Between Border Control, Security Concerns and International Protection: A Judicial Perspective

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TERRORISM AND THE EXCLUSION OF REFUGEE STATUS

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(A) Introduction

This Working Group Paper considers emerging case-law on 'exclusion clauses' from the United Kingdom, Canada, Germany, and Australia in the context of the 2011 IARLJ theme of '*Between Border Control, Security Concerns and International Protection*'. The Rapporteur wishes to record his earnest thanks to the Judges (and IARLJ members) of these leading jurisdictions for their help in providing the case-law for the Working Group on Exclusion Clauses. This is a 'work in progress' Report designed to act as a discussion document for the Working group meeting on 8th September in Bled. The tentative views expressed in this Paper are those of the Rapporteur alone. Since this is a discussion document, no part of this paper is to be cited.

(B) Article 1F

Article 1F of the 1951 Geneva Convention Relating to the Status of Refugees, as amended by the New York Protocol of 31 January 1967 provides as follows:

> "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*." (emphases added).

(C) The issues

The case-law from the jurisdictions of the United Kingdom, Canada, Germany, and Australia suggest that the potential issues for consideration by the Courts include:
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(a) To what extent, if at all, are the acts of a claimant to refugee status acts of terrorism [or render unworthy]?

(b) Are these acts contrary to the purposes and principles of the United Nations?

(c) What is 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'?* (Art. 1F(a)). Does exclusion with respect to the 'acts' in question apply only to acts done after the relevant international instruments were passed?

(d) What is a *serious non-political crime?* (Art. 1F(b)

(e) To what extent, if at all, do particular acts contravene article 1F(c) of the Refugee Convention?

(f) Do a claimant's acts, even if capable of being acts of terrorism and/or acts contrary to the purposes and principles of the United Nations, fail, by reason of lack of specificity, to attract the application of article 1F(c)?

(g) Is the claimant's personal involvement and role in the organisations he was supporting such as to contribute in a significant way to the organisation's ability to pursue terrorist purposes and/or activities contrary to the purposes and principles of the United Nations?

(h) If so, was he aware that his assistance would further such purposes and/or activities?

(D) Excluding the 'Unworthy'?

The case-law from the United Kingdom, Canada, Germany, and Australia shows there to be both an external divergence in the way that issues of exclusion are sometimes handled between different countries, as well as an internal divergence by individual judicial officers within those countries, thus suggesting that the law and practice amongst practitioners is unsettled. In particular, there is a big difference in the way that jurisdictions regard whether a personal involvement of the claimant in specific human rights infringements is regarded to be necessary for exclusion under Article 1F. There is also divergence on whether a person who did not exercise power in a state may nonetheless be held responsible for infringement of human rights.

It is possible that decisions are made on an the basis of an understanding – shored up by a recent legislative enactments both domestic and international which Courts must adhere to – of those who are worthy of asylum and those who are not. Thus, the German Federal Administrative Court has recently referred to how *"[t]he circumstances for exclusion are significantly based on the concept of unworthiness for asylum,"*[1], before concluding that , "Foreigners who commit crimes against humanity or war crimes after

[1] ***Dr. M v Federal Republic of Germany*** , which drew upon the judgment of 24 November 2009 – BVerwG 10 C 24.08 – BVerwGE 135, 252 at 24 et seq.

entering Germany, or who participate in such crimes, commit a serious violation of the system of international law, and are not seeking the protection and peace that the right of asylum is intended to confer. They cannot claim the protection of asylum law under Article 16a of the Basic Law,"[2] since "committing war crimes and crimes against humanity represents a violation of the system of international law supported by the Federal Republic of Germany that is comparable in severity to acts of terrorism." Yet, as will be seen below the Australian High Court has made it clear, in the case of a person who had not himself been involved in an attack, that the alleged criminal conduct by the person concerned should form part of a widespread or systematic attack on a civilian population before he could be excluded under article 1F from protection, thereby suggesting that there is no real notion of a person who may be deemed generally unworthy of asylum.

Similarly, in a Paper prepared "Persons Deemed Unworthy of International Protection (Article 1F): An Australian Perspective"[3] given by the Department of Immigration & Multicultural & Indigenous Affairs, as the Australian contribution to the UNHCR's Expert Roundtable Series, it is observed (at para 3.1) that although, *"States may differ in their approach to Article 1F, Australia considers that the receiving state should be the final arbiter of decisions to exclude under this article…"* such a position being consistent with that adopted by the UNHCR which holds that, "The competence to decide whether any of these exclusion clauses are applicable is incumbent upon the Contracting State in whose territory the applicant seeks recognition of his refugee status".[4] This is because, "Underlying Article 1F is the intention of the Convention founders to preserve the right of States to determine who may enter and remain within their territory. *Article 1F serves two interrelated purposes, namely to protect the order and security of the receiving state, and to preserve the moral integrity of the Convention*."[5] Much of the underlying basis of this Report is based on the belief that Article 1 Fb) is intended for the *"protection of the order and safety of the receiving state."*

This is not a concept that is alien to international law because recently *in* ***Josesobov the Netherlands***[6] the European ourt of Human Rights, in a case involving the exclusion of a person from refugee status n the basis of the so-called '*personal and knowing participation*' test, has yet again resoundingly affirmed the principle that, *"the Court's settled case-law that Contracting States have the right, as a matter of well established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens, and that the right to political asylum is not explicitly protected by either the Convention or its Protocols.*"[7]

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[2] At para 47 which the Court based on the Rome Statute of the International Criminal Court because, "According to the Rome Statute of the International Criminal Court, such actions are among the most serious crimes that are 'of concern to the international community as a whole' (Article 5 Rome Statute)."

[3] The Author is grateful to Mr Justice North for this Paper.

[4] UNHCR Handbook at para 149.

[5] At para 7 see Concluding Comments at p.39. It is interesting that the position adopted in this Paper was that, "Mere membership of an organisation is sufficient to establish complicity if it necessarily involved personal and knowing participation in the persecutory acts." Moreover, it was also suggested that, "Duress is only available as a defence where the harm feared by the perpetrator is greater than the harm inflicted." Ibid.

[6] Ibrahim JOESOEBOV v the Netherlands - 44719/06 [2010] ECHR 1945 (2 November 2010); available at *http://www.bailii.org/eu/cases/ECHR/2010/1945.html*

[7] At para 57

However, the fact that there is an absence of any settled international consensus about the law and the changing views of national courts and tribunals cannot go unnoticed. An Australian Court has expressed the dilemma well that: "*It has been influenced by the changing nature of crimes, of weapons, of the transport of criminals and of the global political order, and the increased vulnerability of modern societies to violent forms of political expression*." Moreover, as the German Federal Adminsitrative court remarked recently, "Courts in other countries also apply the exclusion clause on contravening the purposes and principles of the United Nations (Article 1 F (c) GRC) to persons who have no state power (see, for example, the judgment of the British Immigration Appeal Tribunal of 7 May 2004, ***KK v.Article 1 F c Turkey***, [2004] UKIAT 00101 at 20; Supreme Court of Canada in ***Pushpanathan v. Canada*** [1999] INLR 36), *although there is no uniform practice among countries in this regard*. If one follows the interpretation developed here by the present Court, it would mean abandoning the Federal Administrative Court's decision from 1975, according to which the exclusion provision under Article 1 F (c) of the GRC covers only actions contrary to international peace and international understanding among peoples (see judgment of 1 July 1975, op. cit.)."[8]

(E)The Function of Judges

By all accounts, Courts facing the prospect of dis-applying the refugee provisions to claimant's appearing before them, take the issue seriously. Some examples may suffice.

In a judgment given by the High Court of Australia soon after the outrage of 9/11 Kirby J. in ***Singh***[9], Kirby J put matters in full perspective when he explained that, many centuries before the Geneva Convention of the Status of Refugees 1951 (hereafter 'the Convention')[10] was promulgated, as the primary source of modern refugee law, together with the 1967 Protocol[11], which supplements it, the Dutch jurist Hugo Grotius, in establishing the foundations of a natural law based international system, wrote that asylum was accepted by international law as available for those fugitives who suffered undeserved enmity but not for those who had done something injurious to human society.[12] Ever since that distinction was first propounded in the field of extradition law, and now and more recently in the Convention, courts have struggled to find a point that will allow decision-makers to differentiate between fugitives accused of a serious political crime[13] and those in respect of whom there are 'serious reasons for considering' that they have committed a serious *non*-political crime.[14] This kind of differentiation has troubled courts for more than a hundred years. There is wisdom, therefore, in Viscount Radcliffe's warning,[15] that it is now unlikely that the point of

[8] Dr M. v. ……At para 39

[9] ***Mima v. Singh*** **(2002)** 186 ALR 393 (at paras 64-67, esp. para 67)

[10] http://www1.umn.edu/humanrts/instree/vlcrs.htm

[11] The reference here is to the re-edited version of the 1979 Handbook, which was issued in 1992, and which runs into 223 paragraphs, with six annexures: see, the Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees at http://www1.umn.edu/humanrts/instree/v2prsr.htm

[12] …….

[13] …….

[14] ……

[15] …….

distinction will receive a definitive answer accepted by everyone as universally applicable. On the other hand, where important rights and duties turn on the meaning of the expression, being rights and duties that must be considered by judges and other decision-makers, it is reasonable to demand that there should be a measure of clarity about the concept. Even if the best that courts can do is describe the idea, and the appropriate ways to approach it, they should attempt to do so.[16] The alternative is a negation of the rule of law and the surrender of such questions to idiosyncratic opinions that may have little or nothing to do with the context of the case at hand. That still, however, leaves the problem of defining a 'serious non-political crime', which has been described as one that presents "the gravest difficulties".[17] In an earlier manifestation of the phrase, it was said to present one of the "most acute" dilemmas of extradition law.[18] The difficulties of definition derive, in part, from the absence of any settled international consensus about the expression and the changing views of national courts and tribunals about its meaning.[19] The content of the expression depends on an almost infinite variety of factors.[20] It has been influenced by the changing nature of crimes, of weapons, of the transport of criminals and of the global political order, and the increased vulnerability of modern societies to violent forms of political expression.[21]

Similarly, House of Lords judgment in the UK in ***JS (Sri lanka)*** [2010] UKSC 15 (at paras 2-3) , explained its concern in this way. First, that it is the Court's central task on the present appeal to determine the true interpretation and application of this disqualifying provision. Who are to be regarded as having committed such a crime ("war criminals" as I shall generally refer to them) within the meaning of article 1F(a)? More particularly, assuming that there are those within an organisation who clearly *are* committing war crimes, what more than membership of such an organisation must be established before an individual is himself personally to be regarded as a war criminal? Second, it is common ground between the parties (i) that there can only be one true interpretation of article 1F(a), an autonomous meaning to be found in international rather than domestic law; (ii) that the international instruments referred to in the article are those existing when disqualification is being considered, not merely those extant at the date of the Convention; (iii) that because of the serious consequences of exclusion for the person concerned the article must be interpreted restrictively and used cautiously; and (iv) that more than mere membership of an organisation is necessary to bring an individual within the article's disqualifying provisions. The question is, I repeat, what more? These are all issues of stern principle and they are not just confined to article 1F(a) but apply to Article 1F generally. Thus, following ***JS (Sri Lanka)*** Pill LJ considered the same to apply to Article 1F(c) in ***DD (Afghanistan) [2010]***[22]

(F) Defining Terrorism

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[16] …….

[17] ……

[18] …….The court went onto say that, "so far as the Australian law on refugees is concerned, the scope of offences 'of a political character' is not fixed

[19] …….

[20] ……..

