peaceful settlement of inter-State disputes, although the right to self-determination raises a variety of questions as to whether the same analysis can be straightforwardly applied

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See also, *R v Secretary of State for the Home Department, ex parte Adan*, [1999] 3 WLR 1274 at 1296; House of Lords 19 December 2000:

“It is clear that the signatory States intended that the [1951] Convention should afford continuing protection for refugees in the changing circumstances of the present and future world. In our view, the Convention has to be regarded as a living instrument: just as, by the Strasbourg jurisprudence, the [ECHR] is so regarded.”

138 See the UNHCR Guidelines, *supra* n. 24, at paragraphs 59 *et seq.*

139 Article I(5)(c) of the OAU Convention on the Specific Aspects of Refugee Problems in Africa 1969, 1000 UNTS 46, adds acts contrary to the purposes and principles of the OAU.

140 See Wolfrum, Chapter I, *Purposes and Principles*, in Simma, *The Charter of the United Nations: a Commentary*, 1995, pp.49 *et seq.* Cf. Text at footnote , *supra*.

141 See UNHCR Guidelines, *supra* n. 24, at paragraph 62 and footnote 48. **NB.** Given that Article 14.2 of the Universal Declaration of Human Rights, 1948 includes a similar phrase, there is some merit in this argument. See also, *Pushpanathan*, *supra* n. 110, at 983, which suggests that the purpose of Article 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”.

142 See Statement to the Sixth Committee by Soren Jessen Petersen, 14 November 1996, pointing out that Article 1F(c) is rarely used and overlaps with Article 1F(a).

143 *Viz. Brahim*, 228601 CRR (France, 29 October 1993), where the former Director of National Security in Chad during the Hissène Habré regime was excluded under Article 1F(c).

144 UNHCR Guidelines, *supra* n. 24, at paragraph 61.

145 *Georg K v Ministry of the Interior*, 71 ILR 284 (1969) Austrian Administrative Court.

to conflicts internal to the State.<sup>146</sup> Does a member of an armed opposition group seeking self-determination have the right to use violence and so be outside the exclusionary remit of Article 1F(c)?<sup>147</sup> Nevertheless, van Krieken explicitly accepts that all individuals could be excluded under Article 1F(c), not just high office holders.<sup>148</sup> In the Canadian Supreme Court case of *Pushpanathan*,<sup>149</sup> it was argued that drug related crimes were excludable on the basis that they were contrary to the purposes and principles of the United Nations. The majority of the court found that the crimes were not within Article 1F(c). However, it was recognised that in appropriate circumstances non-State actors could fall within Article 1F(c): “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*.”<sup>150</sup>

Article 1F(c) is vague and is open to abuse by States. It is clear that there is State practice interpreting it widely, but there is no internationally accepted understanding of “acts contrary to the purposes of the United Nations” as yet. Given that Article 1F(c) is a limitation on a fundamental right, there is strong reason to restrict its ambit, and, since acts contrary to the purposes and principles of the United Nations are those perpetrated by States, it would tend to consistency within international law to confine the scope of Article 1F(c) to acts committed by persons in high office in government or in a rebel movement that controls territory within the State.

### The Relationship between Article 1F and Article 33.2

“Article 33 - Prohibition of expulsion or return (“refoulement”)

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.”<sup>151</sup>

The domestic legislation and procedure in certain countries<sup>152</sup> already subsumes concepts from both provisions into a single stage in the process. Therefore, the relationship between Articles 1F and 33.2 is confused in practice. State practice with regard to Article 33.2 shows its joint use with Article 1F. In Canada, a mixture of Articles 1F and 33.2 is used at the ‘eligibility stage’, that is, where the Department of Citizenship and Immigration (CIC) determines if a claim is eligible to be referred to the Immigration and Refugee Board. Nevertheless, in 98-99% of cases, the CIC finds refugees’ claims to be eligible for a refugee status determination hearing before the IRB on the merits. Before the IRB, only Article 1F is

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<sup>146</sup> van Krieken, *supra* n. 11, § Purposes and Principles.

<sup>147</sup> Cf. *Avetisan*, 303164 CRR (France, 4 April 1997), where someone who had attempted to overthrow the democratically elected Shevardnadze regime in Georgia was deemed excluded under Article 1F(c). See also, *Suresh*, *supra* n. 131, at paragraph 36.

<sup>148</sup> Although basing the argument on Article 29(3) of the Universal Declaration of Human Rights, 1948 is less than convincing. In *Muntumusi Mpemba*, 238444 CRR (France 29 October 1993), a member of the Zairean Civil Guard who had engaged in human rights violations was excluded under Article 1F(c).

<sup>149</sup> *Supra* n. 110.

<sup>150</sup> *Supra* n. 110, at 984.

<sup>151</sup> Cf. Articles II and III OAU 1969 Convention, *supra* n. 139, which has no precise equivalent to Article 33.2.

<sup>152</sup> Such as Canada and Germany - see meeting on *Asylum, Terrorism and Extradition*, *supra* n. 2.

used to exclude.<sup>153</sup> In Germany, however, asylum seekers who have either been convicted and sentenced to three or more years in prison and are thus deemed a danger to the community or who are a danger to national security are excluded from *non-refoulement* protection. In three recent cases, the Federal Administrative Court has found that activities deemed ‘terrorist’ render the asylum seeker a danger to national security.<sup>154</sup> However, it was only high officials in the terrorist organization who were subject to this deemed loss or *non-refoulement* protection. In other parts of Europe, rather than use Article 33.2, with its higher demands, States would prefer to use Article 1F where a refugee commits a terrorist act in the country of refuge<sup>155</sup> or where serious non-political crimes committed prior to entry come to light only after refugee status has been granted. The former is clearly a case specifically within Article 33.2 and to be decided with respect to that provision’s requirements. The latter is acceptable, since it can be argued that the false or inadequate information originally supplied vitiates the grant of refugee status and so it is as if one is considering refugee status and exclusion *ab initio*.<sup>156</sup> It should also be noted, though, that the grounds listed in Article 1F are not grounds for cessation under Article 1C - Article 33.2 is the proper route where a refugee commits a particularly serious crime in the country of refuge and constitutes a danger to the community of that country, although even in this situation refugee status does not cease, only the protection of *non-refoulement*.<sup>157</sup>

Having briefly noted the confused relationship between Articles 1F and 33.2, it is necessary to consider Article 33.2 on its own. Whereas, Article 1F excludes applicants from refugee status, Article 33.2 applies to those who are recognised as refugees and would otherwise benefit from *non-refoulement* protection. However, they must either be a danger to the security of the country of refuge or, having been convicted by a final court of a particularly serious crime, they constitute a danger to the community of that country. Generally, the view is that Article 33.2 applies to crimes committed in the country of refuge. In most cases, such a person can be dealt with in the same way as any other criminal. Moreover, extradition laws apply to her/him in exactly the same way as anyone else for post-status crimes committed in other countries. Article 33.2 is only applicable where the country of refuge is preparing to act so as to return or extradite<sup>158</sup> the refugee to a country where his life or freedom would be threatened.

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<sup>153</sup> See meeting on *Asylum, Terrorism and Extradition*, *supra* n. 2.

<sup>154</sup> Section 51 of the Aliens Act (Ausländergesetz) is subject to a terrorism caveat (Terrorismusvorbehalt) - see BVerwG 9 C 22.98, 23.98, 31.98 (30 March 1999). Headnotes may be found at <<http://www.asyl.net/homeNS.html>>. On the facts, the asylum seekers had been engaged in terrorism abroad and it was feared they would continue their campaign from Germany.

<sup>155</sup> Cf. *Rajkumar*, *Conseil d’Etat*, SSR (France, 28 September 1998).

<sup>156</sup> See paragraph 117 of the Handbook, *supra* n. 7. See also, *EU Joint Position Defined by the Council on the basis of Article K.3 of the treaty on European Union on the Harmonized application of the definition of the term "Refugee" in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees (Annex 1)*, Official Journal of the European Communities, L 63, 13 March 1996:

“§13. **Article 1F of the Geneva Convention:** The clauses in Article 1 F ... may also be applied where the acts become known after the grant of refugee status.”

In addition, see Dutch State Secretary of Justice, *Section 1F of the Convention on Refugees*, *supra* n. 15, at p.47. Cf. Slovakian law, where Article 1F is not identified as a ground for revoking refugee status - see Amsterdam Seminar, *Conclusions and Recommendations*, §7, *Action to be taken if Article 1F is determined to be applicable after the Refugee Status has been granted*, *supra* n. 11.

