

## 7.1 Current issues in the application of the exclusion clauses

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## I. Introduction

Those applicants found to fall within Article 1F of the Convention Relating to the Status of Refugees 1951<sup>1</sup> are excluded from refugee status. Article 1F provides:

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 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 he or she falls within paragraph 2 of Article 33:

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

1 Convention Relating to the Status of Refugees 1951, 189 UNTS 150, 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, UN GAOR Supp. (No. 20) 46, UN doc. A/1775, 14 Dec. 1950, para. 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.

The Organization of African Unity (OAU) Convention on the Specific Aspects of Refugee Problems in Africa 1969, 1001 UNTS 45, provides similarly in Art. I.5. The OAU Convention also includes serious non-political crimes as a ground for cessation in Art. I.4(f). See also, the special supplementary issue of the *International Journal of Refugee Law*, vol. 12, Autumn 2000, on 'Exclusion from Protection: Article 1F of the UN Refugee Convention and Article I(5) of the OAU Convention in the Context of Armed Conflict, Genocide and Restrictionism'. See also, J. C. Hathaway and C. J. Harvey, 'Framing Refugee Protection in the New World Disorder', 34(2) *Cornell International Law Journal*, 2001, pp. 257–320.

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;<sup>2</sup> States cannot rely on domestic laws to justify failure to meet treaty obligations.<sup>3</sup>

## II. The 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

2 Namely, Lord Steyn in *R. v. Secretary of State for the Home Department, ex parte Adan, R. v. Secretary of State for the Home Department, ex parte Aitseguer*, UK House of Lords, 19 Dec. 2000, [2001] 1 All ER 593 at 605:

It follows that, as in the case of other multilateral treaties, the [1951 Convention] must be given an independent meaning derivable from the sources mentioned in articles 31 and 32 [of the Vienna Convention on the Law of Treaties 1969] and without taking colour from distinctive features of the legal system of any individual contracting state. In principle therefore there can be only one true interpretation of a treaty. If there is disagreement on the meaning of the Refugee Convention, it can be resolved by the International Court of Justice: article 38. It has, however, never been asked to make such a ruling. The prospect of a reference to the International Court is remote. In practice it is left to national courts, faced with a material disagreement on an issue of interpretation, to resolve it. But in doing so it must search, untrammelled by notions of its national legal culture, for the true autonomous and international meaning of the treaty. *And there can only be one true meaning.*

Emphasis added.

3 Art. 27 of the 1969 Vienna Convention on the Law of Treaties, 8 ILM 679, 1969, 1155 UNTS 331.

4 For the *travaux*, see UNHCR’s *Refworld* (CD-ROM, 8th edn, 1999); G. S. Goodwin-Gill, *The Refugee in International Law* (2nd edn, Clarendon, Oxford, 1996), especially pp. 95–114 and 147–50; and

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 the Second World War or 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,

P. Weis, *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by the Late Dr Paul Weis* (Cambridge University Press, 1995). See also, P. Shah, ‘Taking the “Political” out of Asylum: The Legal Containment of Refugees’ Political Activism’, in F. Nicholson and P. Twomey (eds.), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge University Press, 1999), p. 119 at pp. 130 *et seq.*

- 5 See Standing Committee of the Executive Committee of the High Commissioner’s Programme, ‘Note on the Exclusion Clauses’, 47th Session, UN doc. EC/47/SC/CRP.29, 30 May 1997, para. 3. Care must be taken, however, 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.
- 6 Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the 24th Meeting, UN doc. A/CONF.2/SR.24, 27 Nov. 1951, statements of Herment (Belgium) and Hoare (UK). There was a degree of confusion, however, 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 Nov. and 3 Dec. 1951, Conference of Plenipotentiaries. See also, Weis, above n. 4, at p. 332. Cf. Sub-Committee of the Whole on International Protection, ‘Information Note on Implementation of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees’, UN doc. EC/SCP/66, 22 July 1991, interim report annexed thereto, para. 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 [1951] 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’, i.e. a country other than the country of origin.

See also, J. Fitzpatrick, ‘The Post-Exclusion Phase: Extradition, Prosecution and Expulsion’, 12 *International Journal of Refugee Law* (Supp.), 2000, p. 272.

Article 1F must be applied sparingly and only where extreme caution has been exercised.<sup>7</sup>

### III. The 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 some have 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-emphasized 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. Extrajurisdiction to the *locus delicti* is no longer the only practical way to ensure that offenders

7 See UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, 1979, re-edited 1992), para. 149.

8 See A. Travis, ‘Analysis’, *The Guardian*, 5 Jan. 2001, p. 19. At the same time, the vast majority of refugees have remained in neighbouring countries to those from which they fled and have rarely reached Western Europe or North America. During 1992–2001, 86 per cent of the world’s refugees originated from developing countries, while these countries provided asylum for 72 per cent of the global refugee population. Low-income countries host seven out of ten refugees (UNHCR, *Statistical Yearbook 2001* (Geneva, Oct. 2002), pp. 12–13). In addition, war-torn countries such as Afghanistan, Angola, Colombia, Sri Lanka, and Sudan continue to host large internally displaced populations.

9 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, ‘Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism’, 49/60 of 9 Dec. 1994, annexed to UNGA Res. 51/210, 16 Jan. 1997. Para. 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 Oct. 1999, para. 4, and the comments of the French member of the Security Council, A. Dejammet, on the refusal of asylum to terrorists; and UNGA Res. 50/53, 11 Dec. 1995.

10 Alleged perpetrators of the Rwandese genocide have been found in Belgium and the UK.

11 See P. van Krieken, ‘Article 1F: An Introduction’, lecture 1 at the Amsterdam seminar ‘Article 1F and Afghan Asylum Seekers: Towards a Common Strategy’, 8–9 June 2000, organized by the Netherlands Immigration and Naturalization Service on behalf of a High Level Working Group of the European Union (EU).

are punished. At a particular level, those who have 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 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 Netherlands 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> An Amsterdam seminar in June 2000 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 Bavarian Supreme Court 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> Most recently, the Brussels Court of

12 See below n. 33. 13 See below n. 33.

14 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; in the latter, it was held that Lord Hoffmann should have recused himself in *Pinochet 1* and that therefore the decision in *Pinochet 1* was set aside.

15 Criminal Division, 11 Nov. 1997, No. 3717 AB, cited in Netherlands State Secretary of Justice, 'Section 1F of the Convention on Refugees', 6302011/97/DVB, 19 Nov. 1997, at n. 2, published as Netherlands State Secretary of Justice, 'Note on Article 1F to Parliament, November 1997', in *Refugee Law in Context: The Exclusion Clause* (ed. P. van Krieken, Asser Press, The Hague, 1999), pp. 300–12.

16 See above n. 11, 'Conclusion and Recommendation § 5, Legal/Criminal Proceedings to be Applied if Article 1F is Applied'.

17 *Public Prosecutor v. Djajić*, No. 20/96, Bavarian Supreme Court (*Bayerisches Oberstes Landesgericht*), 23 May 1997, excerpted in *Neue Deutsche Wochenschrift*, 1998, p. 392. This analysis is based on the case summary by C. Safferling, 92 *American Journal of International Law*, 1998, p. 528. A Danish court has convicted a Bosnian Muslim of gross violence and murder for crimes committed in a camp near Mostar, *The Times*, 23 Nov. 1994, p. 13.

18 75 UNTS 31–417, 1950; 1125 UNTS 3–608, 1979; 16 ILM 1391, 1977.

Assizes in June 2001 convicted four Rwandan nationals of war crimes committed in Rwanda in 1994 on the basis of 1993 Belgian legislation establishing universal jurisdiction for grave violations of the 1949 Geneva Conventions and 1977 Additional Protocols.<sup>19</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>20</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 he or she might be prosecuted, punished, or prejudiced on account of his or her race, religion, nationality, or political opinion.<sup>21</sup> The two most recent United Nations multilateral anti-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>22</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>23</sup> most clearly freedom from torture. At least in so far as *non-refoulement* is

19 For details of the case, including the text of the judgment, see *Procureur-Général v. Vincent Ntezimana, Alphonse Higaniro, Consolata Mukangango, Julienne Mukabutera*, <http://www.asf.be/AssisesRwanda2/fr/frStart.htm>.

20 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 Dec. 1970, 10 ILM 133, 1971; the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, done at Montreal, 23 Sept. 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 ILM 1456, 1979; the Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, IMO doc. SUA/CON/15, 10 March 1988, 27 ILM 668, 1988; the 1980 Convention on the Physical Protection of Nuclear Material, 1456 UNTS 124, Cmnd 8112; the International Convention for the Suppression of Terrorist Bombings, 1998, 37 ILM 249, 1998; and the International Convention for the Suppression of the Financing of Terrorism, Annex to UNGA Res. 54/109, 25 Feb. 2000. See also, the draft Comprehensive Convention on International Terrorism, UN doc. A/C.6/55/1, 28 Aug. 2000. The major international and regional instruments dealing with international terrorism are listed in UNHCR, ‘Security Concerns’, below n. 25, at pp. 8–10.

21 See also, Art. 5 of the Council of Europe’s 1977 European Convention for the Suppression of Terrorism, ETS 90, 15 ILM 1272, 1976. In addition, see UNHCR, ‘Report of the United Nations High Commissioner for Refugees’, GAOR, 36th Session, Supp. No. 12, UN doc. A/36/12, 28 Aug. 1981, para. 24.

22 Art. 12 of the Bombings Convention and Art. 15 of the Financing of Terrorism Convention, see above n. 20. Note that membership of a particular social group is not listed as one of the grounds for persecution that would justify refusing extradition: cf. Art. 1 of the 1951 Convention.

23 See *Barcelona Traction, Light and Power Co. Case (Belgium v. Spain)*, ICJ Reports 1970, p. 3 at para. 34.

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. The Office of the United Nations High Commissioner for Refugees (UNHCR) recognizes, for instance, that Article 1F should be applied in Rwanda-type situations.<sup>24</sup> Equally, the tragic events in New York, Washington DC, and Pennsylvania of 11 September 2001 would never allow for refugee status for the perpetrators or those who planned the operation.<sup>25</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.

#### IV. Article 1F

Although consideration of Article 1F is divided between the three subparagraphs, 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.