[21]

[22] ***DD (Afghanistan) [2010].*** EWCA Civ 1407 at para 47

A decade before the atrocity of 9/11, terrorism was defined in ***Re T*** [23] by the UK House of Lords in terms that has undoubtedly wide resonance in the world of today. Whether that approach accords with the position of the UNHCR is a different matter to which we will return below. In ***Re T*** the House of Lords demarcated the contours of political and non-political crimes, restricted 'non-political' crimes to a narrow sphere, excluding all potentially terrorist offences, in a definition that was widely followed in the common law world.[24] This was a case where the appellant was involved in two bombings in Algeria, one of a civil airport where ten innocent people were killed, and one on an army barracks. The House described both attacks as 'terrorist' in nature. Lord Mustill said that "the material does show the bombing at the airport to have been a terrorist offence, and that there were grounds on which the Tribunal could properly find that the same conclusion applied to the attack on the barracks. Both offences are within the scope of Article 1F...."[25] But Lord Slynn was more ambivalent about the attack on the barracks. Whereas His Lordship was clear that "the airport killing [of] innocent civilians was totally beyond the pale" nevertheless, "the attack on the barracks was more debatable" although the "Tribunal was entitled to find that this was yet another 'random killing'."[26]

However, Lord Mustill equated an atrocity, where there is depersonalised and abstract violence which kills twenty, or three, or none, it matters not how many, or whom, so long as the broad effect is achieved", with an act of terrorism. For this reason, he was "more persuaded by the idea of writing 'terrorism' into the modern concept of the political crime" and that, "I would prefer terrorism to atrocity as a test, because it concentrates on the method of the offence, rather than its physical manifestation." The logic was that, "I find it hard to believe that the human rights of the fugitive could ever have been intended to outweigh this cold indifference to the human rights of the uninvolved."[27] His Lordship purported to base this on a provision in the League of Nations Convention of 1937 although "[t]he Convention never came into force, but the definition is serviceable and I am content to adopt it."[28] Lord Lloyd stated that a crime is a 'political crime' for the purposes of Article 1 F (b) in two conditions are satisfied, namely, that it is committed for a political purpose, that is to say, with the object of overthrowing or subverting or changing the government of a state; and that "there is a sufficiently close and direct link between the crime and the alleged political purpose", for which it is necessary to consider "the means used to achieve the political end" and to consider "whether the crime was aimed at a military or government target" , but in either event, " whether it was likely to involve the indiscriminate killing or injuring of members of the public."

It is, however, entirely possible to take a more nuanced approach to the perpetrator of an 'atrocity' or to what may be termed an 'act of terrorism'. This was the approach of the Tribunal in ***Thayabaran ,*** which made it clear that even if the offence was 'terrorist' in nature that still did not meant that an applicant for refugee status

[23] "T" v. SSHD [1996] ImmAR 443
[24] ……
[25] T at p....
[26] Lord Slynn at.....
[27] Lord Mustill in T at p..... His Lordship
[28] The League of Nations Convention of 1937 refers to "Acts of terrorism mean criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public."

fell under Article 1F (b) because even if he had committed a non-political crime, it was still necessary to consider whether this was a '*serious non-political'* crime before Article 1F (b) came into play. The Tribunal was of the view that, *"the introduction of other concepts of consideration is not likely to be helpful*" because although Lord Mustill suggested that the concept of 'terrorism' might be helpful in elucidating the meaning of 'non- political' even he said (at p.464) that, "I am quite unable to see how the fact, if it is a fact, that he foreign crime shows the asylum seeker to be a wicked man whom the country of refuge would be well rid of can have any bearing on this question." It is for this reason why the 'motive' behind an offence may not be irrelevant because if the perpetrator is pursuing a political objective, he still notwithstanding his wickedness, fall outside the disqualifying provisions of Article 1F. Support for this viewpoint may lie in ***Singh***, where the Full Court of the Federal Court of Australia observed that, "the true principle is stated by Lord Mustill in '***T'*** at 764 : The general proposition ....is known ...as the 'incidence' theory. The essence of this is that there must be a political struggle either in existence or in contemplation between the government and one or more opposing factions within the State where the offence is committed, and that the commission of the offence is an incident of this struggle." The Court went onto say, however, that it is also necessary, in addition to demonstrating 'incidence' , to consider the factual situation "in terms of weighing, proportionality, or whether the crime is particularly atrocious" because, "[i]f there is a political struggle in which agents of the government, including police, have a policy of torturing and killing those who oppose the government, we see no reason why crimes directed at those agents, or police officers, may not be regarded as political (that is, as satisfying the 'incidence' test) even though they may be characterised as crimes of revenge." On the other hand, there may be "serious reasons to believe that it cannot be characterised as political."

Such an approach may be untenable, however, under the definition of terrorism which Lord Mustill purported to adopt for a political crime in article 1F(b) under draft League of Nations Convention of 1937, article 1.2, which is that [29], *" 'acts' of terrorism means criminal acts directed against a state and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public",* because all that would then be needed is "a state of terror in the minds of particular persons" affected by the actions of the perpetrator in question. Yet, since Lord Mustill's prophetic judgment the understanding of a 'political crime' such that it falls outside article 1F on account of being based on the 'incident theory' has narrowed down even more. Thus, the post-9/11 resolutions of the UN Security Council, such ***Resolution 1373 (2001) (28 September 2001)*** expressly provides that, ".. . . acts, methods and practices of terrorism are *contrary to the purposes and principles of the United Nations* and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations," in a way that suggests that the House of Lords in ***Re T*** got the law right. This is further demonstrated by ***Resolution 1377 (2001) (12 November 2001),*** which recalled the earlier resolution and reaffirmed: ". . . its unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their forms and manifestations, wherever and by whomever committed." In fact, all states were called on "*to take urgent steps to implement fully resolution 1373*" and to *"intensify their efforts to eliminate*

[29] ***T v SSHD*** [1996] AC 742 at p. 773 B-C

the scourge of international terrorism". In fact, new stricter domestic law was called for because, ***Resolution 1624 (2005) (September 2005)*** called upon states to "*adopt measures, consistent with international obligations, to prohibit, by law, incitement to commit a terrorist act or acts and to deny safe haven to those guilty of such conduct".* Moreover, there are also General Assembly resolutions declaring that acts, methods and practices of terrorism constitute a grave violation of the purposes and principles of the United Nations, for example 49/60 of 9 December 2004. Indeed, in what is perhaps the leading trouble-spot of the world today, the International Special Assistance Force ("ISAF") in Afghanistan is authorised and mandated by ***Security Council Resolution 1386 (2001) (20 December 2001).***

(G) The Traditional Position

All of this is a far cry from what used to be the traditional position with respect to the law on so-called exclusion clauses. Thus, the UK Tribunal in ***Raya***[30] was clear that, "We further accept the cautions of the UNHCR as to the need to consider the relevant provisions of the Handbook, to interpret the exclusion provisions restrictively and to bear in mind the criteria for adjudicating whether a fear of persecution is well founded (ie that there is a reasonable degree of likelihood of persecution). As to the latter point, for our part we would see the burden of asserting that an asylum seeker is excluded as falling on the Secretary of State and for any benefit of the doubt to be given to the applicant." In ***Thayabaran***[31]**,** the Tribunal also noted how, "the use of the phrase, '*there are serious reasons for considering that*' in Article 1F relates to the state of the evidence on the issue of burden of proof. Clearly, however, the exclusion clause cannot be brought into play unless there is some evidence of the alleged crime and of its nature. This meant that the requirement of "serious non-political crimes " under Article 1F (b) did not lead to the exclusion of all those guilty of 'criminal' acts. To be excluded, these must be serious crimes because as Lutfy J (as he then was) of the Federal Court of Canada explained in ***Brzezinski***[32] "[t]he travaux preparatories for both Article 1F(b) and Article 33 (2) disclose the delegates' intention not to exclude persons who committed minor crimes, even 'an accumulation of petty crimes' , from seeking refugee protection. The text of these provisions reflects this intention of the drafters."[33] This was also the decision of the UK Tribunal in ***Thayabaran*** when it emphasised that, "the phrase serious non-political crime' is sufficient to demonstrate not only that not all criminals are excluded from the Convention, but also that even a person who has committed a non-political crime is not necessarily excluded from Convention protection. It is only where the crime in question is a *serious* non-political crime that the exclusion clause comes into play. It is implicit that the Convention protects some persons who have committed non-political crimes, provided that those crimes were not 'serious'."

In the same way, the UNHCR Handbook defines '***crimes against peace or humanity'*** as the *'planning, preparation, initiation or waging of a war of aggression, or a war of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing*."[34] In ***Amberber***, the Tribunal

[30] Raya v. SSHD (11290; 18th August 1994)
[31] Thayabaran v SSHD (18737; 9th October 1998)
[32] Brezinski v. Canada (Minister for Employment and Immigration) (IMM-133-97; 9th July 1998)
[33] Brzezinski in
[34] UNHCR Handbook at para 150

referred to a letter before it from the UNHCR to hold that a person who participated in a 'war of aggression' could still avail himself of the provisions of the Convention.[35] Under international law[36], an armed conflict in eastern Ethiopia between armed AAPO[37] members in Harrar and the EPRDF[38] was not a 'war of aggression', which could only take place if two conditions were satisfied. These were that the act must have been committed by a leader of a state, and it must have been committed against the territorial sovereignty of another state, so that there was a waging of war across international borders. The UNHCR letter explained that the focus was on wars in violation of international treaties and warfare and there was as yet "no evidence" that "a crime of aggression under international law could also be committed by leaders irregular armed movements or even by leaders of entities which can be qualified as 'Statelike'."[39] That traditional position is today very much in question. The traditional position was also that a Crime Against Humanity must in general be committed in a widespread and systematic fashion. The *Charter of the International Military Tribunal* defines crimes against humanity as involving, "murder, extermination, enslavement, deportation, and other inhumane acts committed against civilian populations, 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." This definition was adopted by Linden JA in Canada in the Federal Court of Appeal in ***Sivakumar[40] .*** International instruments have been taken into account and remain significant in understanding the notion of a Crime Against Humanity, where such crimes have been considered to be capable of commission only against a country's own nationals. Linden JA in ***Sivakumar*** did, however, question this limitation observing that, "[t]his is a feature that helped to distinguish a crime against humanity from a war crime in the past" but that given the "changing conditions of international conflict" this was questionable, even though the distinction between the two was regarded as necessary by some writersin order "to consider a crime worthy of attention by international law."[41] Yet the United States Military Tribunal, as Linden JA pointed out, had adopted the position that "private individuals can commit breaches on international law when it convicted several industrialists of crimes against humanity for the use of slave labour in their factories."[42] However, there appears to be a clear
international law basis in this proposition. As Linden JA himself recognised, the International Court of Justice in its Advisory Opinion on *Reservations to the Convention on the Prevention & Punishment of the Crime of Genocide*[43]had also already adopted the same position with respect to the commission of genocide. The International Law Commission has also since determined that crimes against humanity can be committed by individuals who do not have a connection to a state.[44] It was on this basis that Linden JA felt able to say that, "[b]ased on these

[35] *Amberber v.* SSHD(unreported; 00/TH/01570) 13th June 2000
[36] UNGA Resolution 3314 (XXXIX) defines aggression as "the use of armed force *by a State* against the *territorial sovereign* by or political independence of *another state*..."
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[38]
[39]
[40] Sivakumar v. Canada (minister of Employment & Immigration) (A-1043-91; 4th November 1994)
[4141] Referring to Rikhoff, at p.31
[42] See the, *Flick Trial v. United States Military Tribunal at Nuremberg*, Law Reports of Trials of War Criminals, Vol. IX, page 1
[43] ICJ Reports 1951
[44] Rikhoff at p.64

latter authorities, therefore, it can no longer be said that individuals without any connection to the state, especially those involved in paramilitary or armed revolutionary movements, can be immune from the reach on international criminal law. On the contrary they are now governed by it."[45] In the same way, 'torture' is a crime against humanity because it is governed by international law.

The *Convention Against Torture and other Cruel and Inhuman or Degrading Treatment or Punishment 1984*, was the basis of the decision by the Refugee Status Appeals Authority of New Zealand in ***Re MSI[46]***, in its conclusion that the existence of the Torture Convention, "lends support to the view that torture falls within the purview of Article 1 (F)(a) as a 'crime against humanity' as defined in the international instruments drawn up to make provision in respect of such crimes."[47] In ***Rasuli[48],*** Mr Justice Heald in the Federal Court of Canada also had little difficulty in concluding that, "[i]n this case the applicant reported suspected persons thereby exposing them to likely torture or death. In my view, the actions of this applicant are...encompassed by the provisions F(a) of Article A1."[49] However, the traditional position was that if, by the same token, if civilians are killed in 'military actions' then this will not ordinarily be a crime against humanity. In ***Gonzalez[50],*** the Federal Court of Appeal of Canada, in a judgment given by Letourneau JA, expressed the matter thus: "The acts and omissions contemplated by those who defined the crimes of Article 1F are fully exposed in the record of the Nuremberg trial...The murder and ill-treatment of civilian population in Europe is extensively discussed...No particular quotation is possible. It is a litany of horror....[However]..what the applicant admitted to was participation in a military action that does not reach the concepts of war crime or crime against humanity. It was war, not war crime."[51] This did not mean to say that the killing of civilians by a private soldier while engaged in action against an armed enemy could never fall under Article 1 F(a) because "[e]ach individual case will depend on its own particular facts and circumstances" and it may be that upon examination, "such deaths were not the unfortunate and inevitable casualties of war as contended, but rather resulted from intentional, deliberate and unjustifiable acts of killing and slaughtering."