<sup>157</sup> *Pham*, 148997, *Conseil d’Etat* SSR (France, 21 May 1997).

<sup>158</sup> The current, although not universal, view is best expressed in *Bereciartua-Echarri*, 1 April 1988, *Recueil Lebon*. where the fugitive, a Spanish Basque, had been granted refugee status in 1973. The *Cour de Cassation* held that since Article 33 did not expressly mention extradition, it could not be prohibited under the 1951 Convention. The *Conseil d’Etat* reversed, holding extradition should be refused, not because of Article 33, but on the basis of the general principles of

Ordinarily, an Article 1A refugee cannot be refouled as a consequence of Article 33.1, but a Convention refugee loses the guarantee of *non-refoulement* if Article 33.2 supervenes. That will only be permitted where issues of the security of the State are deemed to take priority over *non-refoulement*. If a terrorist is only a threat to her/his usual State of residence because of her/his opposition to that regime, s/he is not a danger to the country of refuge - it would take a very expansive view of Article 33.2 to suggest that a refugee who supports a political cause in a foreign State, even where violence is endemic there, poses a danger to the security of the country of refuge<sup>159</sup> - raising funds to buy arms to further the violence in a foreign State might indicate the refugee is a danger to the security of the country of refuge, but simply being a supporter of an armed opposition group in another State ought to fall within guarantees of freedom of expression and leave the refugee protected by the guarantee of *non-refoulement*.<sup>160</sup>

There is no prescribed method for determining whether *non-refoulement* protection can be withdrawn under Article 33.2. This position contrasts with Article 32.

### “Article 32 - Expulsion

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to

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refugee law derived from Article 1A(2). A State that recognises a fugitive offender’s refugee status is forbidden from returning her/him by any means, method or mechanism whatsoever to a State where s/he might face persecution. Accordingly, extradition law should be subject to the humanitarian principles to be found in the 1951 Convention. See also the Italian case reported at paragraph 206 of the High Commissioner’s Report to the General Assembly in 1956, Eleventh Session, Supp.No.11, A/3123/Rev.1. “In Italy, two cases of extradition were dealt with by my Branch Office in 1955. Evidence of the eligibility of a refugee under the mandate of UNHCR proved to be sufficient to prevent extradition of the refugee from taking place.” See further, EXCOM Note on International Protection, 40th Session, 2 August 1989, A/AC.96/728: “27. Given the position of certain States that Article 33 cannot be automatically interpreted as embracing - and thereby protecting refugees from - extradition, the exemption from extradition of political offenders (even though not every refugee is a political offender and vice-versa) and the protection against extradition where there is the danger of discrimination on the basis of race, religion, colour or ethnic origin, together become all the more important to safeguard the security of refugees. The omission of these protections or safeguards from, or their qualification in, extradition arrangements could have potentially serious repercussions for the welfare and security of the individual refugee threatened with return through extradition.”

<sup>159</sup> Although the Financing of Terrorism Convention, *supra* n. 19, is based in part on such a premise. The English Court of Appeal, relying on a new definition of terrorism in English law, decided in *Secretary of State for the Home Department v Rehman*, *supra* n. 69, that anyone considered a threat to any of the United Kingdom’s allies was threat to national security - *Rehman* had allegedly been engaged in fund raising and recruiting for the conflict in Kashmir against India. Leave to appeal to the House of Lords on this point has been granted - *The Guardian* p.12, 10 October 2000. See also, *Suresh*, *supra* n. 131. Practice in Africa includes admitting people not as refugees, but as political exiles, that is, those who have left a country with the avowed intention of taking action to overthrow the country of origin (*cf.* Article III OAU 1969 Convention, *supra* n. 139) - see meeting on *Asylum, Terrorism and Extradition*, *supra* n. 2. Moreover, States ought not to let their territory be used as a base for aggression against other States - see Principle 1, paragraphs 8 and 9, of the General Assembly Declaration on Principles of Friendly Relations, 1970, GA Res.2625 (XXV), 24 October 1970, and Article 2.4 of the United Nations Charter. See also, the *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, (*Nicaragua v USA*), [1986] ICJ Rep. p.14, paragraphs 183-86 and esp. 189. Nevertheless, neither the wording of the Charter nor the Declaration would authorize the surrender of an individual to a State where s/he would face persecution, they should simply be a guide to setting State policy.

<sup>160</sup> Leader, *Free Speech and the Advocacy of Illegal Action in Law and Political Theory*, 82 Columbia L Rev.412 at p.428 (1982).

appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.”

Given that national security is a broader concept than “danger to the security of the country [of refuge]”,<sup>161</sup> and that loss of *non-refoulement* protection is more far-reaching and dangerous than expulsion, it is clearly justifiable to require that determinations with respect to Article 33.2 apply not only the procedural safeguards of Article 32, but do so with heightened care.<sup>162</sup> Further, due process demands that the refugee should have access to the evidence against her/him. Although the State may well argue that national security issues require that its evidence should be withheld on the basis of public policy, it cannot be proper or in keeping with human rights standards that a person’s life or freedom could be threatened without a chance to challenge the evidence produced by the State.<sup>163</sup> In sum, however, if Article 32 procedures were adopted with respect to Article 33.2, then its application would be less problematic

Additionally, although domestic courts have spoken in terms of ‘national security’, it is Article 32 which deals with national security, while Article 33.2 deals with the more demanding idea of a “danger to the security of the country” or “a danger to the community of that country”. While it would mark a change in the jurisprudence relating to Article 33.2, it is undoubtedly arguable that rather than the presence of the refugee giving rise to an issue of national security, a broad concept, loss of *non-refoulement* protection should only arise where the refugee represents a danger to the security of the country of refuge, a concept more akin to the threshold necessary to derogate from human rights obligations.<sup>164</sup> Furthermore, derogation is only permitted to meet the exigencies of the situation and is monitored by the relevant human rights body in order to see if it exceeds what is necessary. Given the nature of the effect of Article 33.2 of the 1951 Convention, where a peremptory norm of international law is being restricted, such a construction would be fitting and appropriate in the circumstances. A strict view on the use of Article 33.2 would better reflect the idea that the refugee is a danger to the security of the country.

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<sup>161</sup> On the meaning of national security, see Lustgarten and Leigh, *In from the Cold: National Security and Parliamentary Democracy* (1994).

<sup>162</sup> See also, *Chahal*, *supra* n. 127.

“153. In the present case, neither the advisory panel nor the courts could review the decision of the Home Secretary to deport Mr Chahal to India with reference solely to the question of risk, leaving aside national security considerations. On the contrary, the courts’ approach was one of satisfying themselves that the Home Secretary had balanced the risk to Mr Chahal against the danger to national security (see paragraph 41 above). It follows from the above considerations that these cannot be considered effective remedies in respect of Mr Chahal’s Article 3 complaint for the purposes of Article 13 of the Convention.”

<sup>163</sup> *Cf.* The right to a fair trial within Article 6 of the ECHR is not applicable to refugee status determination hearings - see *Maaouia v France*, App.No.39652/98, European Court of Human Rights, 5 October 2000. In Canada, a summary of the evidence has to be prepared for the refugee. *Cf. Avila v Rivkind* 724 F.Supp. 945 at 947-50 (1989) - “An alien who is found by the Attorney-General to be a threat to national security is not entitled to an asylum hearing” (950); *Ali v Reno* 829 F.Supp. 1415 at 1434 *et seq.* (1993) - although the agency supplying the classified information can make a summary available to the applicant/ petitioner (1436); *Azzouka v Meese* 820 F.2d 585 at 586-87 (1987), where a member of the PLO was denied asylum on the basis he presented a danger to the people and security of the United States, based in part on “confidential information, the disclosure of which would be prejudicial to the public interest, safety, and security of the United States” (587).

<sup>164</sup> See Article 4 International Covenant on Civil and Political Rights, UNGA Res.2200A(XXI), UNGAOR, 21st Sess., Supp.No.16, 52 (1966); 999 UNTS 171; 6 ILM 368 (1967); 61 AJIL 870 (1967); hereinafter, ICCPR. “In time of public emergency which threatens the life of the nation  
See equally, Article 15 ECHR, *supra* n. 126. “In time of war or other public emergency threatening the life of the nation.” It is possible that derogation is only permissible where the State is required to implement Common Article 3 of the four Geneva Conventions because the level of violence has reached a certain minimum, so that although human rights standards are derogated from, the Common Article 3 guarantees provide an alternative means of protection.