24 Sub-Committee on Administrative and Financial Matters of Executive Committee, 'Lessons Learnt from the Rwanda Emergency', UN doc. EC/1995/SC.2/CRP.21/Rev.1, 23 June 1995, para. 10(i):

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 on the Exclusion Clauses', above n. 5, paras. 22 *et seq.*; and Executive Committee, 'Report of the Eighth Meeting of the Standing Committee', 48th Session, UN doc. A/AC.96/888, 9 Sept. 1997, para. 15.

25 See UNHCR, 'Addressing Security Concerns Without Undermining Refugee Protection, UNHCR's Perspective', Position Paper, 29 Nov. 2001, para. 3.

A. Article 1F(a)<sup>26</sup>

Article 1F(a) provides:

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<sup>27</sup> 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 the UNHCR,<sup>28</sup> which refers to crimes ‘mentioned in Article VI of the London Charter of the International Military Tribunal’.<sup>29</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>30</sup> the 1948 Genocide Convention,<sup>31</sup> the Draft Code of Crimes Against the

26 See UNHCR, ‘The Exclusion Clauses: Guidelines on their Application’, 1 Dec. 1996, paras. 19–48. See also, J. Pejić, ‘Article 1F(a): The Notion of International Crimes’, 12 *International Journal of Refugee Law* (Supp.), 2000, p. 11. See also, J. Rikhof, ‘War Crimes Law as Applied in Canada’, in *Modern Global Crises and War Crimes: Canada, Peacekeeping and International Humanitarian Law* (ed. R. Wiggers, Centre for Foreign Policy Studies, Dalhousie University, 2002).

27 To the extent that customary international law in this area provides interpretation and analysis of the crimes as set out in the various instruments, then regard must be had to it as well. The reference in Art. 1F(a) to crimes ‘as defined in . . . international instruments’ would only exclude a crime that existed solely in customary international law, but there is no such crime.

28 See above n. 1.

29 Cited in judgment of the International Military Tribunal at Nuremberg, which may be found in *Trial of the Major War Criminals Before the International Military Tribunal* (1948), vol. XXII, pp. 413–14. See also 41 *American Journal of International Law*, 1947, p. 172.

(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.

30 See above n. 18.

31 Convention on the Prevention and Punishment of the Crime of Genocide, 1948, 78 UNTS 277 (1951).

Peace and Security of Mankind,<sup>32</sup> the Statutes of the ICTY and the ICTR<sup>33</sup> and their jurisprudence,<sup>34</sup> and the Statute of the International Criminal Court (ICC).<sup>35</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 ICC) carry weight as a consequence of the more recent analysis made for their preparation. Although the definition for the two ad hoc tribunals is very general by comparison with Articles 6–8 of the Rome Statute, their jurisprudence will inform the interpretation of the specific clauses in the latter instrument once the ICC 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, highlight 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>36</sup> There is debate as to whether only those in a position of high authority in a State can be responsible for

32 To the extent that the International Law Commission’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 of interpretation: UN doc. A/51/332, 1996.

33 The Statute of the ICTY was adopted by 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 *Criminal Law Forum*, 1994, p. 695.

34 See, *Duko Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction before the Appeals Chamber of ICTY, Case No. IT-94-1-AR72, 1995, at para. 134. See also, *The Prosecutor v. Kupreskic*, Case No. IT-95-16-T, 14 Jan. 2000.

35 Done at Rome, 17 July 1998, 37 ILM 999, 1998, as corrected by the *procès-verbaux* of 10 Nov. 1998 and 12 July 1999. See also, R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer Law International, The Hague, 1999).

36 International responsibility for aggression is defined in the 1974 Resolution on the Definition of Aggression, 14 Dec. 1974, UNGA Res. 3314 (XXIX), 69 *American Journal of International Law*, 1975, p. 480, 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’.

a crime against peace, but if individual responsibility for the crime against peace is to be consistent with the 1974 General Assembly Resolution on the Definition of Aggression,<sup>37</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>38</sup> although case law from the tribunals has interpreted its meaning.<sup>39</sup> Beyond genocide, however, the content of crimes against humanity is less uniform. Article 5 of the ICTY Statute<sup>40</sup> lays down that crimes against humanity take place in armed conflict. The modern view is that crimes against humanity can take place in peacetime,<sup>41</sup> a fact recognized in the statutes of the ICTR<sup>42</sup> and the ICC.<sup>43</sup> The latter two instruments require that crimes against humanity

37 See above n. 36.

38 ICTY (Art. 4), above n. 33; ICTR (Art. 2), above n. 33; and ICC (Art. 6), above n. 35.

39 E.g. *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, 2 Sept. 1998.

40 See above n. 33. Article 5 ('Crimes against humanity') provides:

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; [and] (i) other inhumane acts.

And see, *Tadić* above n. 34, *Kupreskic*, above n. 34, and *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T 10, 10 Dec. 1998.

41 Acknowledged by the Tribunal in *Tadić*, above n. 34, at paras. 140–1. See also, M. C. Bassiouni, 'Crimes Against Humanity: The Need for a Specialized Convention', 31 *Columbia Journal of Transnational Law*, 1994, p. 457.

42 See above n. 33. Article 3 ('Crimes against humanity') provides

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; [and] (i) other inhumane acts.

43 See above n. 35. Article 7 ('Crimes against humanity') provides:

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;

(Footnote 43 continued)

- (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;
- (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.

be part of a widespread or systematic attack against any civilian population,<sup>44</sup> and that is the more current interpretation rather than restricting crimes against humanity to times of armed conflict. As such, given that crimes against humanity can be committed under the Rome Statute as part of an organizational policy,<sup>45</sup> they could include terrorism.<sup>46</sup>

There is further divergence as to the place of 'persecution' in crimes against humanity in the three instruments.<sup>47</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 thus 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>48</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 ICC.

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 First Additional Protocol in international armed conflicts,<sup>49</sup> violation of the laws and customs of war, in international and non-international conflicts, can give rise to individual criminal responsibility.<sup>50</sup> Furthermore, individual criminal responsibility attaches to breaches of common Article 3 of the 1949 Geneva Conventions in

44 Art. 7.2(a) of the Rome Statute, above n. 35, 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 Art. 49 of Protocol 1, 1977, above n. 18.

45 Art. 7.2(a) and (i), above n. 35. 46 See below on Art. 1F(b).

47 For the traditional analysis of the place of persecution in crimes against humanity, see Fenrick, 'The Prosecution of War Criminals in Canada', 12 *Dalhousie Law Journal*, 1989, p. 256 at pp. 266 *et seq.*

48 See paras. 140–1 of *Tadić*, above n. 34. And see *Fédération Nationale des Déportés et Internés Résistants et Patriotes et al. v. Barbie*, French Court of Cassation, 78 ILR 125, 1985.

49 Respectively, Arts. 49 (I); 50 (II); 129 (III); 146 (IV); and 85 (Protocol 1), above n. 18.

50 *Tadić*, above n. 34, at paras. 89 and 96 *et seq.*

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 manuals, domestic legislation in the former Yugoslavia and Belgium, and two Security Council resolutions,<sup>51</sup> the ICTY held in paragraph 134 of its 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>52</sup> but the Tribunal's robust approach from 1995 has been followed in part in Article 8 of the Rome Statute.<sup>53</sup> The situation now is that breaches of the laws of war are always unlawful but not necessarily criminalized. 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>54</sup> Article 1F

51 *Tadić*, above n. 34, at paras. 129–33.

52 There would not appear to be the required degree of specificity to create crimes in common Art. 3 as a whole. The principle of *nullem crimen sine lege* argues against such a broad understanding of the criminal scope of common Art. 3. See also, the *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City* case, Permanent Court of International Justice (1935), Series A/B, No. 65 at pp. 52–3:

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.

Cf. Decision of 3 Nov. 1992, Case No. 5 StR 370/92, *Border Guards Prosecution* case, German Federal Criminal Court (*Bundesgerichtshof Strafsenat*), published in English in 100 ILR 364, available in German at <http://www.uni-wuerzburg.de/dfr/dfr.bsjahre.html>. In this case, 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' (*ibid.*, p. 389). The court used human rights as set out in the International Covenant on Civil and Political Rights (hereinafter 'ICCPR') to strike down the defence.

53 See above n. 35, which lists fifty crimes, thirty-four with respect to international armed conflicts and sixteen specifically applying in non-international armed conflicts. See also the International Committee of the Red Cross's forthcoming review of the customary international law of armed conflict.

54 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. E.g. Art. 8.2(b)(xxvi):

of the 1951 Convention would exclude those committing crimes as prescribed by customary international law and is more in line with the ICTY'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>55</sup> Furthermore, command responsibility includes military and civilian commanders and superior orders will only be an excuse in the rarest of cases.<sup>56</sup> The net is drawn widely, therefore, around those who have 'committed' Article 1F(a) crimes.

## B. Article 1F(b)<sup>57</sup>

Article 1F(b) provides:

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 being 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

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, Arts. 4 and 5 of Hague Convention V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 1907, 2 *American Journal of International Law Supp.*, 1908, p. 117; Art. 38 of the 1989 Convention on the Rights of the Child, UNGA Res. 44/25, Annex, 44 UN GAOR Supp. (No. 49), p. 167, UN doc. A/44/49 (1989). It is arguable that custom did not even render recruitment of under-fifteens unlawful, let alone criminal.

55 The *Pinochet* cases, above n. 14, hold only that former heads of State can be prosecuted for acts not within their official capacity.

56 Arts. 28 and 33 of the Rome Statute, above n. 35. See also, Art. 86 of the First Additional Protocol, above n. 18.

57 See also, W. Kälin and J. Künzli, 'Article 1F(b): Freedom Fighters, Terrorists and the Notion of Serious Non-Political Crimes', 12 *International Journal of Refugee Law (Supp.)* 2000, p. 46.

problem is that international law provides no definition,<sup>58</sup> although the United Nations has outlawed several crimes deemed ‘terrorist’ in the popular perception.<sup>59</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>60</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>61</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>62</sup> terror is terror:

58 Equally, most countries in Western Europe have not managed to define ‘terrorism’ for the purposes of their domestic criminal law; cf. the UK Terrorism Act 2000, which is not to say, however, that the UK definition answers all possible questions.

59 See the conventions listed above at n. 20. On the amorphous nature of terrorism, see G. Gilbert, ‘The “Law” and “Transnational Terrorism”’, 26 *Netherlands Yearbook of International Law*, 1995, p. 3; and G. Gilbert, *Transnational Fugitive Offenders in International Law: Extradition and Other Mechanisms* (Martinus Nijhoff, The Hague, 1998), especially pp. 251–61. See also, UNHCR, ‘Exclusion Guidelines’, above n. 26, at para. 66.