(F) The UNHCR Guidelines

It is arguable that the UNHCR Handbook and its subject specific guidelines are the starting point for judicial decision-making. This is because the UNHCR is the body charged with the task of supervising international conventions that provide for the protection of Refugees. The UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status, states[52] that Article 1F was designed to exclude "certain persons who were deemed unworthy of international Protection." This is consistent with the views of Professor James Hathaway that Article 1F represents, 'a pragmatic recognition that states are unlikely to agree to be bound by a regime that requires them to protect undesirable refugees…' even in cases where someone is genuinely at risk of

[45] Linden JA at
[46] Re MSI: Refugee appeal No. 1655/93 (23rd November 1995)
[47]
[48] Rasulli v. Canada (Minister for Citizenship & Immigration) (1996) 12 F.T.R. 263
[49] Rasulli
[50] Gonzalez v Canada (Minister for Employment and Immigration) (A-48-91) 26th May 1994
[51] Gonzalez
[52] Handbook at para 147

persecution in their country of origin.[53] It is true that the Handbook, first written in 1979 and then re-issued n 1992, is not up-to-date in all respects. It risks being antiquated. Recent relevant jurisprudence , and not least judge-made jurisprudence, is not always reflected in it. But it is far from irrelevant. The principles set out in the UNHCR Handbook have been judicially endorsed. Thus, "whilst the views of the UNHCR are not definitive as to the meaning of the Convention, it is an international body which is particularly well qualified to give guidance if one is seeking a purposive approach to Article 1."[54] Yet another general view is that it is in fact, to all intents and purposes, definitive because, "[t]here is no international court charged with the interpretation and implementation of the Convention, and for this reason the Handbook on Procedures and Criteria for Determining Refugee Status, published in 1979 by the Office of the United Nations High Commissioner for Refugees, is particularly helpful as a guide to what is the international understanding of the Convention obligations, as worked out in practice."[55] All this when the Handbook does not in any event set out to be a definitive guide for the determination of refugee claims by state parties."[56]

The views of the UNHCR need to be located in the context of the more general problem in international law of *multifarious legal authority* where the issue needs to be framed as one of '*global governance'*. What is happening in refugee law specifically is what is happening in international law more generally: problems of international law are being tackled as problems of global governance and the approach to these problems is through the avenue of multifarious legal and non-legal initiatives. Refugee law is no different in this sense. International refugee law has no international legislature, no international court, and no international enforcement body. The same applies to international law generally. This is why the recognition of a *multifarious legal authority* is so important. It is well known that the orthodox treatment of International law draws attention to a variety of different sources. These include, according to Article 38 of the Statute of the International Court of Justice, both formal and informal law, so that 'law' is described within this jurisdiction in broadly holistic terms to incorporate the international agreements of treaties and conventions, as well as international customs, and the general principles of law as recognized by civilized nations (*jus cogens*), but also more interestingly, "other" legal materials (which includes the decided cases of other courts), and "teachings of the most highly qualified publicists of various nations"[57] (which includes the writings of scholars[58] and jurists). The sources of international law

[53] (1991) at p. 214

[54] Per Sullivan J. *R v. Secretary of State For The Home Department Ex Parte Aitseguer,*

[55] Per M.R in Robinson

[56] This is clear when the UNHCR states in the concluding section of the Handbook that: "The Office of the High Commissioner is fully aware of the shortcomings inherent in a Handbook of this nature, bearing in mind that it is not possible to encompass every situation in which a person may apply for refugee status. Such situations are manifold and depend upon the infinitely varied conditions prevailing in countries of origin and on the special personal factors relating to the individual applicant" at para 221

57. Statute and Rules of Court, 1940 P.C.I.J. (ser. D) No. 1, 4th ed., at 22.

[58] In ***IH (s.72; 'Particularly Serious Crime') Eritrea [2009] UKAIT 00012*** (09March 2009), the Tribunal held that: "The relevance of academic commentaries to the work of courts in determining the content of international

now extend far and wide. Thus, the Tribunal in ***KK (article 1F(c)) (Turkey)*** [2004][59] observed that [60] that article 31(3)(b) "clearly demonstrates that resolutions of the Security Council are relevant in interpreting the phrase 'the purposes and principles of the United Nations'". They further stated, at paragraph 29, that General Assembly resolutions are, in the light of article 31(3)(a), "clearly relevant in determining the purposes and principles of the United Nations".[61] The sources of international law increasingly include arbitral decisions involving international, commercial or governmental disputes.[62] Further international law has also brought within the purview of its definition the decisions of regional legal bodies like the European Court of Justice or the Inter-American Court of Human Rights. In addition, the formal enactments of regional bodies, such as the Directives and Regulations of the European Union[63] are also now included. The list is un-ending. In this way, the official publications of the UNHCR also should be accorded due weight where appropriate.

In fact, in many respects the UNHCR has been ahead of the game. The UNHCR's post-9/11 *Addressing Security Concerns without Undermining Refugee Protection: UNHCR's Perspective* of 29 November 2001[64] is in terms that:

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law is not disputed. Mr Draycott referred us to the work of two leading academic authors in the field of refugee law – Professor Guy Goodwin-Gill of Oxford University and Professor James Hathaway (then of) Michigan Law School – in support of his submissions. In another case, in *G. v MJELR & Anor* [2010] IEHC 127 (28 April 2010) , the judgment of Mr. Justice Herbert delivered on the 28th day of April, 2010 began with the statement that, "In Camara v. the Minister for Justice, Equality and Law Reform (Unreported, High Court, 26th July, 2000) Kelly J. adopted the statement of Prof. Guy S. Goodwin-Gill, (The Refugee in International Law: Oxford University Press: 2nd Ed. 1988 p. 354) that in assessing credibility, simply considered there are just two issues: First, could the applicant's story have happened or could his or her apprehensions come to pass, on their own terms, given what we know from available country of origin information? Secondly, is the applicant personally believable?"

[59] UKAIT 0010, Mr CMG Ockleton (Deputy President), His Honour Judge Huskinson and Professor Casson,

[60] The Vienna Convention on Law Treaties (1969) as an aid to construction of article 1F(c) was based on the effect of article 31. Article 31(1) provides: "A Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Treaty and their context and in the light of its object and purposes." Article 31(3) provides: "3. *There shall be taken into account, together with the context*: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) *any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation*; (c) any relevant rules of international law applicable in the relations between the parties."

[61] At para 26

[62] These may or may not be published, drafted and adopted "restatements" of law . There may also be the joint efforts of private organizations like the American Law Institute, UNIDROIT, and the Trento Commission.

63. Formal European Union law is now so complex and covers so many subjects that it is a large and mandatory subject in virtually all European law schools (and taught in many American law schools). Is this "regional" law, international? Yes, in that it is law that governs more than one state but no, in that it is not binding on a larger "international" community–it has, so far, only "regional" force. ALINA KACZOROWSKA, EUROPEAN UNION LAW (Milton Park, Abingdon, Oxon, 2010).

[64] See, "Addressing Security Concerns without Undermining Refugee Protection
- UNHCR's perspective – at http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3c0b880e0

18. 'Where, however, there is sufficient proof that an asylum-seeker belongs to an extremist international terrorist group, such as those involved in the 11 September attacks, *voluntary membership could be presumed to amount to personal and knowing participation*, or at least acquiescence *amounting to complicity in the crimes in question*. In asylum procedures, a rebuttable presumption of individual liability could be introduced to handle such cases. Drawing up lists of international terrorist organisations at the international level would facilitate the application of this procedural device since such certification at the international level would carry considerable weight in contrast to lists established by one country alone. *The position of the individual in the organisation concerned, including the voluntariness of his or her membership, as well as the fragmentation of certain groups would, however, need to be taken into account'*.

In the years following 9/11, in ***Gurung v Secretary of State for the Home Department*** [2003][65] it was explained , with reference to this paragraph 18 (at para 110)that:- "…as the passage just cited from UNHCR highlights, even when complicity is established *the assessment under Art 1F must take into account not only evidence about the status and level of the person* in the organisation and factors such as duress and self-defence against superior orders *as well as the availability of a moral choice;* it must also encompass evidence about the nature of the organisation and the *nature of the society in which it operates.* Such evidence will need to include the extent to which the organisation is fragmented."

The UNHCR has issued regular up-dates on the application of the so-called exclusion clauses. Thus, the UNHCR Guidelines on International Protection in relation to article 1F of the Refugee Convention (4 September 2003), state (at paragraph 18) that:

> "For exclusion to be justified, individual responsibility must be established in relation to a crime covered by article 1F. Specific considerations in relation to crimes against peace and acts against the purposes and principles of the UN have been discussed above. In general, individual responsibility flows from the person having committed, or made a substantial contribution to the commission of the criminal act, in the knowledge that his or her act or omission would facilitate the criminal conduct. The individual need not physically have committed the criminal act in question. Instigating, aiding and abetting and participating in a joint criminal enterprise can suffice."

With respect to the concept embraced in the expression *"the purposes and principles of the United Nations"*, the UNHCR Guidelines state (at paragraph 17) that:

> "Given the broad, general terms of the purposes and principles of the United Nations, *the scope of this category is rather unclear and should therefore be read narrowly*.

[65] Imm AR 115, (which was a 'starred' decision of the Immigration Appeals Tribunal under its President, Collins J.)

> Indeed, it is rarely applied and, in many cases, Article 1F(a) or 1F(b) are anyway likely to apply. *Article 1F(c) is only triggered in extreme circumstances by activity which attacks the very basis of the international community's coexistence*. Such activity must have an international dimension. Crimes capable of affecting international peace, security and peaceful relations between States, as well as serious and sustained violations of human rights, would fall under this category. Given that Articles 1 and 2 of the United Nations Charter essentially set out the fundamental principles States must uphold in their mutual relations, it would appear that in principle only persons who have been in positions of power in a State or State-like entity would appear capable of committing such acts. *In cases involving a terrorist act, a correct application of Article 1F(c) involves an assessment as to the extent to which the act impinges on the international plane* – in terms of its gravity, international impact, and implications for international peace and security."

It is often said that post-9/11 everything has changed. However, as Lord Brown pointed out in ***JS (Sri Lanka)*** [66], it is to be noted that the UNHCR have consistently followed the approach adopted in paragraph 18 of their post-9/11 *Addressing Security Concerns without Undermining Refugee Protection: UNHCR's Perspective* of 29 November 2001. In fact, that position in the immediate aftermath of 9/11 of the UNHCR has been refined almost a decade later, on 8 December 2009, in a letter to the parties following the Court of Appeal's judgment in the case of ***JS (Sri Lanka),***[67] their Representative, Roland Schilling, stated (at page 5):

> "In some instances, depending on the organisation's purposes, activities, methods and circumstances, *individual responsibility for excludable acts may be presumed if membership is voluntary*, and when the members of such groups can be reasonably considered to be individually responsible for acts falling within the scope of article 1F(a). For example, *this would be the case where such activities involve indiscriminate killings or injury of the civilian population, or acts of torture*, or where the person concerned is in control of the funds of an organisation that s/he knows is dedicated to achieving its aims through such violent crimes; or if the individual concerned contributed to the commission of excludable crimes by substantially assisting the organisation to continue to function effectively in pursuance of its aims.
>
> However, *caution must be exercised* when such a presumption arises, as *due consideration needs to be given to the individual's*

[66] ***JS (Sri Lanka), R (on the application of) v Secretary of State for the Home Department*** [2009] EWCA Civ 364 (30 April 2009) at para 22

[67] ***JS (Sri Lanka), R (on the application of) v Secretary of State for the Home Department*** [2009] EWCA Civ 364 (30 April 2009)

> *involvement and role*, including his/her position; the voluntariness of his/her membership; his/her personal involvement or substantial contribution to the criminal act in the knowledge that his/her act or omission would facilitate the criminal conduct; *his/her ability to influence significantly the activities of the group or organisation*; and his/her rank and command responsibility."

Lord Brown (at para 23) observed how Mr Schilling's letter concludes:

> "The exclusion clauses are intended to deny refugee status to certain persons who otherwise qualify as refugees but who are undeserving of refugee protection on account of the severity of the acts they committed. It is important that the rigorous legal and procedural standards required of an exclusion analysis outlined above are followed carefully.
>
> UNHCR shares the legitimate concern of States to ensure that there is no impunity for those responsible for crimes falling within article 1F(a) of the 1951 Convention. *Care needs to be taken to ensure a rigorous application in line with international refugee principles whilst avoiding inappropriate exclusion of refugees*.
>
> In particular, in cases involving persons suspected of being members of, associated with, or supporting an organisation or group involved in crimes that may fall under article 1F(a), where presumption of individual responsibility for excludable acts may arise, *a thorough and individualised assessment must be undertaken in each case. Due regard needs to be given to the nature of the acts allegedly committed, the personal responsibility and involvement of the applicant* with regard to those acts, and the proportionality of return against the seriousness of the act."