The final Article 33.2 issue surrounds whether one can balance the refugee's fear of persecution against the danger s/he represents to the security of the country or to the community of the country where s/he has been convicted of a particularly serious crime.<sup>165</sup> The courts possess a discretion as to whether the refugee represents a danger to the security of the country of refuge or whether, given that the crime is *particularly* serious, that s/he represents a danger to the community of that country. Furthermore, mere conviction of a particularly serious crime in the country of refuge, unless there is also evidence that the refugee poses a danger to the community in the future, should not satisfy Article 33.2.<sup>166</sup> What is in issue here is whether, given that all those issues are answered affirmatively by the court, that the court is permitted to factor in the refugee's fear of death or loss of liberty if s/he were to lose protection from *refoulement*. The Handbook<sup>167</sup> unequivocally assumes that such balancing is part of the Article 33.2 process. Furthermore, while guarantees of human rights protection to all, regardless of whether they qualify as Article 1A refugees or not, will be examined below, the ambit of *non-refoulement* within Article 33 has developed since 1951 and is now argued to be a preemptory norm of international law.<sup>168</sup> In addition, international human rights law has also progressed.<sup>169</sup> Given that *non-refoulement* is to be understood as a form of human rights protection for a specific type of person, the refugee, combining the enhanced status of *non-refoulement* and its broader interpretation in the light of human rights developments, then this second level of balancing should be part of Article 33.2. In *QTMT*,<sup>170</sup> however, the respondent, who had entered the United States from Vietnam in 1991, had been convicted of conspiracy to deal in firearms. The United States then instituted deportation proceedings and the respondent sought asylum as a means of preventing deportation. The conviction was for an 'aggravated felony'<sup>171</sup> and so under U.S. law the respondent was ineligible for asylum; furthermore, the immigration judge also found that the aggravated felony constituted a particularly serious crime, thus barring the respondent from withholding of deportation under Article 33.2. The majority in the BIA found that under U.S. law the statutory bar to withholding is based on the nature of the crime "and does not vary with the nature of the evidence of persecution".<sup>172</sup> In *Suresh*,<sup>173</sup> on the other hand, the Canadian Federal Court of Appeal held that there was a Constitutional guarantee of balancing by the Minister which could be reviewed by the courts:

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<sup>165</sup> *Barrera v Canada (Minister of Employment and Immigration)* [1993] 2 FC 3; (1992), 99 DLR (4th) 264; 18 Imm.LR (2d) 81; 151 NR 28 (CA) - also relying on s12 Canadian Charter of Rights and Freedoms.

<sup>166</sup> *Cf. QTMT*, *supra* n. 107 at 656. Suppose, for example, that a refugee under intense provocation and possibly even racial abuse were to lose self-control and hit out at someone who dies as a consequence - culpable homicide. The crime is particularly serious, but does the refugee pose a danger to the community of the country of refuge in the future after her/his release from prison?

<sup>167</sup> *Supra* n. 7, at paragraph 156.

<sup>168</sup> *Eg. Goodwin-Gill*, *supra* n. 4 pp.167 *et seq.*

<sup>169</sup> *See Chahal*, *supra* n. 127.

<sup>170</sup> *Supra* n. 107.

<sup>171</sup> As defined by 8 USC §1101(a)(43) (1994).

<sup>172</sup> *Supra* n. 107 at 656 and the authorities cited there. *Cf.* The concurring and dissenting opinion by Rosenberg, Board Member at 664:

"[It] seems to me incorrect, and unreasonable, to interpret the statutory language to permit blanket determinations of ineligibility, where the international instrument on which our statute is modeled contemplates not only an extraordinary exception to a mandatory form of relief, but specifically refers to due process and individual consideration in determining when that exception may be invoked."

<sup>173</sup> *Supra* n.131, at paragraphs 70 *et seq.* Appeal to the Supreme Court of Canada pending.

“[165] Turning now to the constitutional standard of review of the Minister’s exercise of her discretion, the test articulated by the Supreme Court may be recast as follows: would the deportation of the appellant to Sri Lanka in the circumstances of this case violate the principles of fundamental justice such that it could be said that the proposed governmental action would shock the conscience of the Canadian people? If the standard of review were held to be correctness, then in my opinion it is of significance that Sri Lanka is still a member of the Commonwealth and a democratic state with an independent judiciary. The fact that the appellant’s case has attracted national and international attention, as well as that of the Sri Lankan government, undermines the chances of torture being inflicted on the appellant if detained on his return to Sri Lanka. These factors, when balanced against the appellant’s degree of involvement with a terrorist organization, lead one to conclude that the state interests outweigh those of the appellant in the sense that the Canadian conscience is not shocked by the Minister’s decision.”

There is nothing express in the 1951 Convention to stipulate that there must be a judicial balancing of the refugee’s danger to the country of refuge or its community and the consequences of *refoulement*, although the fact that the guarantee of *non-refoulement* is being withdrawn from the recognised refugee suggests that there are even stronger arguments than exist with respect to Article 1F where the applicant is excluded from entry to the protection regime.<sup>174</sup> Moreover, if the Article 32 requirement of due process is truly part of denial of *non-refoulement* protection under Article 33.2, then the right to present and dispute evidence on a central issue to the determination, is undeniable.

In sum, the second level of balancing where the fear of persecution is taken into account before Article 1F or Article 33.2 are applied, has been called into question in recent years in courts in different States. However, much of this reflects domestic legislation which fails to implement the 1951 Convention as it stands and introduces other concepts. There is also a lack of willingness to apply international norms in those domestic courts when interpreting the domestic legislation. Nevertheless, none of that detracts from the requirements of the 1951 Convention as they have developed in the light of custom and related international human rights law. It is, though, for UNHCR to take a robust stance on balancing with States, both at the diplomatic level and in *amicus curiae* briefs, if the arguments presented here are to succeed.

## PROCEDURAL ISSUES AND OTHER AREAS OF INTEREST

### Inclusion before exclusion?

Does Article 1F have priority in status determination, such that Article 1A is redundant if grounds for exclusion under Article 1F are proven? Is it akin to an admissibility test applied to

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<sup>174</sup> The apparent illogicality that having decided that national interests override threats to the refugee’s life or freedom, one then has to balance the refugee’s fear of persecution in the State to which s/he would return, is only apparent. Article 33.2 is not applied as a second stage in a *non-refoulement* ‘process’ - the individual will already have refugee status and the concomitant guarantee of *non-refoulement* and will subsequently be deemed a danger to the security of the country of refuge or a danger to its community after conviction for a particularly serious crime so as to be *refoul*-able. It is only proper, having regard to the proposed limitation of a fundamental right, that the presently perceived danger be balanced against the ongoing threat to life or freedom of the refugee.

those seeking to apply for refugee status? The view held by a significant number of States is that application of Article 1F precedes refugee status determination under Article 1A(2). The Canadian Federal Court of Appeal has held that there is no need to consider whether the claimant falls within Article 1A(2) if s/he falls within Article 1F.<sup>175</sup> On the other hand, paragraph 141 of the UNHCR Handbook<sup>176</sup> propounds that it will *normally* be during the determination process under Article 1A(2) that the exclusionary factors will come to light, but there is nothing to stop a State dispensing with determination where it is aware that the person would not qualify as a result of Article 1F.<sup>177</sup> The UNHCR Guidelines on Exclusion<sup>178</sup> also presume that the exclusion clauses will only be applied “after the adjudicator is satisfied that the individual fulfils the criteria for refugee status”. The inherently complex nature of Article 1F cases, involving examination of the crime and the applicant’s participation therein, requires full knowledge of all the facts. Furthermore, Article 1F assumes that but for the exclusionary provision, the applicant would otherwise be an arguable case for refugee status.<sup>179</sup> Indeed, to apply Article 1F before Article 1A(2) indicates a presumption that all applicants for refugee status are potentially excludable.<sup>180</sup> Given that Article 1F speaks of “crimes” and “guilt”, one would expect the immigration authorities to adopt a presumption of innocence and apply Article 1A(2) first. In practice, where UNHCR carries out the determination, its status determination officers will assess the applicant under Article 1A(2) right up to the point where the next step would be to accord refugee status and only then see if s/he is excluded by Article 1F.<sup>181</sup>

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<sup>175</sup> See *Ramirez v Canada (Minister of Employment and Immigration)* [1992] 2 FC 306 (CA); *Sivakumar v Canada (Minister of Employment and Immigration)* [1994] 1 FC 433 (CA); *Gonzalez, supra* n. 119. See also Dutch State Secretary of Justice, *Section 1F of the Convention on Refugees, supra* n. 15 at p.48.