60 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* (1872, reprinted 1998), p. 190: ‘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, Case No. 72 XII 77, *Antonin L. v. Federal Republic of Germany*, 80 ILR 673 (Bavarian Higher Administrative Court (BayVGH), 7 June 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. In *Abdul Hussain*, unreported, 17 Dec. 1998, the English Court of Appeal acquitted hijackers who fled Iraq on the basis that they had acted under duress.

61 See L. C. Green, ‘International Crimes and the Legal Process’, 29 *International and Comparative Law Quarterly*, 1980, p. 567 at p. 582.

62 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;

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>63</sup>

Even those fighting for self-determination should at minimum obey common Article 3 of the Geneva Conventions 1949.<sup>64</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 9 December 1994<sup>65</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>66</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>67</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>68</sup> The 1998 International Convention for the Suppression of Terrorist Bombings<sup>69</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>70</sup> Two more recent UN documents have attempted to

UNGA Res. 46/51, 1991; cf. UNGA Res. 48/122, 1993. For a full review of the UN's response to terrorism in the period after 1972, see Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Review of Further Developments in Fields with which the Sub-Commission has been or may be Concerned: Review of Issues not Previously the Subject of Studies but which the Sub-Commission has Decided to Examine', Preliminary Report on Terrorism and Human Rights, UN doc. E/CN.4/Sub.2/1999/27, fifty-first session, 7 June 1999, paras. 6–15.

63 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 Aug. 1985, at p. 263.

64 On the other hand, UNHCR is equally prepared to engage in these fine distinctions. UNHCR, 'Determination of Refugee Status of Persons Connected with Organizations or Groups which Advocate and/or Practise Violence', 1 April 1988, paras. 21 and 22, states that, where the applicant was engaged in a UN-recognized struggle for national liberation, that is a mitigating factor to be taken into account before exclusion.

65 See above n. 9. 66 See below on Art. 1F(c). 67 See above n. 9, para. 6.

68 See also, UNSC Res. 1269 (1999), para. 4, and the comments of the French member of the Security Council, A. Dejammet, on the refusal of asylum to terrorists, above n. 9.

69 See above n. 20.

70 See above n. 21. The Parliamentary Assembly of the Council of Europe provided a definition in Recommendation 1426, 20 Sept. 1999, although some of the language is imprecise:

define terrorism.<sup>71</sup> General Assembly Resolution 53/108<sup>72</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 may be invoked to justify them.

Thus, it is crimes intended to inculcate terror in the population for political purposes. The International Convention for the Suppression of the Financing of Terrorism<sup>73</sup> defines terrorism in part by reference to other UN anti-terrorist conventions<sup>74</sup> and additionally in Article 2(1)(b) as:

(Footnote 70 continued)

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'.

71 Moreover, the Special Rapporteur on Terrorism and Human Rights, L. K. Koufa, has promised to elaborate on 'acts of terrorism' in future reports. See Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Preliminary Report on Terrorism and Human Rights', above n. 62, para. 43.

72 UNGA Res. 53/108, 26 Jan. 1999.

73 See above n. 20; and see *Secretary of State for the Home Department v. Rehman*, [2000] 3 All ER 778 (English Court of Appeal).

74 See above n. 20. The OAU Draft Convention on the Prevention and Combating of Terrorism, CAB/LEG/24.14/vol. 1, adopts a similar approach in Art. 1, with a partial definition in subpara. 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 the general public, a group of persons or particular persons in the territory of any one of the States Parties.

Art. 3.1 provides that armed struggle for self-determination will not count as terrorism; see above n. 62. See also, the draft Comprehensive Convention on International Terrorism, above n. 20, Art. 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;

[a]ny 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>75</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.<sup>76</sup>

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.<sup>77</sup>

(Footnote 74 continued)

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.

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

75 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 Art. 3 of the Geneva Conventions 1949?

76 Approved by the Supreme Court of Canada in *Suresh*, below n. 142, at para. 98.

77 The EU anti-terrorism measures of 27 Dec. 2001, 2001/927/EC, 2001/930/CFSP, and 2001/931/CFSP, OJ 2001 L344/83, 90, and 93, 28 Dec. 2001, provide a very long definition. 2001/931/CFSP, Article 1.3, provides:

For the purposes of this Common Position, 'terrorist act' shall mean one of the following intentional acts, which, given its nature or its context, may seriously damage a country or an international organisation, as defined as an offence under national law, where committed with the aim of:

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

After the events of 11 September 2001, the United Nations has come out much more strongly against terrorism, although without any definition of terrorism. United Nations Security Council Resolution 1373,<sup>78</sup> adopted under Chapter VII of the United Nations Charter, called upon all States to:

[take] appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts;

and to 'ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts'. As UNHCR has pointed out,<sup>79</sup> however, the refugee protection instruments have never provided a safe haven for terrorists.<sup>80</sup>

To be excluded under Article 1F(b), 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. Difficulties arise where the applicant is a member of a group that engages in serious non-political crimes. Is mere membership of a group sufficient to exclude?<sup>81</sup> Are all members complicit?<sup>82</sup> Is constructive knowledge adequate to impose individual criminal responsibility? Under Article 28 of the Rome Statute of the International Criminal Court, a commanding officer or person in an equivalent position shall be responsible where:

*(Footnote 77 continued)*

- (k) participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the group.

For the purposes of this paragraph, 'terrorist group' shall mean a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist acts. 'Structured group' means a group that is not randomly formed for the immediate commission of a terrorist act and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.

78 28 Sept. 2001. See para. 3(f) and (g). See also, UNSC Res. 1368, 12 Sept. 2001, and UNGA Res. 56/1, 18 Sept. 2001.

79 UNHCR, 'Security Concerns', above n. 25, at paras. 3 and 12.

80 Despite the fact that not one of those involved was a refugee or an asylum seeker, this has not stopped States engaging in one of their less edifying responses and scapegoating refugees after 11 Sept. 2001, e.g. the UK Anti-Terrorism, Crime and Security Act 2001 and the EU anti-terrorism measures, above n. 77, 2001/930/CFSP at Arts. 6, 16, and 17.

81 See below, section V.D, 'Standard of proof for Article 1F and membership of the group'.

82 See e.g. Art. 3(e) of the Genocide Convention 1948, above n. 31.

(a) . . . (i) [t]hat 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

(ii) [t]hat 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) [t]he superior either knew, *or consciously disregarded information which clearly indicated*, that the subordinates were committing or about to commit such crimes;

(ii) [t]he crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) [t]he 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.<sup>83</sup>

Nevertheless, 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. Command responsibility is very specific and is inappropriate as a basis for attributing individual criminal responsibility on the basis of complicity. Article 1F(b) only excludes from refugee status those who have committed a serious non-political crime. According to the UNHCR 'Exclusion Guidelines',<sup>84</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>85</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 intention, 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>86</sup> however, senior members of a government or an organization which carries out Article 1F(b) crimes could be found to have constructive knowledge sufficient 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>87</sup>

83 See above n. 35 (emphasis added). 84 See above n. 26, paras. 40 and 45 *et seq.*

85 See also, UNHCR, 'Determination of Refugee Status of Persons Connected with Organizations or Groups which Advocate and/or Practise Violence', above n. 64, at paras. 14 *et seq.*

86 Namely, *Akayesu*, above n. 39.

87 Meeting between the author and UNHCR staff on the subject of 'asylum, terrorism and extradition', UNHCR headquarters, Geneva, 10 Nov. 2000. See also, e.g. s. 19(1) of the Canadian Immigration Act.

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>88</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>89</sup> Before the Conventions on Terrorist Bombings<sup>90</sup> and the Financing of Terrorism,<sup>91</sup> multilateral anti-terrorist treaties did not exclude the political offence exemption. The somewhat special Genocide Convention and Anti-Apartheid Convention did render their proscribed crimes non-political,<sup>92</sup> but there were no other universal treaties excluding the political offence exemption.<sup>93</sup> In Europe, the 1977 European Convention for the Suppression of Terrorism<sup>94</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>95</sup>

88 See the Supreme Court of Canada in *Attorney-General v. Ward*, [1993] 2 SCR 689. See in general, Gilbert, *Transnational Fugitive Offenders*, above n. 59, ch. 6.

89 See I. A. Shearer, *Extradition in International Law* (Manchester, 1971), p. 185. 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:

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 . . .
- (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.

90 See above n. 20. 91 See above n. 20.

92 Genocide Convention, above n. 31, Art. VII; Convention on Suppression and Punishment of the Crime of Apartheid 1973, Art. XI(2), 13 ILM 50, 1974.

93 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.*, High Court of Justice (Queen's Bench Division), [1955] 1 QB 540, [1955] 1 All ER 31; and *In Re Kavic, Bjelanovic and Arsenijevic*, 19 ILR 371 (Swiss Federal Tribunal), 1952.

94 See above n. 21.

95 European Convention on the Suppression of Terrorism, Art. 1 provides:

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:

Furthermore, it gave parties the discretion to exclude a much broader range of *soi-disant* ‘terrorist’ crimes.<sup>96</sup> Nevertheless, the Convention has not been a whole-hearted success,<sup>97</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>98</sup> There are those who, drawing on 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 or his sentence if one simply has regard to the text.<sup>99</sup> Even if one restricts 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>100</sup> Furthermore, if the drafters were tying

- (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.

96 European Convention on the Suppression of Terrorism, Art. 2 provides:

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, above n. 89.

97 See Gilbert, “‘Law’ and ‘Transnational Terrorism’” above n. 59. Recommendation 1426, above n. 70, para. 15, 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.

98 See above n. 1.

99 *Tenzin Dhayakpa v. Minister for Immigration and Ethnic Affairs*, Federal Court of Australia, (1995) 62 FCR 556. See also, UNHCR, ‘Exclusion Guidelines’, above n. 26, at para. 56.

100 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

Article 1F(b) to extradition law, why did they not adopt in Article 1F(b) the language of paragraph 7 of the 1950 Statute<sup>101</sup> or just say: ‘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 he or she could be returned following denial of refugee status under Article 1F(b) would be his or her country of origin where he or she would face persecution.<sup>102</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>103</sup>

On the other hand, Article 1F(b) should be ‘related to’,<sup>104</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>105</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>106</sup> The Swiss approach, to which the United Kingdom now also subscribes, adopts the

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*, Immigration Appeal Tribunal, Appeal No. HX/ 75677/95 (13695), 22 July 1996, [1997] INLR 96, would Art. 1F(b) deny her or him refugee status that would otherwise be accorded?