(G) Other relevant law

Of course, the UNHCR is not the only (or even decisive) law in this field. The principal legal instruments in the application of Article 1F issues currently tend to be , as Lord Brown explained in ***JS (Sri Lanka)*** [68] , "the Rome Statute of the International Criminal Court ('the ICC Statute')" because this " should now be the starting point for considering whether an applicant is disqualified from asylum by virtue of article 1F(a)" . Lord Brown thought the ICC statute important "ratified as it now is by more than a hundred States and standing as now surely it does as the most comprehensive and authoritative statement of international thinking on the principles that govern liability for the most serious international crimes" and this "alone could justify the denial of asylum to those otherwise in need of it." Under the ICC statute Crimes against humanity are defined in article 7 which lists a series of criminal acts and states them to be crimes against humanity "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack". Article 8 defines war

[68] At para 8

crimes by reference to an extensive list of wrongful acts and confers jurisdiction on the Court in respect of such crimes "in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes". The requirement that the listed criminal acts are widespread (the *chapeau* requirement as it has been called) needs no further consideration here nor, indeed, is it necessary to consider the detailed criminal acts listed.[69] Article 28 is under the heading "Responsibility of commanders and other superiors", and essentially this provides that military commanders and other superiors shall be criminally responsible for crimes committed by forces under their effective command and control, or subordinates under their effective authority and control, as a result of their failure to exercise proper control over such forces or subordinates, where they knew or should have known that such crimes were being or were about to be committed and where they failed either to take all necessary and reasonable measures to prevent them or subsequently to submit them to the competent authorities for investigation and prosecution.[70]

The ICC statute is complemented by other international instruments. First, there is ***Qualification Directive (2004/83/EC)*** which provides a common standard for the application of the Refugee Convention's requirements across the EU's 27 Member States. In this instrument Article 12(2)(a) precisely mirrors article 1F(a) itself. Article 12(3), however, provides in addition that article 12(2) "*applies to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein*."[71] Second, there is the ***Statute of the International Criminal Tribunal for the former Yugoslavia*** (ICTY), articles 2-5 of which define comparatively succinctly the war crimes which it governs. Article 7 then sets out the principles for determining individual criminal responsibility. These include: (1) A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime; (2) [Article 7(2) is concerned with Heads of State or Government, or responsible government officials.]; (3) [Article 7(3) is concerned with the criminal responsibility of superiors for the criminal acts of their subordinates and is comparable, therefore, to article 28 of the ICC Statute.]; (4) the fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires."

(H) United Kingdom Jurisprudence

In considering the jurisprudence of the various countries it pays dividends to look closely at the facts of the individual cases as these demonstrate the nature of the problem that courts everywhere now face. The Courts in the UK have taken a rather more liberal approach so as to avoid the dis-applying effects of Article 1F where possible.

In ***JS (Sri Lanka)*** **[**2010] UKSC 15 the UK Supreme Court, followed the strictures of the UNHCR (above) to hold that mere membership of an organisation, that is committed to the use of violence for political ends, is not enough to bring an appellant within the

[69] At para 10.
[70] At para 13
[71] At para 14

exclusion clauses. The facts, however, are revealing. The claimant was a 28 year old Sri Lankan Tamil, who appears by all accounts to have been particularly precocious. In 1992, at the age of 10, he became a member of the Liberation Tigers of Tamil Eelam ("LTTE"). The following year he joined the LTTE's Intelligence Division. At 16 he became team leader of a nine-man combat unit. At 17 he was the leader of a 45-man platoon, on each occasion engaging in military operations against the Sri Lankan army, and on each being wounded. At 18 the claimant was appointed to lead a mobile unit responsible for transporting military equipment and other members of the Intelligence Division through jungles to a point where armed members of the Division could be sent in plain clothes to Colombo. By 2004 he had been appointed one of the chief security guards to *Pottu Amman*, the Intelligence Division's leader, whom he accompanied as a trusted aide on visits to the LTTE District Leader, *Colonel Karuna*, and other prominent LTTE members. From early 2004 to September 2006 he served as second in command of the combat unit of the Intelligence Division. In October 2006 he was sent incognito to Colombo to await further instructions, but upon his presence in Colombo thereafter being discovered, he left the country, arriving in 7 February 2007 in the UK and claiming asylum. His application was rejected based on grounds of the Tribunal decision in ***Gurung*** [2002] UKIAT 04870 (starred) that voluntary membership of an extremist group could be presumed to amount to personal and knowing participation, or at least acquiescence, amounting to complicity in the crimes in question. The problem lies in formulating what more is needed to bring the person within article 1F(a). How close does the person need to get to these activities for the protection of the Convention not to apply to him?

It went onto say that the Tribunal's mistake, was to say that if the organisation was or has become one whose aims, methods and activities are predominantly terrorist in character "*very little more will be necessary*": It concluded that the words "*serious reasons of considering*" are, of course, taken from article 1F itself, but they do import "a higher test for exclusion."[72] The words *"in a significant way*" and "*will in fact further that purpose*" provide the key to the exercise.[73] Those are the essential elements that must be satisfied to fix the applicant with personal responsibility. The words "*made a substantial contribution*" were used by the German Administrative Court, and they are to the same effect. The focus is on the facts of each case and not on any presumption that may be invited by mere membership. Lord Brown also distinguished military actions from terrorist activities. It could not be concluded, Lord Brown stated, that LTTE was "predominantly terrorist in character". In fact, military action against

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[72] Lord Brown (at para 39) explained that, " 'serious reasons for considering' obviously imports a higher test for exclusion than would, say, an expression like 'reasonable grounds for suspecting'. 'Considering' approximates rather to "believing" than to "suspecting". I am inclined to agree with what Sedley LJ said in *Yasser Al-Sirri v Secretary of State for the Home Department* [2009] EWCA Civ 222, para 33: "[the phrase used] sets a standard above mere suspicion. Beyond this, it is a mistake to try to paraphrase the straightforward language of the Convention: it has to be treated as meaning what it says."

[73] As Lord Brown concluded, "Put simply, I would hold an accused disqualified under article 1F if there are serious reasons for considering him voluntarily to have contributed in a significant way to the organisation's ability to pursue its purpose of committing war crimes, aware that his assistance will in fact further that purpose." (at para 38) Also see Lord Hope (at paras 43-45) and Lord Kerr (at para 56-57).

government forces is not to be regarded as a war crime.[74] Lord Brown did not, however, address the definition of "terrorist" as there was no need for His Lordship to do so.

This judgment is consistent with the judgment of Stanley Burnton LJ, with which Waller LJ and Dyson LJ agreed, in ***KJ (Sri Lanka) v Secretary of State for the Home Department*** [2009] EWCA Civ 292, which involved the conduct of a Tamil in Sri Lanka, and where the Court held that, "The application of Article 1F(c) will be straightforward in the case of an active member of organisation that promotes its objects only by acts of terrorism. There will almost certainly be serious reasons for considering that he has been guilty of acts contrary to the purposes and principles of the United Nations."[75] But that, "the LTTE, during the period when KJ was a member, was not such an organization" because, " It pursued its political ends in part by acts of terrorism and in part by military action directed against the armed forces of the government of Sri Lanka" so that, "The application of Article 1F(c) is less straightforward in such a case" because "A person may join such an organisation, because he agrees with its political objectives, and be willing to participate in its military actions, but may not agree with and may not be willing to participate in its terrorist activities." The Court was firmly of the view that, "…a foot soldier in such an organisation, who has not participated in acts of terrorism, and in particular has not participated in the murder or attempted murder of civilians, has not been guilty of acts contrary to the purposes and principles of the United Nations."[76] In short, " the Tribunal failed to focus on the crucial question: were there serious reasons for considering that he had personally been guilty of acts contrary to the purposes and principles of the United Nations? . . ."[77]

In ***SS v SSHD***[78], in July 2010, the Special Immigration Appeals Commission ("SIAC") Mitting J presiding, a decision after that of the Tribunal in the present case. A Libyan national claimed asylum and asylum was refused on the ground that the applicant was an active member of the Libyan Islamic Fighting Group ("LIFG"). SIAC cited UN Security Council Resolutions, the domestic legislation (no point was taken on the temporal effect of section 54), and Council Directive 2004/83/EC of 29 April 2004. It observed that, "[t]he fundamental definition of terrorism …is the use or threat of action designed to influence a government or to intimidate a population by serious acts of violence and some acts of economic disruption."[79] It rejected the argument that terrorism must have an international character or aspect to bring the exemption of Article 1F(c) into existence because , based on Security Council Resolution 1624, "it is the duty of states to deny safe haven to those who have committed a terrorist act. The assassination of a political leader by a national of the same state pursuant to a plot entirely organised and financed within that state can be just as much capable of disturbing the peace of the word as an identical attack financed from abroad. There is no rational basis for distinguishing between the two."[80] Such an approach is not very dissimilar to ***R v F*** [2007] QB 960, where the Court of Appeal Criminal Division, Sir Igor Judge Presiding, considered whether conduct targeted at removing an allegedly tyrannical regime was

[74] At para 27.
[75] ***KJ (Sri Lanka) v Secretary of State for the Home Department*** [2009] EWCA Civ 292, at para 37
[76] At para 38
[77] At para 39
[78] ***SS v SSHD*** (SC/56/2009, 30 July 2010),
[79] At para 15
[80] At para 21.

terrorism within the meaning of section 1 of the Terrorism Act 2000. It was held that the ambit of the Act's protection of the public was not limited to states with governments of any particular type and there was no reason to deprive the inhabitants of states not governed by democratic principles of the protection afforded by the Act. Sir Igor Judge stated[81] that: ". . . We can see no reason why, given the random impact of terrorist activities, the citizens of Libya should not be protected from such activities by those resident in this country in the same way as the inhabitants of Belgium or the Netherlands or the Republic of Ireland." This is because, "Terrorism is terrorism, whatever the motives of the perpetrators."[82]

In ***DD (Afghanistan) [2010]*** EWCA Civ 1407 the Court of Appeal held that an Asylum and Immigration Tribunal made material errors of law when considering if an asylum applicant had disentitled himself to protection under the Convention relating to the Status of Refugees 1951 (United Nations) Art.1F (c) by reason of conduct in Afghanistan amounting to terrorism. It had failed to follow the approach in ***R (on the application of JS (Sri Lanka))*** v Secretary of State for the Home Department (2010) UKSC 15, (2010) 2 WLR 766 and to consider whether the conduct involved *'acts contrary to the United Nations' purposes and principles*.' This case is awaiting a Hearing in the UK Supreme Court now. The claimant alleged to have a history of involvement with Jamiat-e-Islami, the Taliban and Hizb-e-Islami, and said he was in fear of his life if returned to Afghanistan because elements in the Government there sought vengeance on his family.[83] His evidence was that, "*he reported directly to Kashmir Khan and was involved in fighting. Hikmatyir commanded Kashmir Khan. He fought people that Kashmir Khan called the enemy, foreigners or Afghans. He had ten to fifteen people, and there were two Arabs and one Afghan training them*."[84]The single-member Tribunal at first instance found on 27th October 2008, that there were substantial grounds for believing that, if returned, he would face a real risk of being exposed to serious harm amounting to persecution[85] in breach of the Refugee Convention and contrary to article 3 of the European Convention on Human Rights ("ECHR"), but this was reversed on appeal, when under section 54[86] of the ***Immigration, Asylum and Nationality Act 2006*** ('the 2006 Act') – a provision which Lord justice Pill in the Court of Appeal described as one *"which may well have been enacted in response to Security Council resolutions about*

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[81] At para 26

[82] At para 27, Sir Igor Judge explained that, "What is striking about the language of s1, read as a whole, is its breadth. It does not specify that the ambit of its protection is limited to countries abroad with governments of any particular type or possessed of what we, with our fortunate traditions, would regard as the desirable characteristics of representative government. . . . Terrorism is terrorism, whatever the motives of the perpetrators."

[83] At para 2

[84] Pill LJ (at para 22) referring to the determination of the first Tribunal.