<sup>176</sup> *Supra* n. 7.

<sup>177</sup> *Eg.* Where arrival in the State is by means of the perpetration of a hijack. Given the exceptional circumstances of the case, UNHCR excluded twenty Rwandans indicted by the ICTR - information supplied at Meeting on 10 November 2000, *supra* n. 2 UNSC Res.1127 (1997) paragraph 4, (reaffirmed in UNSC Res. 1295 (2000), paragraphs 22-24, and Res.1336 (2001)) also prohibits under Chapter VII the entry of all senior UNITA officials into all other States. Consequently, it is arguable that, as a result of the relationship of the Security Council with all other organs of the United Nations, such officials could be excluded from refugee status automatically. On the other hand, the Security Council Resolution merely prohibits entry to other States and says nothing about refugee status, such that an argument could be made that refugee status, as an aspect of “respect for human rights” (Article 1.3 UN Charter), might override the prohibition and that each case would have to be examined on its own facts. UNHCR has also advised European Union member States that accelerated procedures can be applied where a case is manifestly within Article 1F - see European Union, Council Resolution on Manifestly Unfounded Applications for Asylum (London, 30 November and 1 December 1992): “11.This Resolution does not affect national provisions of Member States for considering under accelerated procedures, where they exist, other cases where an urgent resolution of the claim is necessary, in which it is established that the applicant has committed a serious offence in the territory of the Member States, if a case manifestly falls within the situations mentioned in Article 1F of the 1951 Geneva Convention, or for serious reasons of public security, even where the cases are not manifestly unfounded in accordance with paragraph 1.”

Cited by van Krieken, *supra* n. 11, § Procedure.

<sup>178</sup> *Supra* n. 24, at paragraph 9. See also IOM/FOM, *supra* n. 60, paragraph 4.

<sup>179</sup> There is an argument based on Article 14.2 Universal Declaration of Human Rights, 1948, that in those cases where prosecutions genuinely arise from non-political crimes or from acts contrary to the purposes and principles of the United Nations, those persons are prevented from seeking asylum under Article 14.1 and thus they cannot even be considered for refugee status under Article 1A(2) 1951 Convention. However, such an argument is fallacious, partly on the basis that Article 1A(2) is a legally binding convention whereas the UDHR is a mere aspiration, and partly because it is trying to read Article 1F into Article 14.2 - if everything is being determined by reference to Article 14.2, then not only Article 1A(2), but also Article 1F is preempted. Reliance on the UDHR to deny people legal ‘rights’ is also intellectually dishonest.

<sup>180</sup> *Quaere* automatic bars on refugee status with respect to certain crimes - *viz. QTMT, supra* n. 107.

<sup>181</sup> See meeting on *Asylum, Terrorism and Extradition, supra* n. 2.



Nevertheless, if it is felt necessary, a distinction might be drawn between subparagraph (b) of Article 1F and subparagraphs (a) and (c).<sup>182</sup> Whereas Article 1F refers in general to a “person” with respect to whom there are serious reasons for considering s/he has violated subparagraphs (a), (b) or (c), only subparagraph (b) goes on to state that the serious non-political crime was committed before he entered the country “as a refugee”. It may be that a special case can be made for always determining refugee status before seeing whether Article 1F(b) excludes the applicant.<sup>183</sup>

### Situations of mass influx

During situations of mass influx, where individual determination is a practical impossibility, the priority is to provide assistance and emergency protection measures so as to preserve life. Of necessity, assistance might be provided to a person who would be excluded under Article 1F. UNHCR give priority to assistance and emergency protection measures in such situations.<sup>184</sup> That, however, is based on the presumption that status determination will ensue as swiftly as is practicable. That practicability must include the question of whether it is possible to ensure the security of unarmed UNHCR staff as they carry out status determination and exclusion. Often, UNHCR will be in the field dealing with the mass trans-border influx weeks before any Security Council sponsored peace support operation is deployed. If the security forces of the host State cannot be used to disarm those in the camps, then status determination with consequent exclusion may be a practical impossibility, but UNHCR could still, subject to satisfying the safety needs of its staff, start interviewing those in the camps in order to obtain information that might be of use in the future when circumstances have improved. Even in situations of mass trans-border influx, UNHCR should not act as if it were solely a humanitarian relief organization and should engage as far as possible in its primary function of protection of refugees. Another difficult problem arises where the Security Council proscribes a certain organization and demands States refuse entry to its senior members, as has happened with UNITA.<sup>185</sup> Nevertheless, in situations of mass influx, proscribed persons will be mixed up in a more general population movement, often including those obviously not excluded. Therefore, the *prima facie* assumption of inclusion to be followed by status determination can still operate.

### Prosecution of Article 1F crimes

Whereas in 1951 only the traditional heads of jurisdiction existed to allow for prosecution of crimes in domestic criminal courts,<sup>186</sup> developments since then provide for the prosecution of those committing Article 1F crimes in many more situations. The most prominent international intervention to ensure that major international crimes do not go unpunished is seen in the ICTY and ICTR,<sup>187</sup> although given the geographical and temporal limitations to which they

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182 NB *Gonzalez*, *supra* n. 119, concerned Article 1F(a).

183 In *Re SK*, Refugee Appeal No.29/91, New Zealand Refugee Status Appeals Authority, 17 February 1992, it was implicit in the reasoning of the Appeals Authority that Article 1F(b) was only to be applied after the applicant has been found to be a refugee.

184 See UNHCR Note, *supra* n. 5, paragraphs 22 *et seq.* See also, *supra* n. 5.

185 *Supra* n. 177.

186 That would be, the territorial principle, the active personality principle, the protective principle, the representational principle and universal jurisdiction. Some States would also recognize the passive personality principle. See generally, Gilbert 1998, *supra* n. 55, Chapter 3.

187 *Supra* n. 30.

are subject, they are a small contribution to the avoidance of impunity. The International Criminal Court may well prove to be an effective institution for the prosecution of Article 1F crimes, depending on how many States ratify the Statute.<sup>188</sup> While Article 12 ordinarily requires that the International Criminal Court will only have jurisdiction where the State on whose territory the Article 5 crime occurred or whose national is accused is a party to the Statute, Article 12.3 provides that a State:

“may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question.”

The Security Council can refer cases to the Prosecutor as can States party, but the Prosecutor can act *proprio motu* on the basis of information, and that information could come from NGOs or individuals. The International Criminal Court is not the universal panacea for ensuring non-impunity with respect to Article 1F crimes, but it represents an alternative route to prosecution, rather than returning someone to a State where her/his life or freedom would be threatened.<sup>189</sup>

Furthermore, the obligation on States to prosecute international crimes has undergone radical development, particularly in the last thirty years. In 1951, only grave breaches of the Geneva Conventions 1949 imposed universal jurisdiction.<sup>190</sup> Since then, the United Nations multilateral anti-terrorist conventions have wholeheartedly adopted the principle of *aut dedere, aut judicare*.<sup>191</sup> More interestingly, though, extradition law, reflecting a more humanitarian concern than international refugee law, has long been prepared to refuse surrender where the fate of the fugitive offender would not have been in accordance with human rights and fundamental freedoms.<sup>192</sup> In *The Universal Jurisdiction (Austria) Case*,<sup>193</sup> the Supreme Court of Austria held that it could assume jurisdiction in a representational capacity. “The extraditing State also has the right, in the cases where extradition for whatever reason is not possible, although according to the nature of the offence it would be permissible, to carry out a prosecution and impose punishment, instead of such action being taken by the requesting State.”

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188 *Supra* n. 32. The Statute needs 60 ratifications before it comes into force - Article 126.

189 Technically, the International Criminal Court has to defer to States with jurisdiction under the principle of complementarity (preamble paragraph 10 and Articles 1 and 17), but if such a State is unable “*genuinely* to carry out the investigation or prosecution”, then the I.C.C. can take primacy - a finding that a trial would be contrary to the rules of natural justice and due process in the State would suggest the State was “otherwise unable to carry out its proceedings” (Article 17.3). See also the broad reading of unwilling States and Article 17.2(c): “The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to *justice*.” (emphasis added) See generally, Article 21. It would be strange if, in abiding by a narrow interpretation of Article 17, the I.C.C. were to refuse jurisdiction with respect to a case because the State where the crime was committed asserted its primacy, even though it was apparent that no fair trial of the individual could ever take place. Given that the State where the fugitive accused is found would not surrender her/him for fear of the treatment s/he would receive, the I.C.C. would be colluding in an unfair trial and possibly a crime against humanity -.Article 7(1)(e) and (h).