101 See above n. 1.

102 Namely, UNHCR, ‘Exclusion Guidelines’, above n. 26, para. 57.

103 See also the Yugoslav representative at the Conference of Plenipotentiaries, UN doc. A/CONF.2/SR.24, SR.29, 27–28 Nov. 1951, above n. 6: ‘Mr. Bozovic (Yugoslavia) said that the point at issue was whether criminals should be granted refugee status, not the problem of extradition.’

104 For those who grew up where the English educational 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 educational systems, on school sports days at primary schools in England, there will always be a ‘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.

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

106 *R. v. Governor of Pentonville Prison, ex parte Tzu-Tsai Cheng*, High Court (Queen’s Bench Division), [1973] AC 931 at 945, 24 Jan. 1973, per Lord Diplock.

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>107</sup> The case of *T. v. Secretary of State for the Home Department*,<sup>108</sup> a case concerning an application for refugee status, refined the United Kingdom test. There, the applicant, as a member of the Islamic Salvation Front (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>109</sup> The case 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>110</sup>

Not all non-political crimes fall within Article 1F(b), only serious ones. The UNHCR *Handbook*<sup>111</sup> states that 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, and therefore capital crimes may not in and of themselves be a sufficient test, but offences of sufficient 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>112</sup> Those crimes that are within United Nations multilateral anti-terrorist conventions<sup>113</sup> can safely be assumed to be serious. However, theft of \$1 million is a serious crime, theft of a bar of chocolate

107 *Watin v. Ministère Public Fédéral*, Swiss Federal Tribunal, 72 ILR 614, 1964; *Ktir v. Ministère Public Fédéral*, Swiss Federal Tribunal, 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 or humanity.'

108 [1996] 2 All ER 865. See also, *Ahani v. Canada*, Canadian Federal Court (Trial Division), [1995] 3 FC 669; and *Singh v. Minister for Immigration and Multicultural Affairs*, Federal Court of Australia, [2000] FCA 1125.

109 See above n. 108, p. 899. Lord Lloyd, in part, built on the provisions of the European Convention on the Suppression of Terrorism, above n. 21.

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

111 UNHCR, *Handbook*, above n. 7, para. 155.

112 See above n. 11, § Extradition. Under the UK Extradition Act 1989, acting as a fraudulent medium is an extradition crime, but hardly serious!

113 See above n. 20. See also, UNHCR, 'Exclusion Guidelines', above n. 26, at paras. 67 and 68. There may, however, be a special case for hijacking: see UNHCR, 'Guidelines', at paras. 69 and 70; *Antonin L.* above n. 60; and *Abdul Hussain*, above n. 60.

is not. It is probably easier to conclude that minor crimes do not exclude, even if the applicant for refugee status was a regular reoffender.<sup>114</sup> Furthermore, the seriousness of certain offences varies from State to State.<sup>115</sup> Each case must be viewed on its own facts,<sup>116</sup> which calls into question the very existence of automatic bars to refugee status based on the severity of any penalty already meted out.<sup>117</sup> The UNHCR 'Guidelines on Exclusion'<sup>118</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>119</sup> This view can be seen in *Pushpanathan*,<sup>120</sup> a Canadian Supreme Court case from 1998 under Article 1F(c) dealing with drug smuggling, and in *Aguirre-Aguirre*,<sup>121</sup> a 1999 US

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

115 See UK Home Affairs Select Committee, Seventh Report, 'Practical Police Co-operation in the European Community', House of Commons Paper 363 (1989–90), vol. 1, para. 96: 'There are clear problems when laws differ between EC 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 the Continent of the English concept of conspiracy.' Belgium legalized the personal use of cannabis in Jan. 2001: *The Guardian*, 22 Jan. 2001, p. 14.

116 *Betskoshbeh v. Minister for Immigration and Multicultural Affairs*, Federal Court of Australia, (1998) 157 ALR 95.

117 E.g. the US category of 'aggravated felonies'. See 8 USC §§ 1101(a)(43), 1251(b)(3)(B)(ii) and 1253(h)(2); the Antiterrorism and Effective Death Penalty Act 1996, Pub. L. 104-32; and the Illegal Immigration Reform and Immigrant Responsibility Act 1996, Pub. L. 104-208. See also, *In Re Q.T.M.T.*, 23 Dec. 1996, BIA, Interim Decision No. 3300, 639–71.

118 See above n. 26, at para. 53.

119 Art. 1F refers in general to a 'person' with respect to whom there are serious reasons for considering he or she has violated subparas. (a), (b), or (c), but subpara. (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 Art. 1F(b) excludes the applicant.

120 *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982. See also, J. Rikhof, 'Purposes, Principles and Pushpanathan: The Parameters of Exclusion Ground 1F(c) of the 1951 Convention as Seen by the Supreme Court of Canada' (paper submitted as part of the responses to the UNHCR Global Consultations on Refugee Protection, 2001).

121 *Immigration and Naturalization Service v. Aguirre-Aguirre*, 526 US 415, 119 S.Ct 1439, 143 L.Ed (2d) 590 (1999); see also, T., above n. 108.

Supreme Court case dealing with violent political protest in Guatemala and relying on the domestic law equivalent of Article 1F(b).<sup>122</sup> *Pushpanathan*<sup>123</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>124</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>125</sup> Paragraph 156 of the 1979 *Handbook* talks of balancing the nature of the crime and the degree of persecution feared.<sup>126</sup> Practice in continental Europe does indicate some examples of courts not excluding where there was a fear of persecution on return.<sup>127</sup> Even if it is accepted, however, that the threat of persecution is a factor of which account must be taken, it seems inappropriate to 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>128</sup>

Furthermore, the nature of public international law is that a purposive interpretation must always be applied to treaty interpretation that supplies flexibility.<sup>129</sup> In *Gonzalez*,<sup>130</sup> the Canadian Federal Court of Appeal, basing itself on Goodwin-Gill but limiting his analysis to Article 1F(b) alone,<sup>131</sup> found that there was room for balancing where the court had to determine whether the applicant had committed

122 8 USC § 1253(h)(2)(C). 123 See above n. 120.

124 For instance, as mentioned above at n. 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.

125 UN doc. A/CONF.2/SR.24 at p. 13. However, this is not the present Scandinavian stance.

126 See also, paras. 9 and 53 of the UNHCR, 'Exclusion Guidelines', above n. 26.

127 See S. Kapferer, 'Exclusion Clauses in Europe – A Comparative Overview of State Practice in France, Belgium and the United Kingdom', 12 *International Journal of Refugee Law* (Supp.) 2000, p. 195 at p. 217; and *S.A.M. v. B.F.F.*, Swiss Asylum Appeals Board, 27 Nov. 1992.

128 Art. 1F crimes will often be the subject of permissive universal jurisdiction through multilateral treaty, above n. 20. 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, below n. 212, and the *Hungarian Deserter (Austria)* case, below n. 213.

129 Although probably not as flexible as the English Court of Appeal in *R. v. Abdul Hussain*, above n. 60, 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 UN has never made car-jacking an international crime. See also, UNHCR, *Handbook*, above n. 7, at paras. 157–61.

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

131 Citing what is now Goodwin-Gill, above n. 4, at pp. 106–7. It seems to this author that Goodwin-Gill had restricted his views on balancing to Art. 1F(b) alone.

a serious non-political crime, but not where he or she 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>132</sup> The General Assembly has reaffirmed that all measures to counter terrorism must be in conformity with international human rights standards.<sup>133</sup> Thus, if the serious non-political criminal would face, for example, torture if he or she were to be returned, 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>134</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 status,<sup>135</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>136</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

132 Above n. 110, (1994) 119 DLR (4th) 497 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). On the extradition of criminals to face the death penalty, see now, *Burns*, below n. 255.

133 UNGA Res. 50/186, 6 March 1996, para. 3 and preamble.

134 See R. Higgins, *Problems and Process: International Law and How We Use It* (Clarendon, Oxford, 1994).

135 See above n. 24. 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.

136 23 ILM 1027, 1984, and 24 ILM 535, 1985.

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>137</sup> might be violated, regardless of all other factors,<sup>138</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 ICC will ensure that there is a court with jurisdiction over Article 1F crimes<sup>139</sup> 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 the 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>140</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 as being a disproportionate consequence of that exclusion. 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>141</sup> there existed the safety net of protection provided by Article 3 of the Convention Against Torture<sup>142</sup> or Article 3 of the

137 European Treaty Series, No. 5, 1950.

138 *Chahal v. United Kingdom* (70/1995/576/662), 15 Nov. 1996, (1997) 23 EHRR 413.

139 See Arts. 6, 7, and 8 of the Rome Statute, above n. 35, which would cover crimes within Art. 1F(a) and (c) and, in certain cases, subpara. (b).

140 In *R. v. Moussa Membar et al.*, Court of Appeal (Criminal Division), [1983] *Criminal Law Review* 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.

141 The USA, the UK, and Canada.

142 Cf. *Manickavasagam Suresh v. Minister of Citizenship and Immigration and the Attorney General of Canada*, Federal Court of Canada, [2000] 2 FC 592 (CA), A-415-99, 18 Jan. 2000, paras. 26

European Human Rights Convention. 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 European Human Rights Convention, 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 of the Vienna Convention on the Law of Treaties.<sup>143</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 he or she could return would be Arcadia where her or his life or freedom would be threatened, but if the Arcadian authorities submitted an extradition request, then Ruritania could refuse to surrender on the ground that he or she 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>144</sup> If so, then reading Article 64 with Article 44(2) of the Vienna Convention on the Law of Treaties,<sup>145</sup> it can be argued that any provision of the 1951 Convention that would allow for *refoulement* would be void.<sup>146</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>147</sup>

In sum, refugee law should not lag behind human rights law and it needs to be more fully recognized that the Preamble to the 1951 Convention speaks of refugees

*et seq.*; Supreme Court of Canada, 22 May 2001, judgment delivered 11 Jan. 2002; see also below n. 255. For a more detailed analysis of *Suresh* and other related Canadian jurisprudence, see S. J. Aiken, 'Manufacturing "Terrorists": Refugees, National Security and Canadian Law – Part II', 19(4) *Refuge*, 2001, pp. 116–33.