[85] See the determination of Pill LJ at para 27

[86] It provides: "(1) In the construction and application of Article 1F(c) of the Refugee Convention the reference to *acts contrary to the purposes and principles of the United Nations* shall be taken as including, in particular- (a) acts of *committing, preparing or instigating terrorism* (whether or not the acts amount to an actual *or inchoate offence*), and (b) acts of *encouraging or inducing others to commit, prepare or instigate terrorism* (whether or not the acts amount to an actual or inchoate offence).(2) In this section- 'the Refugee Convention' means the Convention relating to the Status of Refugees done at Geneva on 28th July 1951, and 'terrorism' has the meaning given by section 1 of the Terrorism Act 2000 (c 11)."

terrorism"[87] – it was held that the claimant was excluded from the protection provisions of the Refugee Convention because, in the words of the appeal Tribunal[88] :-

> "151. Having regard to the combined lack of specificity of evidence of the Appellant's [now the respondent] conduct with Hizb-e-Islami and the highly reasonable likelihood, given the chronology, that his involvement with Hizb-e-Islami was at its end stage after September 2006 and the coming into effect of Section 54, I find in sum there are not serious grounds for considering he committed a barred act(s). I find Article 1F(c) does not apply."[89]

The Court adopted a nuanced approach the issues before it. It held that, "Serious violence against members of the government forces would normally be designed to influence the government and be used for the purpose of advancing a political, religious or ideological cause, within the meaning of those words in section 1 of the 2000 Act. On the other hand, it is difficult to hold that every act of violence in a civil war, the aim of which will usually be to overthrow a legitimate government, is an act of terrorism within the 2000 Act."[90] It also held that, "fighting against UN mandated forces would appear to be a clear example of action contrary to purposes and principles of the United Nations, acting in accordance with its Charter. Military actions mandated by decision of the UN Security Council are conducted on behalf of the entire international community. The expressed purpose of the UN is to establish peace and security in the areas in which ISAF forces are mandated to operate, in order to achieve the goals set for UN involvement in Afghanistan. It does not follow that violence against anyone bearing UN colours anywhere is necessarily action contrary to the purposes and principles of the United Nations. Situations will differ and require specific analysis."[91] The Court gave judgment in favour of the claimant because "there were material errors of law in the Tribunal's findings in the failure to approach" the claimant's " conduct and participation in events" and " in failing to go on to consider whether [his] conduct involved acts contrary to the purposes and principles of the United Nations."[92]

(I) Canadian Jurisprudence

Similar cases have arisen in Canada. However, the Canadian courts would appear to have taken a rather more stricter approach than the UK courts to exclusion. In Canada Article 1F is incorporated into Canada's ***Immigration and Refugee Protection Act***. . Thus, Section 98 reads:

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[87] At para 13
[88] Quoted by Pill LJ at para 17
[89] This was para151, and at para 150 the Court said: "Section 54 of the Immigration, Asylum and Nationality Act 2006 came into effect on 31 August 2006. It contained no transitional provisions. It appears to have effected a substantive change of law. I consider, as a matter of natural justice, therefore, that it applies only to acts occurring after it came into force, that is, from September 2006."
[90] At para 55
[91] At para 65
[92] At para 67

> "A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection."

In ***Ezokola***[93], the Federal Court considered the application of 1F(a) to a refugee claimant who had not personally participated in crimes against humanity or war crimes, but who, as a diplomat at the UN, represented a government that had committed such crimes. The Refugee Protection Division (RPD) of the Immigration and Refugee Board found that the claimant was excluded under Article 1F(a). The Court allowed an application for judicial review, stating among other things that: (i) in order for 1F(a) to apply, there should be a personal connection between the claimant and the alleged crimes; (ii) this approach, which considers complicity by association to the extent that there is a certain degree of personal participation by the claimant, is recommended by the UN High Commissioner for Refugees, the Supreme Court of the UK in ***JS (Sri Lanka) v. Secretary of State for the Home Department***, and is adopted in the *Statute of Rome*; and (iii) complicity by association must be interpreted as a presumption based on a set of facts that supports the conclusion that there are serious reasons to consider that the claimant personally participated, personally conspired, or was personally involved in the execution of the alleged crime. Yet, what is interesting is that the Court certified this question: for the purposes of exclusion under Article 1F(a) of the *Convention*, is complicity by association in crimes against humanity established by the fact that a claimant was an employee of a government that committed such crimes, coupled with the fact that the claimant had knowledge of these crimes and did not denounce them, where there is no evidence that he was personally involved, directly or indirectly, in the crimes? The decision is currently under appeal.

With respect to Article 1F(b) and the reference to a person who "has committed a *serious* non-political crime outside the country of refuge prior to his admission to that country as a refugee" , the meaning of 'serious' was examined in ***Jayasekara,***[94] by the Federal Court of Appeal when it held that: (i) serving a sentence for a serious crime prior to coming to Canada does not allow one to avoid the application of Article 1F(b), and that if the length or completion of a sentence is to be considered, it should not be considered in isolation; (ii) while regard should be had to international standards*, the perspective of the receiving state cannot be ignored in determining the seriousness of the crime*; (iii) a non-political crime is presumed to be serious if the Canadian equivalent carries a maximum sentence of 10 years or more; (iv) the interpretation of the exclusion clause, as regards the seriousness of a crime, requires an evaluation of (a) the elements of the crime, (b) the mode of prosecution, (c) the penalty prescribed, (d) the facts, and (e) the mitigating and aggravating circumstances underlying the conviction; (5) the standard of proof is "serious reasons for considering," which is less than the balance of probabilities; and (6) there is no balancing of the nature and severity of the crimes against the alleged risk of persecution – that is, there is no balancing of exclusion with inclusion. It is significant to note that the *Court previously concluded that an individual could be held responsible for acts committed by others on account of his close association with those others.*[95]

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[93] *Ezokola, Rachidu Ekanza v. M.C.I.* (F.C., no. IMM-5174-09), Mainville, June 17, 2010; 2010 FC 662.
[94] *Jayasekara, Ruwan Chandima v. M.C.I.* (F.C.A., no. A-140-08), Létourneau, Sharlow, Pelletier, December 17, 2008; 2008 FCA 404.
[95] *Zrig* v. *Canada (Minister of Citizenship and Immigration*), [2003] 3 F.C. 761 (C.A.)

In relation to Article 1F(c), in ***Islam***,[96] the Federal Court considered the case of a claimant who was active in a political party which, the RPD concluded, committed acts contrary to the purposes and principles of the United Nations. The claimant was excluded by the RPD because of his complicity with that party. The claimant asked the Court for a narrow definition of the notion of '*acts contrary to the purposes and principles of the United Nations'* and submitted that only members of governments may be held responsible. The Court dismissed his application for judicial review, stating that a person who knowingly and willingly associates with an organization guilty of acts contrary to the purposes and principles of the United Nations becomes an accomplice and shares the responsibility. Personal involvement in specific infringements of human rights is not necessary. A person who did not exercise power in a state may nonetheless be held responsible for infringement of human rights. The right to take part in the political life of a country does not include the right to intimidate or use violence against political opponents.

(J) The Australian Jurisprudence

Australian jurisprudence in recent years has also been rather more liberal like the UK jurisprudence. The case of the ***Minister for Immigration & Multicultural Affairs v Singh*** considered both the meaning of "*serious non-political crime*" and the meaning of phrase "*prior to his admission to that country as a refugee*." The claimant, an Indian citizen of Sikh ethnicity, had in India been involved with the Khalistan Liberation Force (the KLF), an organisation that sought the creation of an independent Sikh state and that used violence to achieve this objective. The claimant arrived in Australia and applied for a protection visa under the Migration Act 1958 (Cth). The claimant's role in the KLF was that he had collected information for the KLF. The KLF itself used to kill people and the claimant had assisted in the provision of weapons that were used to carry out acts of violence. The claimant had also, in the words of Callinan J. (dissenting) in the High Court, been engaged " with the murder of the police officer. It was the most violent of crimes" and "crime was committed out of a strong, if not exclusively retributive motivation."[97]A delegate of the Minister for Immigration and Multicultural Affairs held that the claimant was not entitled to a protection visa because he was excluded from the benefit of the Convention by reason of Art 1F(b).[98] The decision of the delegate was confirmed on review by the Administrative Appeals Tribunal (the tribunal). The claimant applied to the Federal Court for judicial review of the tribunal's decision[99], but the single judge there dismissed the application, whereby the Full Court of the Federal Court allowed an appeal by Singh on the ground that the tribunal had erred in its approach to the meaning of Art 1F(b). Thereafter, the minister was granted special leave to appeal to the High Court. The High Court had to consider the question whether Art 1F(b) could have no application to the claimant in the absence of a finding that he was a refugee, and whether the tribunal had erred in its approach to the

[96] *Islam, Khokon v. M.C.I.* (F.C., no. IMM-2777-09), Pinard, January 22, 2010; 2010 FC 71.
[97] Callinan J (dissenting) at para 167
[98] Article 1F(b). of the Convention relating to the Status of Refugees 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".

[99] The application for Judicial review is by virtue of s 44 of the Administrative Appeals Tribunal Act 1975 (Cth)

meaning of Art 1F(b). The majority, (per Gleeson CJ, Gaudron and Kirby JJ) in dismissing the Minister's appeal held that the contention that Art 1F(b) could have no application to the claimant in the absence of a finding that he was a refugee failed, and that the tribunal erred in its approach to the meaning of Art 1F(b) of the Convention (with (McHugh and Callinan JJ dissenting on both issues).

It is salutary to consider the grounds of appeal in full, which were that, (1) The Full Court erred in holding that the tribunal was required to look at the circumstances of the crime so as to determine whether it is an incident of a political struggle before considering whether there are other characteristics of the crime which make it a "non-political crime" within Art 1F of the Refugee Convention and Protocol notwithstanding the existence of any political struggle. The Full Court should have held that it is not an error of law for the tribunal to find that a particular crime is of a kind that is so atrocious that it can bear no sufficient proportionality to political objectives for it to be capable of characterisation as a "political crime" irrespective of the existence of a political struggle. (2) The Full Court erred in failing to find that: (a) of its nature, the object of revenge could not be an "object of overthrowing or subverting or changing the government of a state or inducing it to change its policies" and, therefore, could not itself be characterised as "political"; (b) when a serious crime is done for revenge *and* for the purpose of overthrowing or subverting or changing the government of a state or inducing it to change its policies, the crime is done with mixed political and non-political motives; (c) when a serious crime involves a non-political motive it may be characterised as a non-political crime for the purposes of Art 1F(b); and (d) therefore, once the tribunal had found that the murder of the police officer was affected by a revenge motive it was open to it to characterise the crime as a "non-political crime" and to affirm the decision under review.

The Majority's reasoning, which also considered the British case of ***T v Home Secretary***[100] was as follows. First, it was convenient, and appropriate, to consider the application of Art 1F before addressing any other issues that might have arisen concerning the claimant's refugee status. Article 1F is expressed as an exception. If it is satisfied, the provisions of the Convention are said not to apply to the person in question. Second, the composite phrase "outside the country of refuge prior to his admission "is apt to include a country in which the person concerned seeks refuge" but the crime must have been committed "prior to . . . admission to that country as a refugee". Third, the very fact that the tribunal found it unnecessary to form a view as to the political nature of the KLF, or as to whether it was a terrorist organisation, demonstrates that it was proceeding upon a view that there is a necessary antithesis between violent retribution and political action. That was an error of law. Fourth, the ultimate conclusion of the tribunal may have been correct, but, as the Full Court pointed out, the process of reasoning is flawed, because it is affected by the errors that have already been found to exist in relation to the reasoning on the killing of the police officer; it commences by carrying that reasoning over into this context; there is no apparent consideration of the nature of the "targets" of the weapons and explosives; and whether they were civilians or government agents could be material. Nor was there any examination of the objectives claimed to be political, or their relationship to the criminal acts.

[100] [1996] AC 742; [1996] 2 All ER 865,

The disinclination of the tribunal to examine the political objectives of the KLF, and to consider the submission on behalf of the minister that it was a terrorist organisation, might have favoured one side or the other, but these were matters to be taken into account in order to evaluate the competing contentions. Fifth, it follows that the tribunal erred in the present matter by not determining whether, in relation to the killing of the police officer in Ludhiana, Mr Singh had a significant political purpose. Such a purpose was not negatived by the element of revenge. As the Chief Justice has pointed out in his reasons for judgment in this matter, revenge is likely to be an aspect of many political crimes. Moreover, and as the Chief Justice has also pointed out, it was not negatived by looking simply to the main political objective of the KLF, namely, the establishment of an independent state. It was necessary for the tribunal to consider whether the purpose of the crime was the achieving of one of the other KLF objectives, including, for example, the protection of Sikh people from violence or torture. Sixth, with respect to 'serious non-political crime' the court concluded that the tribunal applied an over-simplistic view of the characterisation of the crimes which were before it. It failed to characterise the crimes by incorrectly regarding the classification of the motives of the respondent as wholly determinative of the characterisation of the crime as "political" or "non-political". The tribunal also failed to consider whether the "targets" of the weapons, were purely political targets or indiscriminate targets necessarily involving innocent civilians.