190 *Supra* n. 18. Although arguably piracy *iure gentium* was equally prosecutable by all States, even if it was not a mandatory obligation as was the case with the Geneva Conventions - see White, *The Marshall Court and International Law: The Piracy Cases*, 83 AJIL 727 (1989). The Genocide Convention 1948, *supra* n. 28 was premised on territorial jurisdiction and the expectation that an international criminal tribunal would be established for the purpose of prosecuting the Convention crimes - see Article VI.

191 *Supra* n. 19.

192 *R v Governor of Brixton Prison, ex parte Kolczynski et al.*, *supra* n. 84, at 551 *per* Lord Goddard CJ: “... reasons of common humanity.”

193 28 ILR 341 at 342 (1958).

*The Hungarian Deserter (Austria) Case*<sup>194</sup> involved the shooting of a border guard by a Hungarian soldier deserting to the West during the Cold War. Again, the Austrian Supreme Court exercised jurisdiction over the fugitive, extradition having been refused partly because he would be in danger of life and liberty if surrendered after having fled for political reasons. Fears of impunity should not be used as an excuse for *refoulement*. If it were to be generally accepted that where an Article 1F case comes to light during refugee status determination it should be referred to the State's prosecutorial authorities,<sup>195</sup> then the assumption of jurisdiction to prosecute where return ought not to take place would not violate principles of comity in international law.

### Standard of proof for Article 1F and membership of the group

Article 1F demands that there be “*serious* reasons for considering” that one or more of the subparagraphs has been satisfied.<sup>196</sup> Implicitly, therefore, Article 1F prohibits the application of automatic bars to refugee status based on a list of excluded crimes;<sup>197</sup> Article 1F as a whole demands individual determination on a case by case basis. Automatic bars do not allow for an effective legal remedy against a restriction on a guarantee of fundamental human rights. Nevertheless, that does not require that the status determination hearing should receive sufficient evidence to justify a finding of guilt at a criminal trial. By analogy with Article 33.2 which merely requires reasonable grounds for regarding the refugee as a danger to the security of the country of refuge, where that is based on a particularly serious crime having been committed by the refugee in that country, there must be a conviction by a final judgment, that is the refugee must have been found guilty in a criminal trial - “*serious* reasons for considering” that the applicant has committed a crime or is guilty of an act within Article 1F must, therefore, at least approach the level of proof necessary for a criminal conviction of the individual.

Difficulties arise where mere membership of a group whose activities fall within Article 1F is enough to exclude the applicant. If membership is accepted to be a relevant criterion in Article 1F determinations, then membership *per se* cannot be adequate on its own.<sup>198</sup> UNHCR speaks of the applicant having to have “direct responsibility” or being “actively associated with acts, albeit committed by others” before membership will suffice to exclude.<sup>199</sup> In *Ramirez*,<sup>200</sup> it was held by the Canadian Federal Court of Appeal that one needs “personal and knowing participation”. In *Suresh*,<sup>201</sup> Robertson JA, giving the judgment of the Federal Court of Appeal, held that:

“I am satisfied that one can reasonably conclude that an individual is a ‘member’ of an organization if one devotes one’s full time to the organization or almost one’s full time, if one is associated with members of the organization and if one collects funds for the organization.”

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194 28 ILR 343 (1959).

195 See, for instance, the Amsterdam Seminar, *supra* n. 11, *Conclusions and Recommendations*, §5, *Legal/ criminal proceedings to be applied if Article 1F is applied*, and Dutch State Secretary of Justice, *Section 1F of the Convention on Refugees*, *supra* n. 15 at p.46.

196 *Cf.* Article 33.2 only requires that there be “reasonable grounds” for regarding the refugee as a danger.

197 See *QTMT*, *supra* n. 107.

198 See Amsterdam Seminar, *supra* n. 11 *Conclusions and Recommendations*, §2 *Burden of Proof*, paragraph III.

199 See IOM/FOM, *supra* n. 60, at paragraph 16.

200 *Supra* n. 175. See s19(1)(e)(iv), (f)(iii) and (g) Immigration Act.

201 *Supra* n. 131 at paragraph 8.

What detailed information exists suggests that courts have been easily satisfied that there are serious reasons for considering that the applicant should be excluded. In many ways, it is this laxity with the burden of proof that calls into question how States have implemented Article 1F. The interpretation of Article 1F is open to debate, but if the required standard of proof were demanded in individual cases, then there would be fewer concerns over abuse of the exclusory clauses.

### Defences to exclusion

Where Article 1F crimes which have been committed knowingly and with a moral choice,<sup>202</sup> it is hard to imagine that in practice the applicant could find a defence for her/his conduct. In this context, a defence is a reason for excusing conduct that would otherwise provide evidence of guilt - where the necessary *mens rea* is not present, then the crime has not been committed so it is inappropriate to talk of defences.<sup>203</sup> Superior orders is not a defence to war crimes.<sup>204</sup> It is equally impossible to conceive of how genocide or crimes against humanity could ever be, for example, a necessity. However, duress has on occasion been recognised as a legitimate defence to some Article 1F crimes.<sup>205</sup> If a criminal court can find that hijacking is excused by duress, then a hijacker should not be excluded under Article 1F in those self-same circumstances, although such a finding will be rare.<sup>206</sup>

A related issue is the effect of an amnesty. In extradition law, amnesties declared by the requesting State are a defence to a request for surrender. On the other hand, inasmuch as there could never be an amnesty for those perpetrating genocide, all amnesties if they are to be recognised ought to have been voluntarily granted by a legitimate, representative government.<sup>207</sup>

Given the nature of the crimes in Article 1F and the desire to avoid impunity, it is less than surprising that there are few defences that are *practicably* available.

### Passage of time and exclusion

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<sup>202</sup> See UNHCR Guidelines, *supra* n. 24, at paragraphs 41 *et seq.* The position of child soldiers who have committed war crimes is difficult - see below.

<sup>203</sup> See Articles 31 and 32 Rome Statute, *supra* n 32.

<sup>204</sup> See Principle IV Nuremberg Principles, UNGAOR, V, Supp.12 (A/1316) pp.11-14, 1950 - see paragraphs 119-124. See also, *supra* n and associated text.

<sup>205</sup> See the UNHCR Guidelines, *supra* n. 24 at paragraph 78. See also *Abdul Hussain* and the discussion at *supra* n. 56.

<sup>206</sup> The position is confused because there is a line of political offence exemption cases from extradition law where those escaping from repressive regimes were held to have committed political crimes - thus, on that analysis, hijacking may, in certain circumstances, be outside Article 1F(b). See *Kolczynski* and *Kavic*, both *supra* n. 84. See also, UNHCR Guidelines, *supra* n. 24, at paragraphs 69 and 70.

<sup>207</sup> *Quaere* the amnesty granted by the Pinochet regime with respect to crimes committed in the 1970s in Chile - *R v Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet; R v Evans and Another and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet (On Appeal from a Divisional Court of the Queen's Bench Division)*, [1999] 2 WLR 827. Cf. Article 6.5 Protocol II, 1977, *supra* n. 18 and UNHCR Guidelines, *supra* n. 24, paragraph 56.

Does lapse of time annul Article 1F? If someone who has committed Article 1F crimes in the past, renounces such methods, will s/he qualify for refugee status after the passage of a sufficient interval? UNHCR contemplates that where the Article 1F crimes are sufficiently distant in the past and the applicant's conditions of life have changed, then s/he may be able to claim refugee status.<sup>208</sup> According to paragraph 157 of the Handbook,<sup>209</sup> the central question should be whether the applicant's criminal character still predominates - some crimes are so heinous that the perpetrator's criminality will always predominate. The State contemplating granting refugee status should bear in mind that if the applicant is still supporting the activities of an organization fighting the government of another State, the latter might see refugee status as support for the rebels.<sup>210</sup>

### Exclusion and minors

There is no internationally accepted minimum age of criminal responsibility.<sup>211</sup> Equally, there is no equivalent to Article 1F in Article 22 Child Rights Convention.<sup>212</sup> The Rome Statute eschews jurisdiction over "any person who was under the age of 18 at the time of the alleged commission of a crime".<sup>213</sup> Nevertheless, it would be possible to exclude applicants who were under that age when they acted contrary to Article 1F<sup>214</sup> - child soldiers could be excluded for their participation in genocide, war crimes or crimes against humanity unless one could show a lack of *mens rea*. However, UNHCR has argued that even if one applies Article 1F to a child, that they should still be protected from *refoulement*, partly because "the fact that a child has been a combatant may enhance the likelihood and aggravate the degree of persecution he or she may face upon return".<sup>215</sup> Responses to child applicants who would be excludable under Article 1F need to be age-sensitive. It is not for UNHCR to devise mechanisms and processes to meet the needs of children who may well have committed heinous offences, and States should not contribute to the traumatization of the child by washing their hands of them through the process of exclusion from refugee status.