143 See above n. 3, especially subpara. 3 dealing with suspending the operation of a treaty. Reading Art. 62 with Art. 44(3) of the Vienna Convention on the Law of Treaties, one can limit the suspension to a particular clause, in this case, Art. 1F(b).

144 E.g. Goodwin-Gill, above n. 4, pp. 167 *et seq.* See also the paper on *non-refoulement* by E. Lauterpacht and D. Bethlehem in Part 2.1 of this volume.

145 See above n. 3.

146 Even accepting that *non-refoulement* is a peremptory norm of international law, questions remain as to its scope.

147 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.

benefiting from international human rights law.<sup>148</sup> In the twenty-first century, the two systems need to be better harmonized.

### C. Article 1F(c)<sup>149</sup>

Article 1F(c) provides:

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>150</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 be ‘guilty’ of such acts. Not all purposes and principles of the United Nations, as set out in Articles 1 and 2 of the UN Charter,<sup>151</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>152</sup> There is a danger that the phrase is so imprecise as to allow

148 See above n. 1.

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 . . .

See also, *R. v. Secretary of State for the Home Department, ex parte Adan and ex parte Aitseguer*, English Court of Appeal, [1999] 3 WLR 1274 at 1296: ‘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.’ This part of the judgment was subsequently also cited by Lord Hutton in his consideration of the appeal in the House of Lords, 19 Dec. 2000, [2001] 1 All ER 593, above n. 2.

149 See UNHCR, ‘Exclusion Guidelines’, above n. 26, at paras. 59 *et seq.* See also, E. Kwakwa, ‘Article 1F(c): Acts Contrary to the Purposes and Principles of the United Nations’, 12 *International Journal of Refugee Law*, 2000 (Supp.), p. 79.

150 Art. I(5)(c) of the 1969 OAU Refugee Convention, above n. 1, adds acts contrary to the purposes and principles of the OAU.

151 See R. Wolfrum, ‘Purposes and Principles’, in *The Charter of the United Nations: A Commentary* (ed. B. Simma, Oxford University Press, 1995), pp. 49 *et seq.* Cf. the text above at n. 66.

152 See UNHCR, ‘Exclusion Guidelines’, above n. 26, at para. 62 and n. 48. NB. Given that Art. 14(2) of the Universal Declaration of Human Rights (UDHR), 1948, includes a similar phrase, there is some merit in this argument. See also, *Pushpanathan*, above n. 120, at p. 983, which suggests that the purpose of Art. 1F(c) ‘is to exclude those individuals responsible for serious, sustained or systemic violations of fundamental human rights which amount to persecution in a non-war setting’.

States to exclude applicants without adequate justification. What is clear after 11 September 2001 and the subsequent Security Council resolutions, particularly Resolution 1377,<sup>153</sup> is that acts of international terrorism constituting a threat to international peace and security are contrary to the purposes and principles of the United Nations. Nevertheless, the guiding principle has to be that all limitations on rights have to be interpreted restrictively.<sup>154</sup>

If the acts covered by Article 1F(c) are less than clear, there are also questions as to who can perpetrate them. On the basis that the UN 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>155</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>156</sup> In the *Georg K.* case,<sup>157</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 to conflicts internal to the State.<sup>158</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>159</sup> Nevertheless, van Krieken explicitly accepts that all individuals could be excluded under Article 1F(c), not just high office holders.<sup>160</sup> In the Canadian Supreme Court case of *Pushpanathan*,<sup>161</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

153 12 Nov. 2001. The Security Council called upon States to deny safe haven to terrorists.

154 See Statement to the Sixth Committee by S. Jessen Petersen, 14 Nov. 1996, pointing out that Art. 1F(c) is rarely used and overlaps with Art. 1F(a).

155 Namely, *Brahim*, Commission française des recours des réfugiés (CRR, French refugee appeals board), Decision No. 228601, 29 Oct. 1993, where the former Director of National Security in Chad during the Hissène Habré regime was excluded under Art. 1F(c).

156 UNHCR, 'Exclusion Guidelines', above n. 26, at para. 61.

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

158 Van Krieken, above n. 11, § Purposes and Principles.

159 Cf. *Avetisan*, CRR (France), Decision No. 303164, 4 April 1997, where someone who had attempted to overthrow the democratically elected Shevardnadze regime in Georgia was deemed excluded under Art. 1F(c). See also, *Suresh*, above n. 142, at para. 36.

160 Although basing the argument on Art. 29(3) of the UDHR, 1948, is less than convincing. In *Muntumusi Mpemba*, CRR (France), Decision No. 238444, 29 Oct. 1993, a member of the Zairean Civil Guard who had engaged in human rights violations was excluded under Art. 1F(c).

161 See above n. 120.

were not within Article 1F(c). However, it was recognized 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>162</sup>

Security Council Resolution 1377 assumes a non-State actor can fall within Article 1F(c), but it does not automatically follow that any member of such an international terrorist organization could be within Article 1F(c).

Article 1F(c) is vague and is open to abuse by States.<sup>163</sup> It is clear that there is State practice interpreting it widely, but there is as yet no internationally accepted understanding of all those 'acts contrary to the purposes and principles of the United Nations'. 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 promote 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 or in a group perpetrating international terrorism that threatens international peace and security. Those perpetrating acts of international terrorism constituting a threat to international peace and security who are not high-ranking members of the organization should be excluded under Article 1F(b).

#### D. The relationship between Article 1F and Article 33(2)

Article 33(2) provides:

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>164</sup>

<sup>162</sup> See above n. 120, at p. 984.

<sup>163</sup> The Netherlands Ministry of Justice has held that it will not use Art. 1F(c) as an independent ground for exclusion. 'The provisions of [Art.] 1F(a) and 1F(b) provide enough starting points at present for exclusion in cases where it is indicated'. Information supplied by Immigration Policy Department in the Ministry of Justice, 'Section 1F of the 1951 Geneva Convention', 630201/97/DVB, 19 Nov. 1997, text at note 16, published as Netherlands State Secretary of Justice, 'Note on Article 1F to Parliament, November 1997', in *Refugee Law in Context: The Exclusion Clause*, above n. 15, at p. 308.

<sup>164</sup> Cf. Arts. II and III of the OAU 1969 Convention, above n. 1, which has no precise equivalent to Art. 33(2).

The domestic legislation and procedure in certain countries<sup>165</sup> already subsumes concepts from both Article 1F and Article 33(2) 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 (IRB). Nevertheless, in 98–99 per cent 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 used to exclude.<sup>166</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>167</sup> However, it was only high officials in the terrorist organization who were subject to this deemed loss of *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>168</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 ought 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>169</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

165 Such as Canada and Germany. See Meeting on ‘asylum, terrorism and extradition’, above n. 87.

166 *Ibid.*

167 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.

168 Cf. *Rajkumar*, Conseil d’Etat, SSR (France), 28 Sept. 1998.

169 See para. 117 of the *Handbook*, above 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), OJ 1996 L63/2, 13 March 1996, para. 13: ‘The clauses in Article 1F . . . may also be applied where the acts become known after the grant of refugee status.’ In addition, see Netherlands State Secretary of Justice, ‘Section 1F of the Convention on Refugees’, above n. 15, at p. 47; cf. Slovakian law, where Art. 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’, above n. 11.

community of that country, although even in this situation refugee status does not cease, only the protection of *non-refoulement*.<sup>170</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 recognized as refugees and who 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 him or her 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>171</sup> the refugee to a country where his or her life or freedom would be threatened. Ordinarily, an Article 1A refugee cannot be returned 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 or his usual State of residence because of her or his opposition to that regime, she or he is not a danger to the country of refuge. It would take a very expansive view of Article 33(2) to

170 *Pham*, Conseil d'Etat SSR (France), Decision No. 148997, 21 May 1997.

171 The current, although not universal, view is best expressed in French *Conseil d'Etat* decision in *Bereciartua-Echarri*, Decision No. 85234, 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 Art. 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 Art. 33, but on the basis of the general principles of refugee law derived from Art. 1A(2). A State that recognizes a fugitive offender's refugee status is forbidden from returning her or him by any means, method, or mechanism whatsoever to a State where she or 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 para. 206 of the High Commissioner's Report to the General Assembly in 1956, 11th 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, Executive Committee, 'Note on International Protection', 40th session, UN doc. A/AC.96/728, 2 Aug. 1989, para. 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.

suggest that a refugee who supports a political cause in a foreign State, even where violence is endemic, poses a danger to the security of the country of refuge.<sup>172</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>173</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, which provides:

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 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>174</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

172 Although the Financing of Terrorism Convention, above n. 20, 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*, above n. 73, that anyone considered a threat to any of the UK’s allies was a threat to national security. Rehman had allegedly been engaged in fund-raising and recruiting for the conflict in Kashmir against India. The House of Lords later dismissed the appeal against this ruling in *Secretary of State for the Home Department v. Rehman*, UK House of Lords, [2001] UKHL 47, 11 Oct. 2001. See also, *Suresh*, above n. 142. 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. Art. III of the OAU 1969 Refugee Convention, above n. 1). See meeting on ‘asylum, terrorism and extradition’, above n. 87. Moreover, States ought not to let their territory be used as a base for aggression against other States. See Principle 1, paras. 8 and 9, of the General Assembly Declaration on Principles of Friendly Relations, 1970, UNGA Res. 2625 (XXV), 24 Oct. 1970, and Art. 2(4) of the UN Charter. See also, the *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, (1986) ICJ Reports p. 14, paras. 183–6 and especially para. 189. Nevertheless, neither the wording of the Charter nor the Declaration would authorize the surrender of an individual to a State where he or she would face persecution; they should simply be a guide to setting State policy.

173 Leader, ‘Free Speech and the Advocacy of Illegal Action in Law and Political Theory’, 82 *Columbia Law Review*, 1982, p. 412 at p. 428; see also, Kälin and Künzli, above n. 57.

174 On the meaning of national security, see L. Lustgarten and I. Leigh, *In from the Cold: National Security and Parliamentary Democracy* (Clarendon, Oxford, 1994).

of Article 32, but do so with heightened care.<sup>175</sup> Further, due process demands that the refugee should have access to the evidence against her or 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>176</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>177</sup> Furthermore, derogation is

175 See also, *Chahal*, above n. 138, para. 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 . . . 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.