The case of ***SRYY v. Minister for Immigration & Multicultural & Indigenous Affairs*** [2005] FCAFC 42, before the Federal Court of Australia also concerned a refusal of asylum status on grounds of reasonable suspicion that applicant engaged in war crimes and crimes against humanity, and the question whether the Administrative Appeals Tribunal ('AAT') should have defined war crimes and crimes against humanity by reference to definitions in Rome Statute of International Criminal Court, and whether it should have taken into account defence of obedience to superior orders contained in Rome, before concluding that the applicant was excluded under the Convention on the Status of Refugees Art 1F(a) .

The appellant, a Sri Lankan national of the majority Singhalese ethnicity, claimed to have a well-founded fear of persecution in Sri Lanka by members of the *Liberation Tigers of Tamil Eelan* (LTTE), when he arrived in Australia in November 2000, His claim was based on the fact that in the course of his service in the Sri Lankan military, he had interrogated Tamil citizens suspected of involvement with LTTE. He had used violence and threats as means of extracting information. His application for a protection visa was refused by the Minister for Immigration and Multicultural and Indigenous Affairs ('MIMIA') on the grounds that the Convention on the Status of Refugees (Refugee Convention) did not apply to the appellant by reason of Art 1F(a). because the appellant was an individual seriously believed to have 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".

The appellant sought review before the Administrative Appeals Tribunal (the AAT)[101] which affirmed the government's decision, by applying the definitions of crimes against

[101] This is pursuant to s 44 of the Administrative Appeals Tribunal Act 1975 (Cth) (the AAT Act).

humanity and war crimes contained in Arts 7 and 8 respectively of the ***Rome Statute of the International Criminal Court*** ('Rome Statute'). The AAT held that this was a relevant international instrument for the purposes of Art 1F(a) and provided the most contemporary authoritative definitions of war crimes and crimes against humanity. The appellant appealed against the AAT's decision before the Federal Court of Australia.[102] The primary judge found no jurisdictional error.

But when on appeal to the Full Court of the Federal Court of Australia, the appellant contended that the AAT had fallen into jurisdictional error by applying the definitions of crimes against humanity and war crimes contained in Arts 7 and 8 of the Rome Statute, and had failed also to apply the defence of obedience to superior orders contained in Art 33 of the Rome Statute, his appeal was allowed, with the matter being remitted back to the AAT for re-determination according to law.

The Full Court of the Federal Court of Australia gave the following decision. First, that (i) Article 1F(a) of the Refugee Convention was intended to prevent individuals who had engaged in war crimes or crimes against humanity from benefiting from the protection of the Refugee Convention. However, this requires that the alleged conduct be defined as criminal conduct under international treaty or customary law *at the time* that the applicant for refugee status engaged in the conduct. This is because the relevant phrase was that, "'*there must be serious reasons for considering'* that the person in question has *'committed'* a relevant international crime."[103] It must be defined as criminal in a binding or non-binding international instrument at the time that the applicant seeks refugee status. However, although the relevant international instrument need not have been drawn up at time that the applicant for refugee status engaged in the alleged criminal conduct, it must reflect the state of international law at the time of the conduct.[104] This conclusion followed inexorably from, "[t]he the circumstances of the drafting of Art 1F(a) suggest that it was not intended to impose a requirement that the instrument relied on must exist at the time of the conduct in question. The conference debates make it clear that Art 1F(a) was intended to exclude persons involved in crimes under international law during the Second World War from the protection offered by the Refugees Convention, notwithstanding that the 'international instrument' defining

[102] This was pursuant to s 44 of the AAT Act

[103] In reliance upon the earlier judgment of Sackville J. in ***Ovcharuk v Minister for Immigration and Multicultural Affairs*** (1998) 88 FCR 173; 51 ALD 549; 158 ALR 289, the Court (at para 61) explained "[t]here is a textual difficulty with the minister's construction. It is implicit in the phrase 'there must be serious reasons for considering' that the person in question has 'committed' a relevant international crime, that the conduct in question constituted a crime at the time that conduct was engaged in."

[104] Thus the Court observed (at para 63) "It does not follow, however, that an instrument defining the crime must be in existence at the time the crime is allegedly committed. As was observed by the ***Nuremberg IMT (in International Military Tribunal (Nuremberg) Judgement and Sentences*** (1947) 41 AJIL 172 at 219):

'The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing.'

such crimes, namely the London Charter, was drawn up after the commission of the crimes in question."

Secondly, it is possible that a number of international instruments may come within the ambit of Art 1F(a) of the Refugee Convention. In that event, it is within the discretion of the decision-maker to determine which instrument is most appropriate to apply in the particular case. On the other hand, the drafting history of Art 1F(a) suggests that the most appropriate instrument will be that which reflects the most recent developments in international law up to the time of the alleged criminal conduct, so that it was advisable that "resort be made to a definition in an instrument that is contemporary in the sense that it reflects international developments up to the date of the alleged crime, rather than to definitions in earlier instruments that may have become antiquated."[105] However, depending on the circumstances, "if the instrument in question satisfies the criterion in Art 1F(a) it will be open to a decision-maker to select the instrument that is appropriate to the circumstances of the case…"[106]

Thirdly, that in this respect the AAT did not err in referring to the definitions of crimes against humanity and war crimes in Arts 7 and 8 of the Rome Statute for the purposes of Art 1F(a) of the Refugee Convention. This is because, "although the Rome Statute was not 'in force' during late 1999 and early 2000 when the appellant was stationed at Jaffna, the statute had been "drawn up" and adopted by a substantial majority in attendance at the ***UN Diplomatic Conference in Plenipotenaries*** on 17 July 199, which pre-dates the conduct in question", and that this logic was consistent with "the reference in Art 1F(a) to 'international instruments drawn up ...' which clearly embraces the Rome Statute."[107] Its importance lay in the fact that it provided definitions for crimes already crystalised into international law. Therefore, as an international

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[105] At para 72

[106] At para 73, where the Court further explained that, "In some instances the selection may be obvious. For example, the London Charter would plainly be an appropriateinstrument for international crimes committed in Europe during the Second World War. Also, the statutes for the ICTY and ICTR would plainly be appropriate instruments for international crimes committed in the course of the conflicts the subject of those statutes. However, as explained above, even if the crimes of the kind alleged (for example, international crimes in the internal armed conflict in Sri Lanka) have not been the subject of a specific instrument the general criterion in Art 1F(a) can nonetheless apply."

[107] At para 66, where the Court went onto reason that, "In the context of international law the term "instrument" is commonly used to refer to non-binding documents such as general assembly resolutions, draft instruments prepared by the International Law Commission, or non-binding declarations made by groups of states (such as the UDHR) and treaties not yet in force. Recourse to such 220 ALR 394 SRYYY v MIMIA (Full Court) 415 non-binding instruments by international writers and courts in the context of public international law disputes is common and there is no reason to assume that Art 1F(a) intended to exclude such instruments. This approach is supported by guidelines published by the UNHCR, which have made reference to a number of non-binding instruments as being relevant to Art 1F(a) determinations, including: General Assembly Resolutions 3(I) of 13 February 1946 and 95(I) of 11 December 1946, the Draft Code of Crimes, the ILC Principles, and the draft form of the Rome Statute prior to its adoption in 1998: see UNHCR Handbook Annex VI; UNHCR Standing Committee, Note on the Exclusion Clauses, EC/47/SC/CRP.29 at [8] and [9]; and UNHCR, The Exclusion Clauses: Guidelines on their Application, December 1995, at [19]–[21] which refers at [20] to "non-binding but authoritative sources". The writings of leading commentators in the area of refugee law take a similar approach: see for example J C Hathaway, The Law of Refugee Status, Butterworths, Toronto, 1991, p 217 (The Law of Refugee Status). Accordingly, we are satisfied that the fact that the Rome Statute was not in force when the crimes in question were allegedly committed did not preclude the AAT from having recourse to it."

instrument drawn up prior to the occurrence of the appellant's alleged criminal conduct, and a statement of international criminal law contemporary to that time, it was a correct and appropriate choice of international instrument for the AAT to apply for the purposes of Art 1F(a). Thus, given that, "the Rome Statute was drawn up to provide for the crimes it defined and purported to define those crimes as crimes that had crystallised into crimes in international law as at the date of the statute.."[108] its import could not be overlooked. Therefore, "the definitions of crimes against humanity and war crimes contained in Arts 7 and 8(2)(c) of the Rome Statute respectively were appropriate definitions for the AAT to apply and that the AAT did not err in law in applying those definitions."[109]

Fourth, the AAT did, however, on the other hand, fall into jurisdictional error by incorrectly applying the definition of crimes against humanity in Art 7 of the Rome Statute. In determining whether there were serious reasons to believe that the appellant had committed crimes against humanity as defined in Art 7, "[t]he AAT did not consider whether *the appellant's conduct* took place "as part of a widespread or systematic attack directed against any civilian population" given that the, "the definition of a war crime in Art 8 contains no requirement that there be evidence of a 'widespread or systematic attack'."[110] Thus, the AAT neglected to consider an essential element of the offence, being that the alleged criminal conduct by the person concerned should form part of a widespread or systematic attack on a civilian population. The appellant himself had not been involved in such an attack. The AAT decided that the appellant had committed war crimes within the meaning of Art 8 by unnecessarily taking into account the fact that the Sri Lankan military was engaged in systematic persecution of a civilian group. The fact that Articles 8(2)(d) and (f) of the Rome Statute both employ the language of "internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature" to denote acts of violence that occur in the course of armed conflicts not of an international character that are incapable, of themselves, of amounting to war crimes, however, "have nothing whatsoever to do with crimes against humanity."[111] The AAT erred in its analysis of the elements of the offence under Art 7 and the distinction between offences under Arts 7 and 8. The Court was uncompromisingly clear:-

> "These matters cannot be treated in a loose manner. When considering whether there is evidence which suggests that a person has committed a particular offence, it is essential that the elements of that offence are correctly identified and that each of them is properly addressed. Plainly, a serious issue was raised by the evidence as to whether the appellant's conduct in relation to interrogating civilian detainees, in order to obtain information they had about LTTE members, was conduct that was '*part of a widespread and systematic attack directed against any civilian population'*. In our view that issue was required to be, but was not, addressed by the AAT."[112]

[108] At para 75

[109] At para 76
[110] At para 107
[111] At para 108
[112] At para 109.

Fifth, in seeking to gauge the true extent of the appellant's culpability, the AAT also fell into jurisdictional error, according to the Court, by failing to consider whether the appellant was relieved of criminal responsibility for war crimes by reason of the defence of obedience to superior orders, contained in Art 33 of the Rome Statute. Article 1F(a) of the Refugee Convention requires that the convention should not apply to individuals seriously considered to have engaged in criminal conduct. An individual cannot be seriously considered to have engaged in criminal conduct if there is available to that person a defence which could relieve him or her of criminal responsibility. The AAT should have taken the defence in Art 33 of the Rome Statute into account when determining the appellant's responsibility for war crimes within the meaning of Art 8. As the Court explained (at para 127) :

> "Article 1F(a) refers to serious reasons for considering that the relevant person "has committed a crime". We are unable to accept the proposition that a person may be said to have committed a crime when that person has a defence which, if upheld, will absolve or relieve that person from criminal responsibility. Professor Cassese, in *'Justifications and Excuses in International Criminal Law'* in The Rome Statute: A Commentary at p 951 discusses the distinction between defences described as justifications and those described as excuses in most national law systems, and observes (at p 954) that it is indisputable that "until now no practical distinction has been made between the two classes of defences" in respect of criminal responsibility for the acts in question. The learned author then refers specifically to the Rome Statute and explains (at p 954–5) why the defences in Arts 31–33 exclude criminal responsibility. We do not accept that it is open to a decision-maker when considering whether there are "serious reasons" for thinking that a person has committed a particular crime under the Rome Statute to ignore the availability of a defence under that Statute if it is relied upon by that person."