### Implications of exclusion for family members

Ordinarily, where a head of family is given refugee status, the principle of family reunification allows in the rest of the family who obtain derivative refugee status. The corollary should not arise, however, that where the head of family is excluded, the rest of the family is excluded. Article 1F speaks of those committing crimes or guilty of acts contrary to the purposes and principles of the United Nations, and there should be no exclusion by association.<sup>216</sup> Other members of the family should be entitled to prove they qualify in their own right.<sup>217</sup> Indeed,

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208 See IOM/FOM, *supra* 60, paragraphs 18 and 19.

209 *Supra* n. 7.

210 In 1998-99, Angola alleged Zambia was supporting the UNITA rebel movement because it allowed the establishment of refugee camps within its borders. See also, *Nicaragua case*, *supra* n. 159.

211 See Article 40 Convention on the Rights of the Child, *supra* n. 51.

212 *Supra* n. 51.

213 Article 26. *Cf. Prosecutor v Drazen Erdemovic*, Judgment, Case No. IT-96-22-A, 7 October 1997.

214 See the UNHCR Guidelines, *supra* n. 24, paragraph 14.

215 See the letter from UNHCR, ref.HO/98/23 - 50/7, 25 September 1998, to the Dutch State Secretary for Justice.

216 See also, Article 10 Convention on the Rights of the Child, *supra* n. 51.

217 See Amsterdam Seminar, *supra* n. 11 *Conclusions and Recommendations*, §6 *Spouses of excluded persons*. **NB.** The excluded person would not be able to avoid exclusion by relying on the principle of family unity.

the fact that the head of family has been excluded may well be further evidence that other members of the family would suffer persecution. Cross-reference should also be made to the various guidelines on gender-sensitive interpretation of the 1951 Convention. In most cases, the excluded person will be male, either a husband, father or brother. It may be that the State of nationality is a repressive regime where women have no means of expressing their views in public with the consequence that they would fail to be recognised as traditional refugees, but where a gender-sensitive approach to status determination would acknowledge persecution by association and, indeed, persecution as a consequence of the sexist structure of the society.<sup>218</sup>

## ALTERNATIVE MECHANISMS FOR PROTECTION

To the extent that *non-refoulement* under Article 33 of the 1951 Convention draws on principles from international human rights law, developments in that field should necessarily feed into the interpretation of the 1951 Convention. The decision that international human rights law is broader and more protective than Article 33, therefore, should lead to a reconsideration of the restrictive definition given to *non-refoulement* under the Convention. However, since the 1951 Convention confers a status in international law on the individual that is much more wide ranging than simple non-return,<sup>219</sup> it should not be surprising that international human rights law will protect the applicant where refugee status is denied. What is important is that international human rights law should not draw too far ahead of *non-refoulement*, which should always be informed by those very same developments.<sup>220</sup> States should not defend a narrow and ungenerous interpretation of the 1951 Convention on the ground that applicants are protected by international human rights instruments.<sup>221</sup>

The major guarantees of non-return in international human rights law are to be found in Article 3 of the Convention Against Torture<sup>222</sup> and Article 3 of the ECHR.<sup>223</sup> Everyone within the jurisdiction of a State Party to those treaties shall not be returned to a place where

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218 *Viz. Islam and Shah v Secretary of State for the Home Department* [1999] 2 AC 629.

219 See Articles 3-30 1951 Convention, *supra* n. 3.. On this indeterminate status of non-return, see Amsterdam Seminar, *supra* n. 11, *Conclusions and Recommendations*, §4, *Further action and status of cases for which exclusion under Article 1F is applied*.

220 No attempt is made here to investigate the scope and ambit of customary *non-refoulement*. See Goodwin-Gill, *supra* n. 4, at pp.167-71. **NB.** In many cases where refugee status is denied by reference to Article 1F, the State of refuge still grants complementary forms of protection. The Afghan hijackers who came to the United Kingdom in 1999 are being denied refugee status, but are not being returned to Afghanistan - *The Guardian* p.7, 28 July 2000.

221 *Eg.* The Convention Against Torture is now part of United States domestic law and absolute in its protection. There is an additional difficult question related to the way this ungenerous interpretation is exported to States where there is no fallback position predicated on international human rights guarantees. It is always open to States parties to the 1951 Convention to apply their own analysis and grant refugee status where States in western Europe and North America seem now to rely on human rights guarantees - Tanzania, a party to the 1969 OAU Convention, gave refugee status during the Great Lakes Crisis because of the knowledge that Rwandese would be killed if returned. However, where the State has not ratified the 1951 Convention, refugee status determination will usually be handled by UNHCR with a view to resettlement in a third country, often in western Europe or North America. UNHCR will, therefore be faced with the dilemma that the States of resettlement would reject the applicant, yet if refugee status is denied, then the State of refuge will send the person back to where their life or freedom would be threatened. Once again, the sacred duty to protect refugees is broader than the narrow, protectionist response of certain States.

222 *Supra* n. 125.

223 *Supra* n. 126. See also, Article 7 ICCPR, *supra* n. 164, Article 5 American Convention on Human Rights, 9 ILM 673 (1970), Article 5 African Charter on Human and Peoples' Rights, 21 ILM 59 (1982).

their right to be free from torture<sup>224</sup> will not be respected.<sup>225</sup> The human rights treaties protect all persons

“where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In these circumstances, Article 3 implies the obligation not to expel the person in question to that country ....”<sup>226</sup>

Even if one were to find that the refugee was a threat to national security, *Chahal*<sup>227</sup> has held that such issues cannot be a factor for consideration where there is a real danger of torture, inhuman or degrading treatment or punishment on return.

“151. In such cases, given the irreversible nature of the harm that might occur if the risk of ill-treatment materialised and the importance the Court attaches to Article 3, the notion of an effective remedy under Article 13 requires independent scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3. This scrutiny must be carried out without regard to what the person may have done to warrant expulsion or to any perceived threat to the national security of the expelling State.”

Thus, even if international refugee law will not provide protection for serious non-political criminals, international human rights law is still available.<sup>228</sup> Nevertheless, someone who would be excluded under Article 1F of the 1951 Convention need not be accorded a permanent right of residence if return is prohibited as a consequence of Article 3 of either the Convention Against Torture or the ECHR.<sup>229</sup> However, protection from torture under human rights instruments is absolute and non-derogable.<sup>230</sup>

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224 And in the case of the ECHR, their right to be free from “inhuman or degrading treatment or punishment”, as well. On the meaning of torture, see Article 1 Convention Against Torture, *supra* n. 125, and *Selmouni v France*, App.No.25803/94, 28 July 1999, *Labita v Italy*, App.No.26772/95, 6 April 2000.

225 See *Mutombo v Switzerland*, Communication No.13/1993, CAT/C/12/D/13/1993, 27 April 1994, paragraph 9.3; *Khan v Canada*, Communication No.15/1994, CAT/C/13/D/15/1994, 18 November 1994, paragraph 12.2; *Chahal*, *supra* n. 127.

226 *Chahal*, *supra* n. 127, at paragraph 74 - see generally, paragraphs 74-80. See also, *Jabari v Turkey*, App.No.40035/98, European Court of Human Rights, 11 July 2000.

227 *Supra* n. 127. . Cf. *Agee v United Kingdom*, 7 DR 164 (1976).

228 *Viz. Soering v United Kingdom* Series A, vol.161 (1989), an extradition case, but one that formed the basis for *Chahal*, *supra* n. 127 *Viz. Case of M.Singh and P.Singh*, The Guardian p.5, 1 August 2000, where the Special Immigration Appeals Commission found the applicants did not qualify for refugee status, but should not be returned for fear of torture in India.

229 *Viz. Dutch State Secretary of Justice, Section 1F of the Convention on Refugees*, *supra* n. 15, at pp.54-55.