Access to legal advice is also of importance from the very earliest stages of the applicant entering the status determination process. M. Timmer, M. Soffers, and J. Handmaker, 'Perspectives on the Legal Basis and Practice of the Netherlands Government Regarding Exclusion of Refugees in Terms of s. 1F of the 1951 United Nations Convention Relating to the Status of Refugees' (written submission to UNHCR Global Consultations on International Protection, 2001), § 3, Access to Legal Advice.

176 Cf. the right to a fair trial within Art. 6 of the ECHR is not applicable to refugee status determination hearings. See *Maaouia v. France*, Application No. 39652/98, European Court of Human Rights, 5 Oct. 2000. In Canada, a summary of the evidence has to be prepared for the refugee. However, in the USA the refugee has no right of access: *Avila v. Rivkind*, US District Court for the Southern District of Florida, 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' (*ibid.*, p. 950); *Ali v. Reno*, US District Court for the Southern District of New York, 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 (*ibid.*, p. 1436); *Azzouka v. Meese*, US Court of Appeals (2nd Circuit), 820 F 2d 585 at 586–7 (1987), where a member of the Palestine Liberation Organization was denied asylum on the basis he presented a danger to the people and security of the USA, based in part on 'confidential information, the disclosure of which would be prejudicial to the public interest, safety, and security of the United States' (*ibid.*, p. 587). See also, Bliss, below n. 215, at pp. 101 and 120 *et seq.*

177 See International Covenant on Civil and Political Rights, Art. 4, UNGA Res. 2200 A (XXI), UN GAOR, 21st Session, Supp. No. 16, p. 52, 1966; 999 UNTS 171; 6 ILM 368, 1967; 61 AJIL,

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), 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.

The final Article 33(2) issue concerns whether one can balance the refugee's fear of persecution against the danger he or she represents to the security of the country or to the community of the country where he or she has been convicted of a particularly serious crime.<sup>178</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 he or she 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>179</sup>

What is in issue here is whether, if all those issues are answered affirmatively by the court, the court is permitted to factor in the refugee's fear of death or loss of liberty if he or she were to lose protection from *refoulement*. The *Handbook*<sup>180</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 peremptory norm of international law.<sup>181</sup> In addition, international human rights law has also progressed.<sup>182</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 *Q.T.M.T.*,<sup>183</sup> however, the respondent, who had entered the

1967, p. 870: 'In time of public emergency which threatens the life of the nation . . .'. See equally, ECHR, Art. 15, above n. 137: '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 Art. 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 Art. 3 guarantees provide an alternative means of protection.

178 *Barrera v. Canada (Minister of Employment and Immigration)*, Federal Court of Canada, [1993] 2 FC 3 (CA); (1992) 99 DLR (4th) 264; (1992) 18 Imm LR (2d) 81; (1992) 151 NR 28 (CA), also relying on s. 12 of the Canadian Charter of Rights and Freedoms.

179 Cf. *Re Q.T.M.T.*, above n. 117, p. 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 or his release from prison?

180 See above n. 7, at para. 156.

181 E.g. Goodwin-Gill, above n. 4, pp. 167 *et seq.*

182 See *Chahal*, above n. 138.

183 See above n. 117.

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>184</sup> and so under US 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 Board of Immigration Appeals found that under US law the statutory bar to withholding deportation is based on the nature of the crime 'and does not vary with the nature of the evidence of persecution'.<sup>185</sup> In *Suresh*,<sup>186</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:

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 a recognized refugee suggests that there are even stronger arguments than exist with respect to Article 1F where the applicant

184 As defined by 8 USC § 1101(a)(43), 1994.

185 See above n. 117, p. 656 and the authorities cited there. Cf. the concurring and dissenting opinion by Rosenberg, Board Member at p. 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.

186 See above n. 142, at paras. 70 *et seq.*; the Supreme Court of Canada upheld this approach at paras. 45–7.

is excluded from entry to the protection regime.<sup>187</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, however, 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.

## V. Procedural issues and other areas of interest

### A. 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 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 Federal Court of Canada has held that there is no need to consider whether the claimant falls within Article 1A(2) if she or he falls within Article 1F.<sup>188</sup> Extrapolating this approach, EC Ministers agreed in 1992 that exclusion cases could be considered under accelerated

187 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 he or she would return, is only apparent. Art. 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 'refoulable'. 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.

188 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*, above n. 130. See also, Netherlands State Secretary of Justice, 'Section 1F of the Convention on Refugees', above n. 15, at p. 48; Timmer, Soffers, and Handmaker, above n. 175, § 2; and s. 34 of the UK Anti-Terrorism, Crime and Security Act 2001. The corollary must be that, without s. 34, inclusion must precede exclusion.

procedures, when they approved their non-binding 'Resolution on Manifestly Unfounded Applications for Asylum'. Paragraph 11 stated:

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.<sup>189</sup>

On the other hand, paragraph 141 of the UNHCR *Handbook*<sup>190</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>191</sup> Cases where a State is certain in advance that exclusion applies will be rare, however. As UNHCR has stated, applications which may involve the exclusion clauses 'can give rise to complex issues of substance and credibility which are not given appropriate consideration under admissibility or accelerated procedures'.<sup>192</sup> In order to avoid consideration of suspected exclusion cases in accelerated procedures, UNHCR has proposed the establishment of specialized exclusion units.<sup>193</sup> The UNHCR Exclusion Guidelines also presume that the exclusion clauses will only be applied 'after the adjudicator is satisfied that the individual fulfils the criteria for refugee status'.<sup>194</sup> In 2000, the European Commission's

189 EC Council of (Immigration) Ministers, 'Resolution on Manifestly Unfounded Applications for Asylum', 30 Nov./1 Dec. 1992. See R. Plender (ed.), *Basic Documents on International Migration Law* (Martinus Nijhoff, The Hague, 1999), pp. 474–7.

190 See above n. 7.

191 E.g. 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 'asylum, terrorism and extradition', above n. 87. See also, para. 17 of UNHCR, 'Security Concerns', above n. 25, which states that an indictment from an international criminal tribunal provides serious reasons for believing the accused is excludable under Art. 1F. UNSC Res. 1127 (1997) para. 4 (reaffirmed in UNSC Res. 1295 (2000), paras. 22–4, and Res. 1336 (2001)) also prohibits under Chapter VII the entry of all senior officials of the National Union for the Total Independence of Angola (UNITA) into all other States. Consequently, it is arguable that, as a result of the relationship of the Security Council to all other organs of the UN, 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' (Art. 1(3) of the UN Charter), might override the prohibition and that each case would have to be examined on its own facts.

192 UNHCR, 'Asylum Processes (Fair and Efficient Asylum Procedures)', UN doc. EC/GC/01/12, 31 May 2001, para. 29. See also, UNHCR, 'Overview of Protection Issues in Western Europe: Legislative Trends and Positions Taken by UNHCR', 1(3) *European Series*, 1995, p. 10.

193 See, UNHCR, 'Security Concerns', above n. 25, paras. 7 and 16.

194 See above n. 26, at para. 9. See also, UNHCR, 'Determination of Refugee Status of Persons Connected with Organizations or Groups which Advocate and/or Practise Violence', above n. 64,

draft Directive on asylum procedures likewise stated that, where ‘there are serious reasons for considering that the grounds of Article 1(F) . . . apply’, Member States shall not consider this as ‘grounds for the dismissal of applications for asylum as manifestly unfounded’.<sup>195</sup>

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>196</sup> Indeed, to apply Article 1F before Article 1A(2) indicates a presumption that all applicants for refugee status are potentially excludable.<sup>197</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 he or she is excluded by Article 1F.<sup>198</sup>

Nevertheless, if it is felt necessary, a distinction might be drawn between subparagraph (b) of Article 1F and subparagraphs (a) and (c).<sup>199</sup> Whereas Article 1F refers in general to a ‘person’ with respect to whom there are serious reasons for considering he or she has violated subparagraphs (a), (b), or (c), only subparagraph (b) goes on to state that the serious non-political crime was committed before he or she 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>200</sup>

para. 4. This is not to say that there could not be specialized exclusion units that could swiftly determine the applicant’s status while at the same time carrying out a proper factual and legal assessment. See UNHCR, ‘Security Concerns’, above n. 25, at paras. 7 and 16.

195 See European Commission, ‘Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status’, COM(2000) 578 final, 20 Sept. 2000, Art. 28(2).

196 There is an argument based on Art. 14(2) of the UDHR, that in those cases where prosecutions genuinely arise from non-political crimes or from acts contrary to the purposes and principles of the UN, those persons are prevented from seeking asylum under Art. 14(1) and thus they cannot even be considered for refugee status under Art. 1A(2) of the 1951 Convention. However, such an argument is fallacious, partly on the basis that Art. 1A(2) is a legally binding convention whereas the UDHR is a mere aspiration, and partly because it is trying to read Art. 1F into Art. 14(2) – if everything is being determined by reference to Art. 14(2), then not only Art. 1A(2), but also Art. 1F is pre-empted. Reliance on the UDHR to deny people legal ‘rights’ is also intellectually dishonest.

197 *Quære* automatic bars on refugee status with respect to certain crimes, namely, *Re Q.T.M.T.*, above n. 117.

198 See meeting on ‘asylum, terrorism and extradition’, above n. 87.

199 NB. *Gonzalez*, above n. 130, concerned Art. 1F(a).

200 In *Re S.K.*, Refugee Appeal No. 29/91, New Zealand Refugee Status Appeals Authority, 17 Feb. 1992, it was implicit in the reasoning of the Appeals Authority that Art. 1F(b) was only to be applied after the applicant had been found to be a refugee.

## B. Situations of mass influx<sup>201</sup>

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 gives priority to assistance and emergency protection measures in such situations.<sup>202</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 may be 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.<sup>203</sup> Another difficult problem arises where the Security Council proscribes a certain organization and demands that States refuse entry to its senior members, as has happened with the UNITA rebel movement in Angola.<sup>204</sup>

201 See M. Bliss, ‘“Serious Reasons for Considering”: Minimum Standards of Procedural Fairness in the Application of the Article 1F Exclusion Clauses’, 12 *International Journal of Refugee Law*, 2000 (Supp.), pp. 129 *et seq.*

202 See UNHCR, ‘Note on the Exclusion Clauses’, above n. 5, paras. 22 *et seq.* See also above n. 24. Arguably, if everyone crossing the border is treated as a *prima facie* refugee, then it should not be possible subsequently to exclude under Art. 1F; regard would have to be had to the danger the refugee posed to the country of refuge under Art. 33(2). However, since it is only an initial, presumptive assessment of refugee status, then a full and proper evaluation should be held later, at which point exclusion under Art. 1F is permitted.