The case of ***SZCWP v Minister for Immigration & Multicultural & Indigenous Affairs [2006] FCAFC 9*** again faced the question of a Nepalese citizen who was associated with Maoist insurgents, and was then held to be excluded by the Australian Government from the application of the Refugee Convention on the basis of "serious reasons for considering" he had committed "war crimes and crimes against humanity" , and whether the Administrative Appeals Tribunal had then erred in law in determining that question. The Tribunal had applied the definitions in Rome Statute of the International Criminal Court, and the question was whether Tribunal failed to have regard to particular requirements of definitions. The basic facts were, as the Deputy President recounted, that 'Nepal is a nascent democracy, having been ruled as a kingdom until about 1992. The country then became a democracy. The applicant belongs to the privileged, educated class, but at university he was exposed to the Maoist ideas. He became concerned by the corruption and exploitation of the poor, especially by wealthy rural landowners."[113] As the Deputy President further noted with respect to the

[113] At para 9

applicant's role, after he joined the Maoists, "he later followed the faction that advocated violence as a method to achieve the goals of the group (when he felt that the election system could not work due to entrenched corruption)" and that he *"had been involved in some violence, however he has never killed a person that he knows of*" and *" was not involved directly in the fighting during the attack on the police station*" because *"he stayed in reserve in case he was needed to fight in the village and to provide rear defence."* His function was that he "g*athered information which enabled the attack on the police station in the village in which a number of police and Maoists were killed"* and that he " supported the use of violent means to overthrow the government and to install a Maoist government. He was aware of the killing of civilian landowners, wealthy people and politicians by the Maoist group and supported such activities when necessary as a means of forcing change.'[114]

The Federal Court of Australia (of the New South Wales District Registry) (Wilcox J and Downes J with which Gyles J concurred in a separate opinion), hearing an appeal from a decision of a Deputy President of the Administrative Appeals Tribunal ('the AAT'), observed that, "In addressing the question whether the applicant was a person who fell within Article 1F of the Refugees' Convention, it is necessary and appropriate to read his evidence against the background of news reports and 'country information' concerning occurrences in Nepal and, in particular, the activities of the Maoist group. *However, Article 1F requires a judgment about the applicant himself; that is, whether there are serious reasons for considering that he himself has done particular things. It would be a serious error to determine the question adversely to the applicant by reference only to the conduct of the group as a whole or other members of it. For this reason, it is necessary to set out, and to carefully analyse, such evidence as there is concerning the actions of the applicant himself.*"[115] This was a case, however, where "[t]he only evidence before the AAT as to the applicant's role in the Maoist group's activities was that contained in records of interviews with him."[116] The applicant admitted that, " (i) over a period of about four years, he was a member of a Nepalese Maoist group that advocated the use of force to effect social change; (ii) the Maoist group was inspired by a Communist, anti-democratic ideology; in particular, the group was concerned to assist the rural poor against perceived oppression by wealthy landlords; (iii) the Maoist group was prepared to kill people who stood in the way of achievement of their objectives, including landlords who rejected their demands and government representatives such as police; (iv) the applicant advocated to others the position of this group; (v) during a period of some months, between the time he left university and his departure from Nepal, the applicant engaged in non-violent activities on behalf of the group, including representing it in discussions (no doubt intimidatory discussions) with landlords; (vi) although the activities mentioned in (iv) and (v) did not themselves involve the use of violence, the applicant undertook them with knowledge of the group's readiness to use violence (including murder), if that was needed to achieve its goals; (vii) on about six occasions, after he left university, the applicant participated in small-scale group clashes with landlords and police. Although he used a khukura knife once or twice, and has fired a rifle in the air, he did not kill anyone in any of these clashes; the applicant was never uniformed or a frontline soldier."[117]

[114] At para 10
[115] At para 13
[116] At para 14.
[117] At para 20

(viii) immediately prior to his departure from Nepal, the applicant was involved in an attack by the Maoist group on the police station in the village of Mahaghat in the Rukum district. He did not participate in the fighting but he carried out reconnaissance in preparation for the attack and was a member of a second force that was held in the jungle in reserve, against the possibility of being needed to supplement the 300 strong 'first force' that had been sent into the village to capture the police station.

The issue before the Court was whether the applicant had committed war crimes and crimes against humanity. It was argued on his behalf that, as a matter of law, the admitted conduct of the applicant is not capable of being regarded as falling within either of these categories of conduct, as they are defined in the Rome Statute.

The Court first considered whether the claimant had committed a 'crime against humanity' under the Rome Statute. It concluded that he had not because the Court held that Article 7.2(a) defines the term 'attack directed against any civilian population' as meaning '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'. The word 'organizational' is not defined.[118] It explained how Article 9 of the Rome Statute provides for the adoption, by a two-thirds majority in the Assembly of State Parties, of a document called 'Elements of Crimes'. The document may be amended from time to time and is to be consistent with the Rome Statute.[119] It then drew attention to the fact that, An Elements of Crimes document ('the EoC') was adopted by the Assembly of State Parties at a meeting in New York in September 2002. It is useful immediately to note the introductory paragraphs to that document's discussion of Article 7 of the Rome Statute which requires [120] "*conduct which is impermissible under generally applicable international law, as recognized by the principal legal systems of the world*."[121]

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[118] At para 31
[119] At para 32
[120] At para 33
[121] *'1. Since article 7 pertains to international criminal law, its provisions, consistent with article 22, must be strictly construed, taking into account that crimes against humanity as defined in article 7 are among the most serious crimes of concern to the international community as a whole, warrant and entail individual criminal responsibility, and require conduct which is impermissible under generally applicable international law, as recognized by the principal legal systems of the world.*

2. The last two elements for each crime against humanity describe the context in which the conduct must take place. These elements clarify the requisite participation in and knowledge of a widespread or systematic attack against a civilian population. However, the last element should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization. In the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack.

3. "Attack directed against a civilian population" in these context elements is understood to mean a course of conduct involving the multiple commission of acts referred to in article 7, paragraph 1, of the Statute against

The Court observed how, "[t]he term 'Murder', used in Article 7.1(a), is not defined in the Rome Statute. However, guidance as to its meaning is provided by the EoC. The EoC identifies three elements of the crime against humanity of murder:
'(1). The perpetrator killed one or more persons; (2) The conduct was committed as part of a widespread or systematic attack directed against a civilian population; (3) The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.' (footnote omitted).[122]

The Court also observed how , "The word 'persecution', used in Article 7.1(h), is defined by Article 7.2(g) as meaning 'the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity'.[123] The Court observed that, it is salutary to note how Article 7.1 refers to 'widespread **or** systematic attack', not 'widespread **and** systematic attack'. The sub-Article uses the disjunctive, not conjunctive, thereby embracing a wider range of attacks on civilian populations than if both adjectives had to apply. Moreover, Article 7.1 makes no reference to individual criminal responsibility. The reason for this is that Article 1F excludes the application of the Convention only against a person with respect to whom there are serious reasons for considering that '**he** has committed … a crime against humanity'; so it is necessary there be serious reasons to consider that the particular person was involved in a crime against humanity.[124]

The Court noted that, "The EoC makes clear that, for conduct to constitute the crime against humanity of murder, the relevant person must have killed one or more persons. In decisions given before the date upon which the Assembly of Parties adopted the EoC, the ICTR and ICTY each accepted that the relevant killing may be carried out by the accused person through a subordinate: see ***The Prosecutor v Jean Paul Akayesu*** (ICTR-96-4-T, judgment 2 September 1998) and ***The Prosecutor v Dario Kordic*** and ***Mario Cerkez*** (IT-95-14/2-T, judgment 26 February 2001). But there is no authority that suggests it would be enough to satisfy Article 7.1(a) that the person is an associate or accomplice of persons who have carried out killings."[125]

The Court then considered whether the claimant had committed a 'war crime' and concluded he had not because the Geneva Conventions created individual criminal responsibility in relation to international conflict. Article 8.2(b) expressly refers to international armed conflict. However, the conflict in which the applicant was involved was not of an international nature. The Court held that, "….., it was not enough for the Deputy President simply to characterise the conflict and consider whether it involved actions falling within para (c) or para (e) of Article 8.2; it was necessary for him to tie responsibility for at least one of those actions to the applicant. The Deputy President did

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any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. The acts need not constitute a military attack. It is understood that "policy to commit such attack" requires that the State or organization actively promote or encourage such an attack against a civilian population.

[122] Ar para 35
[123] At para 36
[124] At para 38
[125] At para 42

not do this."[126] And that, "the evidence before the AAT did not provide a basis upon which it could have found there were serious reasons for considering that the applicant had committed a war crime as defined by reference to any of the provisions of paras (c) and (e) of Article 8.2."[127] Moreover, "of the four types of action listed in para (c) of Article 8.2, the only one that could conceivably be applicable to this case is item (i) – 'violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture'. However, the EoC makes it clear, in respect of murder, mutilation, cruel treatment and torture, that the relevant person must have done the act; it is not enough that the person may have associated with others who so acted. Although these four categories are not an exhaustive statement of what constitutes 'violence to life and person', it seems reasonable to apply the same requirement of individual responsibility to any violence that falls outside the stated four categories. Although the applicant admitted having acted in a threatening way towards landlords, the evidence does not establish that he did anything that could be described as 'violence to life and person', treating that phrase as covering actions of the same type as murder, mutilation, cruel treatment and torture."[128]

(J) The German Jurisprudence

German jurisprudence shows evidence of a stricter approach to issues of international terrorism. In ***Dr. M. v. Federal Republic of Germany***[129] in March 2011, the Federal Administrative Court Justices (Prof. Dr Dörig, Richter, Beck, Prof. Dr Kraft and Fricke) considered the case of the claimant, who was a Rwandan citizen and a member of the Hutu ethnic group. He was appealing against the *revocation* of his recognition as a refugee and a person entitled to asylum. A teacher by profession, he had entered Germany in 1989, completed studies in economics in 1995, and received a doctorate in December 2000. Since the civil war in Rwanda in 1994, he had been involved in Rwandan exile organisations in Germany, primarily in a leadership capacity. He was recognised in 2000 as a person entitled to asylum on the basis of the danger of political persecution with which he was threatened because of his political activities in exile. In mid-2001 he became President of the *Forces Démocratiques de Libération du Rwanda* (hereinafter the 'FDLR'), a Hutu exile organisation founded in 1999, which has armed combatant units in the eastern part of the Democratic Republic of the Congo.

However, on 1 November 2005, the Sanctions Committee of the United Nations Security Council, applying ***Security Council Resolution 1596 (2005)*** of 18 April 2005, included the Complainant in the list of persons and institutions on whom restrictions were imposed because of the arms embargo for the territory of the Democratic Republic of the Congo. Thereupon, in a decision of 22 February 2006, the Federal Office for Migration and Refugees (the 'Federal Office') revoked the recognition of his entitlement to asylum. This revocation was based on the fact that the Complainant is the President of the FDLR, and therefore there is good reason to believe that he has committed war crimes and crimes against humanity, as well as actions that contravene the purposes and principles of the United Nations. The Federal Office found that the FDLR was responsible for regular abuses – such as raids, rapes and abductions – of villagers in the

[126] At para 61
[127] At para 62
[128] At para 63
[129] Judgment of the 10th Division of 31 March 2011 – BVerwG 10 C 2.10

eastern Congolese province of South Kivu. It estimated that the organisation had 10,000 to 15,000 combatants in the eastern part of the Democratic Republic of the Congo, and for years had been committing crimes against the Congolese civilian population. These, the Federal Office found, were war crimes and crimes against humanity within the meaning of the Rome Statute of the International Criminal Court of 17 July 1998. It found that the Complainant was responsible for these, as a superior officer. Yet, the Administrative Court reversed the revocation decision in a judgment of 13 December 2006 on the grounds that the Federal Office had been unable to adequately set forth and document the existence of the requirements for exclusion, including the claimant's responsibility. The court found that the information produced in the proceedings was rather vague and insufficiently reliable.[130] The claimant appealed and in January 2010, the Higher Administrative Court denied the complaint and shared the opinion of the Federal Office. The court saw no obstacle to the claimant's revocation of refugee status in the fact that the actions that resulted in exclusion were subsequent in time to the grant of protection as a refugee.[131] The FDLR, the court held, was an organisation similar to a state, and the Complainant personally was one of the holders of positions of power who are able to commit contraventions of the aims of the United Nations.[132]

Before the Federal Administrative Court, the claimant now argued, *inter alia*, as follows: (1) that according to Section 73(1) of the Asylum Procedure Act, recognition of entitlement to asylum and refugee status may be revoked only if the actual conditions on which the recognition was based have ceased to exist, but by contrast, a subsequent occurrence of circumstances for exclusion does not justify revocation; (ii) The Geneva Convention on Refugees also presupposes that the circumstances for exclusion under Article 1 F must already have existed at the time of the decision whether to accept a person as a refugee, so that measures to terminate a status may be taken only under the conditions of Article 33(2) of the GRC, with the result that a revocation of entitlement to asylum because of a subsequent occurrence of circumstances for exclusion would be a violation of Article 16a of the Basic Law; (iii) If the rights of the community are viewed as an inherent limit on granting asylum, he argues, this is to be interpreted as meaning the German community, which is not affected in the present case; and that the claimant's personal responsibility owing to abetment and dominance in an organisation is only a matter of allegation, because it has not been established what contribution he made towards the acts.[133] These would appear to be *prima facie* formidable arguments.