230 It is to be hoped that the Supreme Court of Canada will take the opportunity to reverse the wayward judgment of the Federal Court of Appeals in *Suresh*, *supra* n. 131. The FCA judgment restricts the ambit of the right to be free from torture found in the ICCPR (paragraph 25) and proposes that Article 3 of the Convention Against Torture is derogable (paragraph 27). Ignoring the express wording of the Human Rights Committee’s General Comment on Article 7 (20/37, CCPR/C/21/Add.3, paragraph 6, 1982), the FCA held that that Article was only non-derogable with respect to the treatment a person might receive within the jurisdiction of the State where he was now to be found and that one could derogate if the torture would only occur in the State to which a person would be returned. This part of the decision is nothing less than perverse, ignoring, for example, *Ng v Canada*, Doc. CCPR/C/49/D/469/1991 at paragraphs 16.2 - 16.4 (1994), where the Committee held that death by cyanide gas asphyxiation, since it may cause prolonged suffering and agony and might take up to ten minutes, violated Article 7 ICCPR, and thus that extradition to the United States would amount to a breach of the Covenant by Canada (see also, the Supreme Court of Canada in *United States v Burns*, 2001 SCC 7 File No.: 26129, 15 February 2001). If anything, the FCA’s reading of Article 3 of the Convention Against Torture is possibly worse. Relying on Article 16, which is designed to deal with where references to torture can be read to include “cruel, inhuman or degrading treatment or punishment” and to provide broader protection through other international instruments than is to be found in the Convention Against Torture (Article 16.2), the FCA held that since Article 33.2 of the 1951 Convention permits *refoulement* in certain circumstances, so must the Convention Against Torture in those self-same circumstances. This opinion flatly ignores the Preamble to the Convention Against Torture and decisions of the Committee Against Torture. In *Paez v Sweden* (CAT/C/18/D/39/1996), the applicant was a member of Sendero Luminoso

## RECOMMENDATIONS FOR DISCUSSION

### General considerations

•*Dual nature and function of Article 1F:*

- i) refugee status has to be protected from abuse by prohibiting its grant to undeserving cases, and
- ii) the need to ensure that those who commit international crimes are prosecuted.

•However, given that Article 1F represents a limitation on a humanitarian provision, it needs to be interpreted restrictively. It only applies to pre-entry acts by the applicant. Given the potential consequences of excluding someone from refugee status, Article 1F must be applied sparingly and only where extreme caution has been exercised.

### Article 1F(a)

•*Definition of international crimes under Article 1F(a).* UNHCR should take the 1998 Rome Statute as reflecting an understanding broadly agreed within the international community and the one which will continue to develop as cases come before the International Criminal Court. It should also be borne in mind that according to Article 27 of the Statute of the International Criminal Court, official capacity, even as Head of State, is no excuse.

-It is clear that there is no accepted definition of the crime against peace or of aggression giving rise to individual criminal responsibility, but if individual responsibility for the crime against peace is to be consistent with the 1974 Resolution on the Definition of Aggression, then, as well as the leaders of a State, it might include leaders of rebel groups in non-international armed conflicts which seek secession, but few if any others.

-Crimes against humanity include genocide and, having regard to the Statutes of the *ad hoc* tribunals and the International Criminal Court, as well as the jurisprudence of the former, widespread or systematic attacks on a civilian population whether in time of peace or war. Widespread or systematic persecution based on political, racial, national, ethnic, cultural,

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and on 1 November 1989 participated in a demonstration where he handed out leaflets and distributed handmade bombs. Nevertheless,

“14.5 The Committee considers that the test of article 3 of the Convention is absolute. Whenever substantial grounds exist for believing that an individual would be in danger of being subjected to torture upon expulsion to another State, the State party is under obligation not to return the person concerned to that State. The nature of the activities in which the person concerned engaged cannot be a material consideration when making a determination under article 3 of the Convention.” See also, *Khan, supra* n. 225 at paragraph 12.1, and *Ayas v Sweden*, (CAT/C/21/D/97/1997) 12 November 1998, at paragraph 7.

As regards treaty interpretation in *Suresh*, the FCA fails to have proper regard to Article 30.3 and 30.4, Vienna Convention on the Law of Treaties 1969, *supra* n. 132. Article 30.1 VCLT states that it is subject to Article 103 of the UN Charter which requires that where there is a conflict between Charter obligations and obligations under other international agreements, the Charter shall prevail. It is arguable that the Article 56 pledge to co-operate with the United Nations in promoting observance of human rights and fundamental freedoms under Article 55(c) of the Charter should entail that States give priority to the protection of refugees in international law.

Finally, Canada is on record that the fight against terrorism must be consistent with the broader commitments to human rights and the rule of law. The institutions entrusted to fight terrorism would attract public support by respecting those principles - see Robert R. Fowler in the Security Council, 19 October 1999, Press Release SC/6741.

For a fuller analysis of *Suresh* and related jurisprudence, see Aiken, *supra* n. 131.



religious, gender or other grounds that are universally recognized as impermissible under international law, is a separate crime against humanity. Crimes against humanity can be perpetrated by the State or by an organization carrying out functions akin to the State within the territory of a State.

-As a consequence of the Statutes of the ICTY, ICTR and I.C.C. and the jurisprudence of the two *ad hoc* tribunals, as well as grave breaches of the Geneva Conventions and Additional Protocol 1 in international armed conflicts, violation of the laws and customs of war, in international and non-international conflicts, can give rise to individual criminal responsibility. Furthermore, individual criminal responsibility attaches to breaches of common Article 3 of the 1949 Geneva Conventions in non-international armed conflicts.

#### Article 1F(b)

- Fairness and due process*: Given that a status determination hearing can never replicate a full criminal trial of the issues, it is nevertheless fundamental to the decision-making process that exclusion is on the basis that there are serious reasons for considering that the applicant has committed a serious non-political crime. Therefore, the hearing should assume the applicant innocent until ‘proven guilty’, the benefit of the doubt must be accorded to the applicant given the very serious consequences, and there should be no automatic presumptions, each case must be viewed on its own facts.

- With respect to ‘terrorism’, an initial problem is that international law provides no definition, although the United Nations has outlawed several crimes deemed ‘terrorist’ in the popular perception.

- The applicant must have committed *a serious non-political crime*. There does not need to be proof sufficient for a criminal trial, but there should be serious reasons for considering that the applicant did commit a serious non-political crime. As well as perpetrating the completed offence, it includes inchoate offences such as attempts, conspiracies and incitement. Membership *per se*, whether of a repressive government or of an organization advocating violence, should not, however, be enough to exclude under Article 1F(b). Seniority within the government or organization might provide ‘serious reasons for considering’ that the applicant was a party to the preparation of a serious non-political crime perpetrated by others. However, given that Article 1F(b) represents a limitation on an individual right, *non-refoulement*, it should be interpreted restrictively and, without evidence of involvement in a specific serious non-political crime, it would be contrary to the spirit and intent, if not the very language of the 1951 Convention to exclude someone in that position for mere membership.

- For the purposes of extradition law, there are very few crimes specifically designated non-political. Article 1F(b) should be ‘related to’, although not limited by, the jurisprudence developed with respect to the political offence exemption. In determining whether an applicant for refugee status has committed a serious *non-political* crime, status determination hearings should adopt the predominance test, that is, having regard to the ultimate goal of the fugitive’s organization and the act’s proximity thereto, was it proportionate or was the crime too heinous.

•Only *serious* crimes should lead to exclusion and the multiple repetition of minor offences does not render them serious. A serious offence is one that would on the facts attract a long period of imprisonment. Each case must be viewed on its own facts, which calls into question the very existence of automatic bars to refugee status based on the severity of any penalty already meted out.