203 See UNHCR, ‘The Civilian Character of Asylum: Separating Armed Elements from Refugees’, Global Consultations on International Protection, 1st meeting, UN doc. EC/GC/01/5, 19 Feb. 2001; and C. Beyani, ‘International Legal Criteria for the Separation of Members of Armed Forces, Armed Bands and Militia from Refugees in the Territories of Host States’, 12 *International Journal of Refugee Law*, 2002 (Supp.), p. 251. Note that separation is not exclusion.

204 UNSC Res. 1127 (1997), para. 4 (reaffirmed in UNSC Res. 1295 (2000), paras. 22–24, and Res. 1336 (2001)) prohibit under Chapter VII of the UN Charter the entry of all senior officials of the National Union for the Total Independence of Angola (UNITA) 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’ (Art. 1(3) of the UN Charter), might override the prohibition and that each case would have to be examined on its own facts.

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.

### C. 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>205</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>206</sup> although, given the geographical and temporal limitations to which they 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>207</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 parties, but the Prosecutor can act *proprio motu* on the basis of information, and that information could come from non-governmental organizations 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 or his life or freedom would be threatened.<sup>208</sup>

205 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, above n. 59, ch. 3.

206 See above n. 33.

207 See above n. 35. Having achieved the requisite sixty ratifications (Art. 126), the Statute is due to come into force on 1 July 2002.

208 Technically, the ICC has to defer to States with jurisdiction under the principle of complementarity (preambular para. 10 and Arts. 1 and 17), but if such a State is unable ‘genuinely to carry out the investigation or prosecution’, then the ICC 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’ (Art. 17(3)). See also the broad reading of unwilling States and Art. 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, Art. 21. It would be strange if, in abiding by a narrow interpretation

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 1949 Geneva Conventions imposed universal jurisdiction.<sup>209</sup> Since then, the United Nations multilateral anti-terrorist conventions have wholeheartedly adopted the principle of *aut dedere, aut judicare*.<sup>210</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>211</sup> In the *Universal Jurisdiction (Austria)* case,<sup>212</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.

The *Hungarian Deserter (Austria)* case<sup>213</sup> involved the shooting of a border guard by a Hungarian soldier deserting to the West during the Cold War. Again, the Supreme Court of Austria 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>214</sup> then the assumption of jurisdiction to

of Art. 17, the ICC 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 or him for fear of the treatment she or he would receive, the ICC would be colluding in an unfair trial and possibly a crime against humanity if it deferred to the jurisdiction of the State where the crime occurred (Art. 7(1)(e) and (h)).

209 See above n. 49. 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 G. E. White, 'The Marshall Court and International Law: The Piracy Cases', 83 *American Journal of International Law*, 1989, p. 727. The Genocide Convention 1948, above n. 31, 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 Art. VI).

210 See above n. 20.

211 *R. v. Governor of Brixton Prison, ex parte Kolczynski et al.*, above n. 93, at p. 551 *per* Lord Goddard CJ: 'reasons of common humanity'.

212 Supreme Court of Austria (*Oberster Gerichtshof*), OGH Serie Strafsachen XXIX No. 32; 28 ILR 341 at 342, 1958.

213 Supreme Court of Austria (*Oberster Gerichtshof*), ÖR 38 (1960) p. 96; 28 ILR 343, 1959.

214 See, for instance, the Amsterdam Seminar, above n. 11, 'Conclusions and Recommendations', section 5, 'Legal/ Criminal Proceedings to be Applied if Article 1F is Applied', and Netherlands State Secretary of Justice, 'Section 1F of the Convention on Refugees', above n. 15, at p. 46. Cf. Timmer, Soffers, and Handmaker, above n. 175, section 7.

prosecute where return ought not to take place would not violate principles of comity in international law.

#### D. Standard of proof for Article 1F and membership of the group<sup>215</sup>

Article 1F demands that there be ‘*serious reasons for considering*’ that one or more of the subparagraphs has been satisfied.<sup>216</sup> Implicitly, therefore, Article 1F prohibits the application of automatic bars to refugee status based on a list of excluded crimes;<sup>217</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.<sup>218</sup> Equally, it cannot be doubted but that the burden of proof lies on the State to show that there are serious reasons for considering that the applicant should be excluded.<sup>219</sup>

215 See M. Bliss, “‘Serious Reasons for Considering’: Minimum Standards of Procedural Fairness in the Application of the Article 1F Exclusion Clauses”, 12 *International Journal of Refugee Law*, 2000 (Supp.) p. 92, especially at pp. 99–100 and 115–17.

216 Cf. Art. 33(2), which only requires that there be ‘reasonable grounds’ for regarding the refugee as a danger.

217 See *Q.T.M.T.*, above n. 117.

218 Of course, Art. 33(2) requires that the refugee has been found guilty in a criminal trial of a particularly serious crime, but the ‘reasonable grounds’ test goes to the danger to the community, that is, the refugee has committed a particularly serious crime *and* there are reasonable grounds for considering her or him to be a danger to the community of the country of refuge – i.e. reasonable grounds that she or he is a danger to the security of the country. Art. 1F, on the other hand, requires ‘serious reasons for considering that’ the applicant has violated one of subparas. (a), (b), or (c). First, it is impossible to conceive how one might have serious reasons without at least reasonable grounds. More importantly, however, it reveals the danger of relying too heavily on extradition law for an interpretation of Art. 1F. Extradition law might only require prima facie evidence in order to permit surrender (and even that is only in common law jurisdictions), but that is because the object is to return the fugitive to face a criminal trial in the requesting State – the extradition hearing is not to usurp the function of the full trial. However, before an applicant is excluded under Art. 1F, the court must find that there are serious reasons for considering that she or he has committed that crime – there may be no subsequent trial after exclusion, just persecution. The difference is that refugee status determination is the final judgment, so reasoning by analogy with extradition hearings is unwarranted and inappropriate.

219 Timmer, Soffers, and Handmaker, above n. 175, section 4.

Difficulties arise where mere membership of a group whose activities fall within Article 1F is enough to exclude the applicant. UNHCR has favoured an internationally agreed list of international terrorist organizations in contrast to lists established by individual countries, so as to facilitate consistent application between the different domestic decision takers.<sup>220</sup> If membership is accepted to be a relevant criterion in Article 1F determinations, then membership per se cannot be adequate on its own.<sup>221</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>222</sup> In *Ramirez*,<sup>223</sup> it was held by the Canadian Federal Court of Appeal that one needs ‘personal and knowing participation’. In *Suresh*,<sup>224</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.

What detailed information exists suggests that courts have been easily satisfied that there are serious reasons for considering that the applicant should be excluded. Although a status determination hearing can never replicate a criminal trial, exclusion is only justified where there is strong evidence<sup>225</sup> that the applicant has committed a crime under Article 1F(a) or (b) or is guilty of an act contrary to the purposes and principles of the United Nations – there needs to be high proof of individual criminal responsibility. In many ways, it is laxity with the standard 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 exclusion clauses.

220 UNHCR, ‘Security Concerns’, above n. 25, at para. 18. See the EU anti-terrorism measures, above n. 77, 2001/931/CFSP, Annex section 2.

221 See Amsterdam Seminar, above n. 11, ‘Conclusions and Recommendations’, section 2 ‘Burden of Proof’, para. III. Note that singling out a group of persons because of their race, religion, or country of origin would be discriminatory and contrary to Art. 3 of the 1951 Convention.

222 See, UNHCR, ‘Determination of Refugee Status of Persons Connected with Organizations or Groups Which Advocate and/or Practise Violence’, above n. 64, at para. 16. However, in the wake of the tragic events of 11 Sept. 2001, UNHCR has indicated that there could be a rebuttable presumption of individual liability where the applicant belongs to an ‘extremist international terrorist group’ (UNHCR, ‘Security Concerns’, above n. 25, at para. 18; cf. para. 19). Such a stance is unnecessary, potentially ambiguous, and difficult to justify when one is looking at a restriction on human rights.

223 See above n. 188. See s. 19(1)(e)(iv), (f)(iii) and (g) of the Immigration Act.

224 See above n. 142, at para. 8. In the Supreme Court of Canada, the focus was on what is terrorism in the light of the Canadian domestic legislation. See paras. 98, 108, and 110.

225 The phrase is that of P. White, a refugee law judge in Australia and a member of the International Association of Refugee Law Judges.

## E. Defences to exclusion

Where Article 1F crimes have been committed knowingly and with a moral choice,<sup>226</sup> it is hard to imagine that in practice the applicant could find a defence for her or 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>227</sup> Superior orders is not a defence to war crimes.<sup>228</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 recognized as a legitimate defence to some Article 1F crimes.<sup>229</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>230</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 recognized ought to have been voluntarily granted by a legitimate, representative government.<sup>231</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 *practically* available.

## F. Passage of time and exclusion

Does lapse of time annul Article 1F? If someone who has committed Article 1F crimes in the past renounces such methods, will he or she 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

226 See UNHCR, 'Exclusion Guidelines', above n. 26, at paras. 41 *et seq.* The position of child soldiers who have committed war crimes is difficult: see below.

227 See Arts. 31 and 32 of the Rome Statute, above n. 35.

228 See Principle IV of the Nuremberg Principles, UNGAOR, V, Supp. 12 (A/1316), pp. 11–14, 1950, paras. 119–24. See also, above n. 56 and associated text.

229 See UNHCR, 'Exclusion Guidelines', above n. 26, at para. 78. See also *Abdul Hussain*, above n. 60 and the discussion above at n. 129.

230 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 Art. 1F(b). See *Kolczynski* and *Kavic*, both above n. 93, although both predate the UN anti-hijacking conventions. See also, UNHCR, 'Exclusion Guidelines', above n. 26, at paras. 69 and 70.

231 *Quaere* the amnesty granted by the Pinochet regime with respect to crimes committed in the 1970s in Chile. See *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. Art. 6.5 of Protocol II, 1977, above n. 18, and UNHCR, 'Exclusion Guidelines', above n. 26, para. 56.

conditions of life have changed, then he or she may be able to claim refugee status.<sup>232</sup> According to paragraph 157 of the *Handbook*,<sup>233</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 also 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>234</sup>

### G. Exclusion and minors<sup>235</sup>

There is no internationally accepted minimum age of criminal responsibility.<sup>236</sup> Equally, there is no equivalent to Article 1F in Article 22 of the Convention on the Rights of the Child.<sup>237</sup> The Rome Statute eschews jurisdiction over 'any person who was under the age of eighteen at the time of the alleged commission of a crime'.<sup>238</sup> Nevertheless, it would be possible to exclude applicants who were under that age when they acted contrary to Article 1F.<sup>239</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, he or she 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>240</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.