The Federal Administrative Court, however, rejected these arguments for the following reasons. First, the very wording of Section 73(1) sentence 1 of the Asylum Procedure Act, establishes the obligation to revoke, without objective restrictions, if the conditions on which that recognition is based 'have ceased' to exist. This is also the case if reasons for exclusion arise subsequently, so that under Section 73(2a) sentence 4 of the Asylum Procedure Act a revocation is also possible once three years have passed after the decision on recognition becomes non-appealable.[134] Secondly, the Court led that this interpretation is not opposed by the Geneva Convention on Refugees (GRC), where Article 1 F of the GRC governs only the substantive requirements for exclusion from

[130] At para 5
[131] At para 7
[132] At para 9
[133] At para 10
[134] At para 21

refugee status, not the procedure for recognition or withdrawal. The Court went onto say that, *"The circumstances for exclusion are significantly based on the concept of unworthiness for asylum* (see judgment of 24 November 2009 – BVerwG 10 C 24.08 – BVerwGE 135, 252 at 24 et seq.), *and the need to exclude persons unworthy of asylum does not depend on the date at which they bring about the substantive reasons for exclusion under Article 1 F of the GRC.* The Court reasoned that, "Anything to the contrary applies only to the reason for exclusion under Article 1 F (b) of the GRC, which unlike the circumstances for exclusion under Article 1 F (a) and (c) of the GRC – which apply here – is limited to non-political crimes that were committed prior to admission as a refugee (as does Section 3(2) sentence 1 no. 2 of the Asylum Procedure Act)." The Court further went onto say that "[t]he High Commissioner for Refugees also deems a revocation of refugee status justified if reasons for exclusion arise only after the decision granting that status."[135] It is interesting that the Court took the view that: "Nor can anything to the contrary be concluded from the wording regarding reasons for exclusion that arose in the past ('committed', 'was guilty of'), because this indicates only that such conduct must have existed before the reason for exclusion takes effect…"

What is interesting is that the Court rejected the proposition, cited in the present appeal before it, that "unless they are to arouse concerns under international law, national provisions on reasons for exclusion can block only a status decision, but cannot justify a post facto revocation." The Court also observed the ***Background Note of the UNHCR*** on the reasons from exclusion dating from 2003 the UNHCR deems[136] that revocation *ex nunc* because of a subsequent occurrence of reasons for exclusion under Article 1 F (a) and (c) of the GRC is justified if the prerequisites are met, and cites as an example the refugee's participation in armed actions within the country to which he or she was admitted.

Furthermore, the Court reasoned how, "such an interpretation of Section 73(1) sentence 1 of the Asylum Procedure Act is also argued for by ***Article 14(3)(a) of Directive 2004/83/EC,*** which establishes the obligation to revoke, terminate or refuse to renew refugee status if a reason for exclusion exists, *irrespective of when the reasons for exclusion arose ('should have been or is excluded').* In fact, "Section 73 of the Asylum Procedure Act in the version under the 2007 Directive Implementation Act also serves to implement this provision of European Union law."[137] Indeed, "Union law also requires an application of reasons for exclusion to recognitions declared before Directive 2004/83/EC took effect," and *"[t]he European Court of Justice (ECJ) cites in this connection the mandatory nature of Article 14(3)(a) of the Directive, which requires refugee status to be terminated or revoked when reasons for exclusion exist, even for proceedings that had already been initiated and completed before that time*."[138]

The Court also reasoned, on the basis of the ICC statute, that, "[t]he Higher Administrative Court correctly views these acts as war crimes within the meaning of

[135] At para 22 The Court added that, "For example, item 4 of the UNHCR Guideline on Cessation of Refugee Status of 10 February 2003 (HCR/GIP/03/03) states: 'Revocation may take place if a refugee subsequently engages in conduct coming within the scope of Article 1 F (a) or 1 F (c).'
[136] At 17
[137] At para 22
[138] Citing at para 24, ECJ, judgment of 9 November 2010 – Cases C-57/09, (B) and C-101/09, (D) – NVwZ 2011, 285 at 74

Article 8 and crimes against humanity within the meaning of Article 7 (a) and (g) of the ***Rome Statute of the International Criminal Court*** of 17 July 1998 (BGBl 2000 II p. 1394)" not least because "in its judgment of 24 November 2009 – BVerwG 10 C 24.08 at 31) it was previously decided that the question of whether war crimes or crimes against humanity within the meaning of Section 3(2) sentence 1 no. 1 of the Asylum Procedure Act exist should currently be decided primarily in accordance with the circumstances constituting these crimes as defined in the Rome Statute. This manifests the current status of developments in international criminal law regarding violations of international humanitarian law."[139] The fact was that, "the Complainant's responsibility proceeds from Article 28 (a) of the Rome Statute. That article provides, among other points, that a military commander is criminally responsible for crimes committed by forces under his effective command or control if he knew, or should have known, that the forces were committing such crimes, and he failed to take all necessary and reasonable measures within his power to prevent their commission."[140] Furthermore, it observed how, "one may also conclude that the Complainant is responsible if one applies the criteria of the European Court of Justice as developed in its judgment of 9 November 2010 for the exclusion of refugee status under Article 12(2)(b) and (c) of Directive 2004/83/EC (op. cit., at 95 et seq.). According to those criteria, a member of an organisation may be attributed with a share of the responsibility for the acts committed by the organisation in question while that person was a member. Here it is of particular significance what role was played by the person concerned in the perpetration of the acts in question; his position within the organisation; and the extent of knowledge he had, or was deemed to have, of its activities. Here the Complainant, as the President and supreme military commander, held a high position in the organisation that committed war crimes and crimes against humanity. He knew of the crimes that had been committed, and took no suitable measures to prevent the acts." [141]

There are two observations to be made about this case. The first is that the Federal Administrative Court did not find for the Government on the grounds that the lower court had not been able to establish the claimant's individual responsibility in regard to acting contrary to the purposes and principles of the United Nations by violating the arms embargo. In this respect its finding was consistent with the approach of the UK and Australian courts above, especially in ***JS (Sri Lanka)*** when it reasoned that "The court below performed no such individual examination here."[142] But the Court then

[139] At para 28
[140] At para 30
[141] At para 32

[142] At para 40 the court explained that, "If one applies these criteria, such a responsibility on the Complainant's part does not proceed from the mere fact that he has been included by the United Nations in a list of persons against whom restrictions should be applied in order to enforce the arms embargo. In ***Resolution 1596 (2005)*** of 18 April 2005, in items 13 and 15, the Security Council adopted a prohibition on immigration, and financial restrictions, against persons designated under item 18(a) of the Resolution by a Committee appointed for that purpose, and maintained on a list to be updated. The Complainant was added to this list on 1 November 2005, on the grounds of his position as President of the FDLR and his participation in arms trading, in violation of the embargo that had been imposed. However, inclusion in such a list does not in itself suffice for assuming that the reason for exclusion of acting contrary to the purposes and principles of the United Nations exists; in that regard it has (only) a significant indicative effect. Rather, if the person concerned – as here – disputes the underlying circumstances of fact, findings in this regard by the national authorities or courts are necessary. This examination must also include the Complainant's individual responsibility in regard to acting contrary to the

went onto find that, because under ***UN Security Council Resolution 1493 (2003)*** "*non-state actors are also attributed a significant influence on the breach of international peace"* the claimant as the President of the FDLR had, "a significant influence on his combatants' conduct, has personal responsibility for the acts of the FDLR" and fell to now have his asylum status revoked.[143] It is arguable, however, that this still does not show the claimant's individual personal responsibility for the acts in question as a non-state actor.

Conclusion

Twenty-five years ago, when the judicial systems of contemporary liberal western democracies first began to regularly apply international refugee law in their courts, the question was *who qualified* for refugee status. Nowadays, the more difficult question for the courts is trying to work *who does not*. Determining who qualifies for refugee status is rather less difficult because the basic principles are now well established. By contrast, the basic principles for 'exclusion' remain largely unclear. The result is that while there is consensus on who qualifies, there is less consensus on who does not. Sovereign states are left to determine the matter as they will. Yet, the absence of an international refugee court should not mean that it is open to individual signatory states to determine this question as they see in terms of their own security needs. The power for that lies in Art 33(2) of the Refugee Convention. It is this provision which deals with security, and not Article 1 (F). Yet, this has not been well addressed by the courts, and hardly at all by academics. In fact, it has never been raised by the UNHCR. The tendency has therefore been to use Article 1F where it should not be. Unfortunately, the word 'exclusion' is a rather unfortunate term. It does not appear in the language of the text which more appropriately refers to 'does not apply', and it therefore does rather more harm than good by conveying the wrong moral message about what refugee law is about. Perhaps a more accurate way of conceiving it is to treat Article 1F as a 'dis-applying' provision. It is arguable that a more proper example of "exclusion" from

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purposes and principles of the United Nations by violating the arms embargo (see ECJ judgment of 9 November 2010, op. cit., at 82 ff.). The court below performed no such individual examination here."

[143] At para 41 the Court explains, "….., the following circumstance does argue that the Complainant is responsible within the meaning of Section 3(2) sentence 1 no. 3 of the Asylum Procedure Act: It is evident from UN Security Council Resolution 1493 (2003) that *a breach of international peace exists*, and that it proceeds from the armed conflicts in the eastern Democratic Republic of the Congo, *which involve the participation of not only army units of the state, but also non-state militias like the FDLR*, as well as from the *systematic acts of violence against civilians* and breaches of international humanitarian law, which the Security Council urges 'all parties, including the Government of the Democratic Republic of the Congo' to prevent (item 8 of the Resolution). *This argues that here, non-state actors are also attributed a significant influence on the breach of international peace.* If one furthermore adds *the findings of the court below that the FDLR has been involved in the armed conflict for years, occupies territory in the eastern Democratic Republic of the Congo, and systematically perpetrates acts of violence against the civilian population*, it might well be considered a non-state organisation that acts contrary to the purposes and principles of the United Nations. Here it does not matter – as the Higher Administrative Court believes – whether the FDLR is an organisation similar to a state. *Rather, the deciding factor is whether the effects on the breach of international peace that it and its leaders produce are comparable to the effects that proceed from authorities of a state*. The Complainant, as the organisation's President, who according to the findings of the court below has a significant influence on his combatants' conduct, has personal responsibility for the acts of the FDLR that breach international peace (see ECJ judgment of 9 November 2010, op. cit., at 97 et seq.)."

refugee status is the Opinion of Advocate General Sharpston last year in ***Nawras Bolbol v Bevándorlási és Állampolgársági Hivatal*,**[144] which considered the position of excluded Palestinians, receiving protection or assistance from UNRWA, and held that as she had not availed herself of UNRWA she could not succeed. This affirmed that Palestinian refugees remain excluded from the terms of the Geneva Convention on the Status of Refugees 1951 where they can turn to UNRWA. It needs remembering that the Refugee Convention 1951 does not technically exclude potential refugees from its ambit. To say that it does is to posit a very clear moral proposition of a sort. It merely states that its provisions, *"shall not apply to any person"* against whom it can be said that there are *"serious reasons for considering"* him to be guilty of three particular kinds of actions. First, that he has *"committed a crime against peace, a war crime, or a crime against humanity."* The meaning of these terms is not specifically explicated. Instead, it is to be understood, *"as defined in the international instruments drawn up to make provision in respect of such crimes*."[145] As such, the meaning is clearly an evolving one being dependent on the state of the standards set by developing international instruments. Professor Hathaway states that this provision covers three distinct types of crimes. A 'crime against peace' entails the 'planning of or participation in an unlawful war'; a War Crime involves, 'the violation of a law of war", which includes the mistreatment of civilians and prisoners of war; and a "Crime against humanity" is one where there has been "fundamentally inhumane conduct" with examples being "genocide, slavery, torture and apartheid."[146] That may very well be the case but it does not make the problem of resolving these questions any easier.

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[144] ***Bolbol (Area of Freedom, Security & Justice)*** [2010] EUECJ C-31/09 (17 June 2010)
[145][145] Article 1 (F) (a) of the Refugee Convention.
[146] James Hathaway, The Law of Refugee Status (London) at p.216.
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