•*Proportionality and balancing test*: The fear of persecution in the country of origin should affect the decision whether or not to exclude from refugee status under Article 1F(b). The fear of persecution should prevent *refoulement* no matter what the crime - a very serious crime should be prosecuted in the State where the applicant seeks refugee status. The nature of public international law is that a purposive interpretation must always be applied to treaty interpretation that supplies flexibility. All the United Nations sponsored multilateral, anti-terrorist conventions include a clause permitting the requested State to refuse extradition where the fugitive would be prejudiced or punished on account of his race, religion, nationality or political opinion. That persons suspected of such serious crimes may still be protected from extradition on grounds derived from the 1951 Convention shows that the issue is not at all clear-cut. If extradition law is trying to find a balance between limiting the political offence exemption and the fugitive's fear of persecution in the requesting State, then it is hardly surprising that the same judges use the same principles when applying Article 1F(b). The General Assembly has reaffirmed that all measures to counter terrorism must be in conformity with international human rights standards. Thus, if the serious non-political criminal would face, for example, torture if s/he were to be *refoulé*, then refugee status should still be available with the concomitant guarantee of *non-refoulement*. Article 1F(b) cannot be confined by the *travaux*. It needs to be flexible, dynamic and developed. While the Convention Against Torture provides an independent means of protection, the interpretation of the 1951 Convention has to reflect the elements of custom bound up therein. The broader understanding of *non-refoulement* needs to be reflected in the interpretation of Article 1F(b). The obligation within Europe at least towards all those within the jurisdiction of a member State of the Council of Europe not to return them to a State where their rights under Articles 2 (right to life) and 3 (freedom from torture or inhuman or degrading treatment or punishment) of the European Convention for the Protection of Human Rights and Fundamental Freedoms might be violated, regardless of all other factors, indicates the ever-increasing importance attached to protection of the individual over the past half century. Even if the fear of persecution was originally irrelevant to the interpretation of the exclusion clause, that can no longer be the case. In sum, refugee law should not lag behind human rights law and it needs to be more fully recognised that the Preamble to the 1951 Convention speaks of refugees benefitting from international human rights law

#### Article 1F(c)

•While paragraphs (a) and (b) specifically refer to crimes, Article 1F(c) talks of “acts contrary to the purposes and principles of the United Nations”. Nevertheless, it still requires that the applicant is “guilty” of such acts. There is a danger that the phrase is so imprecise as to allow States to exclude applicants without adequate justification. Nevertheless, the guiding principle has to be that all limitations on rights have to be interpreted restrictively. It is clear that there is State practice interpreting it widely, but there is no internationally accepted understanding of “acts contrary to the purposes of the United Nations” as yet. Given that Article 1F(c) is a limitation on a fundamental right, there is strong reason to restrict its ambit, and, since acts contrary to the purposes and principles of the United Nations are those perpetrated by States,

it would tend to consistency within international law to confine the scope of Article 1F(c) to acts committed by persons in high office in government or in a rebel movement that controls territory within the State.

#### Expulsion under Article 32 and Article 33(2)

- There is no prescribed method for determining whether *non-refoulement* protection can be withdrawn under Article 33.2. Given that national security is a broader concept than “danger to the security of the country [of refuge]”, and that loss of *non-refoulement* protection is more far-reaching and dangerous than expulsion, it is clearly justifiable to require that determinations with respect to Article 33.2 apply not only the procedural safeguards of Article 32, but do so with heightened care. In sum, however, if Article 32 procedures were adopted with respect to Article 33.2, then its application would be less problematic

- Although domestic courts have spoken in terms of ‘national security’, it is Article 32 which deals with national security, while Article 33.2 deals with the more demanding idea of a “danger to the security of the country” or “a danger to the community of that country”. It is undoubtedly arguable that rather than the presence of the refugee giving rise to an issue of national security, a broad concept, loss of *non-refoulement* protection should only arise where the refugee represents a danger to the security of the country of refuge, a concept more akin to the threshold necessary to derogate from human rights obligations. Given the nature of the effect of Article 33.2 of the 1951 Convention, where a peremptory norm of international law is being restricted, such a construction would be fitting and appropriate in the circumstances.

- The courts possess a discretion as to whether the refugee represents a danger to the security of the country of refuge or whether, given that the crime is *particularly* serious, that s/he represents a danger to the community of that country. Furthermore, mere conviction of a particularly serious crime in the country of refuge, unless there is also evidence that the refugee poses a danger to the community in the future, should not satisfy Article 33.2. The ambit of *non-refoulement* within Article 33 has developed since 1951 and is now argued to be a peremptory norm of international law. In addition, international human rights law has also progressed. Given that *non-refoulement* is to be understood as a form of human rights protection for a specific type of person, the refugee, combining the enhanced status of *non-refoulement* and its broader interpretation in the light of human rights developments, then Article 33.2 should be read to include a second level of balancing based on the fear of persecution.

#### Procedural issues and other areas of interest

- *Inclusion before exclusion*: The inherently complex nature of Article 1F cases, involving examination of the crime and the applicant’s participation therein, requires full knowledge of all the facts. Furthermore, Article 1F assumes that but for the exclusionary provision, the applicant would otherwise be an arguable case for refugee status. Indeed, to apply Article 1F before Article 1A(2) indicates a presumption that all applicants for refugee status are potentially excludable. Given that Article 1F speaks of “crimes” and “guilt”, one would expect the immigration authorities to adopt a presumption of innocence and apply Article 1A(2) first.

- *Mass influx*: During situations of mass influx, where individual determination is a practical impossibility, the priority is to provide assistance and emergency protection measures so as to preserve life. That, however, is based on the presumption that status determination will ensue

as swiftly as is practicable. That practicability must include the question of whether it is possible to ensure the security of unarmed UNHCR staff as they carry out status determination and exclusion.

- Prosecution of Article 1F crimes:* Developments since 1951 provide for the prosecution of those committing Article 1F crimes in many situations. This will increase with the establishment of the International Criminal Court. Furthermore, the obligation on States to prosecute international crimes has undergone radical development, particularly in the last thirty years. If it were to be generally accepted that where an Article 1F case comes to light during refugee status determination it should be referred to the State's prosecutorial authorities, then the assumption of jurisdiction to prosecute where return ought not to take place would not violate principles of comity in international law.

- Standard of proof:* Article 1F as a whole demands individual determination on a case by case basis. Automatic bars do not allow for an effective legal remedy against a restriction on a guarantee of fundamental human rights. *serious reasons for considering* that the applicant has committed a crime or is guilty of an act within Article 1F must, therefore, at least approach the level of proof necessary for a criminal conviction of the individual. Difficulties arise where mere membership of a group whose activities fall within Article 1F is enough to exclude the applicant. If membership is accepted to be a relevant criterion in Article 1F determinations, then membership *per se* cannot be adequate on its own. In many ways, it is this laxity with the burden of proof that calls into question how States have implemented Article 1F. The interpretation of Article 1F is open to debate, but if the required standard of proof were demanded in individual cases, then there would be fewer concerns over abuse of the exclusory clauses.

- Defences to exclusion:* In this context, a defence is a reason for excusing conduct that would otherwise provide evidence of guilt - where the necessary *mens rea* is not present, then the crime has not been committed so it is inappropriate to talk of defences. Duress has on occasion been recognised as a legitimate defence to some Article 1F crimes.

- Passage of time:* Someone who has committed Article 1F crimes in the past and then renounces such methods, should qualify for refugee status after the passage of a sufficient interval. The central question should be whether the applicant's criminal character still predominates - some crimes are so heinous that the perpetrator's criminality will always predominate.

- Minors:* There is no internationally accepted minimum age of criminal responsibility. Equally, there is no equivalent to Article 1F in Article 22 Child Rights Convention. Child soldiers could be excluded for their participation in genocide, war crimes or crimes against humanity unless one could show a lack of *mens rea*. Responses to child applicants who would be excludable under Article 1F, however, need to be age-sensitive. It is not for UNHCR to devise mechanisms and processes to meet the needs of children who may well have committed heinous offences, and States should not contribute to the traumatization of the child by washing their hands of them through the process of exclusion from refugee status.

- Implications for family members:* Ordinarily, where a head of family is given refugee status, the principle of family reunification allows in the rest of the family who obtain derivative refugee status. The corollary should not arise, however, that where the head of family is excluded, the rest of the family is excluded. Article 1F speaks of those committing crimes or guilty of acts contrary to the purposes and principles of the United Nations, and there should be no exclusion by association. Indeed, the fact that the head of family has been excluded may well be further evidence that other members of the family would suffer persecution. Cross-reference should also be made to the various guidelines on gender-sensitive interpretation of the 1951 Convention.

### Alternative Mechanisms for Protection

•*Summary of findings:* To the extent that *non-refoulement* under Article 33 of the 1951 Convention draws on principles from international human rights law, developments in that field should necessarily feed into the interpretation of the 1951 Convention. The decision that international human rights law is broader and more protective than Article 33, therefore, should lead to a reconsideration of the restrictive definition given to *non-refoulement* under the Convention. The major guarantees of non-return in international human rights law, however, are to be found in Article 3 of the Convention Against Torture and Article 3 of the ECHR. Even if international refugee law will not provide protection for serious non-political criminals, international human rights law is still available and are absolute and non-derogable.