232 See UNHCR, 'Determination of Refugee Status of Persons Connected with Organizations or Groups which Advocate and/or Practise Violence', above n. 64, paras. 18 and 19.

233 See above n. 7.

234 In 1998–9, Angola alleged Zambia was supporting the UNITA rebel movement because it allowed the establishment of refugee camps within its borders. See also, *Nicaragua* case, above n. 172.

235 For a Canadian perspective, see J. Rikhof, 'Criminal Responsibility of Child Soldiers', Citizenship and Immigration Canada, Internal Memorandum, 1 May 2000, submitted to UNHCR Global Consultations on International Protection.

236 See Art. 40 of the Convention on the Rights of the Child, above n. 54.

237 See above n. 54.

238 Art. 26. Cf. *Prosecutor v. Drazen Erdemovic*, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber judgment, Case No. IT-96-22-A, 7 Oct. 1997.

239 See the UNHCR, 'Exclusion Guidelines', above n. 26, para. 14.

240 See the letter from UNHCR, ref. HO/98/23 – 50/7, 25 Sept. 1998, to the Netherlands State Secretary for Justice.

## H. Implications of exclusion for family members

Ordinarily, where a head of family is given refugee status, the principle of family unity allows the rest of the family to 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>241</sup> Other members of the family should be entitled to prove they qualify in their own right.<sup>242</sup> 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. 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 recognized as traditional refugees. 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>243</sup>

## VI. 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>244</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

241 See also, Art. 10 of the Convention on the Rights of the Child, above n. 54.

242 See Amsterdam Seminar, above n. 11, ‘Conclusions and Recommendations’, section 6, ‘Spouses of Excluded Persons’. Note that the excluded person would not be able to avoid exclusion by relying on the principle of family unity. Even though Pakistan deported the former Taliban ambassador, Abdul Salam Zaeef, to Afghanistan on 5 Jan. 2002, his two wives and six children may be permitted to stay: *The Guardian*, 7 Jan. 2002, p. 12.

243 Namely, *Islam and Shah v. Secretary of State for the Home Department*, UK House of Lords, [1999] 2 AC 629.

244 See Arts. 3–30 of the 1951 Convention, above n. 1. On this indeterminate status of non-return, see Amsterdam Seminar, above n. 11, ‘Conclusions and Recommendations’, section 4, ‘Further Action and Status of Cases for Which Exclusion under Art. 1F is Applied’.

same developments.<sup>245</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>246</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>247</sup> and Article 3 of the European Human Rights Convention.<sup>248</sup> Everyone within the jurisdiction of a State party to those treaties shall not be returned to a place where their right to be free from torture<sup>249</sup> will not be respected.<sup>250</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>251</sup>

245 No attempt is made here to investigate the scope and ambit of customary *non-refoulement*. See Goodwin-Gill, above n. 4, at pp. 167–71; and the paper on *non-refoulement* by E. Lauterpacht and D. Bethlehem in this volume. In many cases where refugee status is denied by reference to Art. 1F, the State of refuge still grants complementary forms of protection. Exclusion in the case of temporary protection rather than refugee status must, however, still comply with human rights standards on non-return. The Afghan hijackers who came to the UK in 1999 are for the most part being denied refugee status, but are not being returned to Afghanistan: *The Guardian*, 28 July 2000, p. 7. Several were convicted of hijacking; see *The Guardian*, 7 Dec. 2001, p. 10, and 19 Jan. 2002, p. 9.

246 E.g. the Convention Against Torture is now part of US 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 fall-back 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 Refugee Convention, gave refugee status during the Great Lakes Crisis because of the knowledge that Rwandese would be killed if returned. 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.

247 See above n. 136.

248 See above n. 137. See also, Art. 7 of the ICCPR, above n. 177; Art. 5 of the 1969 American Convention on Human Rights, 9 ILM 673, 1970; Art. 5 of the 1981 African Charter on Human and Peoples' Rights, 21 ILM 59, 1982.

249 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 Art. 1 of the Convention Against Torture, above n. 136, and *Selmouni v. France*, Application No. 25803/94, 28 July 1999, *Labita v. Italy*, Application No. 26772/95, 6 April 2000 (both European Court of Human Rights).

250 See *Mutombo v. Switzerland*, Communication No. 13/1993, CAT/C/12/D/13/1993, 27 April 1994, para. 9.3; *Khan v. Canada*, Communication No. 15/1994, CAT/C/13/D/15/1994, 18 Nov. 1994, para. 12.2; *Chahal*, above n. 138.

251 *Chahal*, above n. 138, at para. 74, see generally, paras. 74–80. See also, *Jabari v. Turkey*, Appeal No. 40035/98, 11 July 2000 (European Court of Human Rights).

Even if one were to find that the refugee was a threat to national security, *Chahal*<sup>252</sup> has held that such issues cannot be a factor for consideration where there is a real danger of torture or 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>253</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 European Human Rights Convention.<sup>254</sup> However, protection from torture under human rights instruments is absolute and non-derogable.<sup>255</sup>

252 See above n. 138. Cf. *Agee v. United Kingdom*, European Commission of Human Rights, Application No. 7729/76, 17 Dec. 1976; 7 DR 164, 1977.

253 Namely, *Soering v. United Kingdom*, Series A, No. 161, 1989, an extradition case, but one that formed the basis for *Chahal*, above n. 138. Namely, 'Case of M. Singh and P. Singh', *The Guardian*, 1 Aug. 2000, p. 5, 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. Even UNSC Res. 1373 states that international human rights standards must be met even when acting against terrorists.

254 Namely, Netherlands State Secretary of Justice, 'Section 1F of the Convention on Refugees', above n. 15, at pp. 54–5. Cf. Timmer, Soffers, and Handmaker, above n. 175, section 6.

255 It is to be welcomed that the Supreme Court of Canada took the opportunity to reverse the wayward judgment of the Federal Court of Appeals in *Suresh*, above n. 142. The FCA judgment restricted the ambit of the right to be free from torture found in the ICCPR (para. 25) and proposed that Art. 3 of the Convention Against Torture is derogable (para. 27). Ignoring the express wording of the Human Rights Committee's General Comment on Art. 7 (20/37, CCPR/C/21/Add.3, 1982, para. 6), 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 was nothing less than perverse, ignoring, for example, *Ng v. Canada*, UN doc. CCPR/C/49/D/469/1991 at paras. 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 Art. 7 of the ICCPR, and thus that extradition to the US 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 Feb. 2001). The Supreme Court of Canada rejected the reasoning of the FCA: 'The clear import of the ICCPR, read together with the General Comments, is to foreclose a State from expelling a person to face torture elsewhere' (para. 67). If anything, the FCA's reading of Art. 3 of the Convention Against Torture was possibly worse. Relying on Art. 16, which is designed to deal with

## VII. Conclusion

The original drafters, while they did not speak with one clear voice on this issue, were concerned that *non-refoulement* should not provide a means of impunity to serious non-political criminals. There are now a variety of mechanisms that will allow for prosecution of serious non-political criminals, even if they are not extradited to the *locus delicti*.

1. *Aut dedere, aut judicare* is more firmly embedded in international criminal law and procedure, being recognized as a treaty duty of States, not just a power.<sup>256</sup>

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 (Art. 16.2), the FCA held that, since Art. 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 ignored 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 the Sendero Luminoso and on 1 Nov. 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*, above n. 250, at para. 12.1, and *Ayas v. Sweden*, (CAT/C/21/D/97/1997) 12 Nov. 1998, at para. 7. The Supreme Court of Canada rejected the stance of the FCA (para. 71):

75. We conclude that the better view is that international law rejects deportation to torture, even where national security interests are at stake. This is the norm which best informs the content of the principles of fundamental justice under s. 7 of the [Canadian Charter of Rights and Freedoms].

As regards treaty interpretation in *Suresh*, the FCA failed to have proper regard to Art. 30(3) and (4) of the Vienna Convention on the Law of Treaties 1969, above n. 3. Art. 30(1) of that Convention states that it is subject to Art. 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 Art. 56 pledge to cooperate with the UN in promoting observance of human rights and fundamental freedoms under Art. 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 R. R. Fowler in the Security Council, Press Release SC/6741, 19 Oct. 1999). For a fuller analysis of *Suresh* in the FCA and related jurisprudence, see Aiken, above n. 142.

<sup>256</sup> See M. C. Bassiouni and E. M. Wise, *Aut Dedere, Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Martinus Nijhoff, Dordrecht, 1995). See also, M. C. Bassiouni, ‘The Penal Characteristics of Conventional International Criminal Law’, 15 *Case Western Reserve Journal of International Law*, 1983, p. 27 at pp. 28–31 and 34 *et seq.*

2. The priority of fair trial outside the jurisdiction of the *locus delicti* has been endorsed by the Security Council in the *Lockerbie* case and the subsequent ‘Scottish’ trial in the Netherlands.<sup>257</sup>
3. In the 1990s, the Security Council showed itself willing to create ad hoc tribunals to ensure the prosecution of those perpetrating gross human rights violations in times of armed conflict.
4. The international community will soon have at its disposal the International Criminal Court to deal with all crimes that would fall within Article 1F that would not otherwise be suitable for trial in the State of refuge.

The true fear that finds voice in Article 1F is not that refugee status might be besmirched if it were to be applied to those falling within Article 1F, it is that the receiving State will be a safe haven.<sup>258</sup> The new mechanisms of international criminal law render that fear less substantial than it was in 1951. Moreover, a State that simply denied refugee status and returned an applicant falling within Article 1F may well be failing in its international obligations with respect to ensuring the prosecution of war criminals and serious non-political criminals.

More importantly, however, ignoring the developments in international human rights law since 1951 renders international refugee law peripheral. Protection of the individual is an overriding principle in the implementation of international law and for international refugee law to maintain a policy based on an anachronistic understanding thereof, leaves it open to a charge of redundancy.

257 See *The Guardian*, 1 Feb. 2001, pp. 1–5.

258 Namely, *Suresh*, above nn. 142 and 255.