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THE EXCLUSION CLAUSES: GUIDELINES ON THEIR APPLICATION

I. Introduction

1 The Statute of the United Nations High Commissioner for Refugees (the UNHCR Statute), the 1951 Convention Relating to the Status of Refugees (the 1951 Convention) and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (the OAU Convention) contain provisions for excluding from the benefits of refugee status certain persons who would otherwise qualify as refugees. These provisions are commonly referred to as "exclusion clauses".[1]

2 Events in the last few years have resulted in increasing use of the exclusion clauses by governments and by UNHCR and requests for clarification or review of UNHCR's position on exclusion. This Note provides a detailed analysis and review of the exclusion clauses, taking into account the practice of states, UNHCR and other relevant actors, UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status (the Handbook)*, case law, the *travaux préparatoires* of the relevant international instruments, and the opinions of commentators. It is hoped the information provided in this Note will facilitate the proper application of the exclusion clauses through a thorough treatment of the main issues. Obviously, each case must be considered in light of its own peculiarities, bearing in mind the information provided below.

II. The Exclusion Clauses in the International Refugee Instruments

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

> In respect of whom there are serious reasons for considering that he has committed a crime covered by the provisions of treaties of extradition or a crime mentioned in article VI of the

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[1] The grounds for exclusion are enumerated exhaustively in the international refugee instruments. While these grounds are subject to interpretation, they cannot be supplemented by additional criteria in the absence of an international convention to that effect. The exclusion clauses referred to and discussed in this Note are those in Article 1 F (a-c) of the 1951 Convention. It should be noted that Articles 1 D and E also exclude certain persons from the scope of the Convention. Article 1 D provides that the Convention shall not apply to persons receiving protection or assistance from organs or agencies of the United Nations other than UNHCR. They may be covered, however, in the event that such protection or assistance has ceased "for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations." Under Article 1 E, the Convention does not apply "to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country."
In addition, while this is not an exclusion clause, Article 33(2) provides that the benefit of the non-refoulement provision "may not...be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

London Charter of the International Military Tribunal or by the provisions of article 14, paragraph 2, of the Universal Declaration of Human Rights [2]

4 Article 1(F) of the 1951 Convention likewise states that the provisions of that Convention "shall not apply to any person with respect to whom there are serious reasons for considering" that

(a) he 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.

5 Article 1(5) of the OAU Convention contains identical language. In addition, it excludes from refugee status any person who "has been guilty of acts contrary to the purposes and principles of the Organization of African Unity"

6 The logic of these exclusion clauses is that certain acts are so grave as to render the perpetrators undeserving of international protection as refugees. Thus, their primary purposes are to deprive the perpetrators of heinous acts, and serious common crimes, of such protection; and to safeguard the receiving country from criminals who present a danger to the country's security. These underlying purposes, notably the determination of an individual as *undeserving* of protection, must be borne in mind in interpreting the applicability of the exclusion clauses.

7 While a State's decision to exclude removes the individual from the protection of the Convention, that State is not compelled to follow a particular course of action upon making such a determination (unless other provisions of international law call for the extradition or prosecution of the individual). States retain the sovereign right to grant other status and conditions of residence to those who have been excluded. Moreover, the individual may still be protected against *refoulement* by the application of other international instruments, notably Article 3 of the 1984

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[2] The provisions of the London Charter are discussed below under "War Crimes." Art. 14 of the Universal Declaration of Human Rights states:
(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.
(2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[3] and Article 22(8) of the 1969 *American Convention on Human Rights.*[4]

(i) General Application

8 As with any exceptions to provisions of human rights law, the exclusion clauses need to be interpreted restrictively. As emphasized in paragraph 149 of the *Handbook*, a restrictive interpretation and application is also warranted in view of the serious possible consequences of exclusion for the applicant. The exclusion clauses should be used with utmost caution being, in effect, the most extreme sanction provided for by the relevant international refugee instruments.

9 In principle, the applicability of the exclusion clauses should be considered only after the adjudicator is satisfied that the individual fulfills the criteria for refugee status. This is chiefly because cases of exclusion are often inherently complex, requiring an evaluation of the nature of the crime and the applicant's role in it (including any mitigating factors) on the one hand, and the gravity of the persecution feared, on the other. An assessment of the case requires that these elements be weighed against one another (often referred to as the "proportionality test"). This can only be undertaken by officials fully familiar with the case and the nature of the persecution feared by the applicant.

10 The exclusion clauses should therefore not be used to determine the admissibility of an application or claim for refugee status.[5] A preliminary or automatic exclusion would have the effect of depriving such individuals of an assessment of their claim for refugee status. By their very nature, the exclusion clauses relate to acts of an extremely serious nature. As such, the refugee claim and any related exclusion aspects should in every case be examined by officials trained in refugee law.

11 The applicant's own confession, the credible and unrebutted testimonies of other persons, or other trustworthy and verifiable information may suffice to establish "serious reasons for considering" that the applicant should be excluded. However, ordinary rules of fairness and natural justice require

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[3] Article 3.

(1) No State Party shall expel, return (*"refouler"*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

(2) For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

(92 States party as at 12 March 1996).

[4] Article 22(8):

In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.

[5] In the extreme case of an asylum-seeker who is indicted by the International Criminal Tribunals for the former Yugoslavia and for Rwanda, or by a future International Criminal Court, a rebuttable presumption of exclusion is warranted. Persons thus indicted may also be protected against return to their country of origin or to another country under the provisions of the Convention Against Torture or other international human rights instruments.

that an applicant be given the opportunity to rebut or refute any accusations An applicant who casts reasonable doubts on the "serious reasons for considering. " his or her guilt should not be excluded from the benefits of refugee status

12 The exclusion of an applicant can have implications for family members Paragraph 185 of the *Handbook* states that the principle of family unity generally operates in favour of dependents, and not against them. In cases where the head of a family is granted refugee status, his or her dependents are normally granted ("derivative") refugee status in accordance with this principle If a refugee is excluded, derivative refugee status should also be denied to dependents. Dependents and other family members can, however, still establish their own claims to refugee status. Such claims are valid even where the fear of persecution is a result of the relationship to the perpetrator of excludable acts Family members with valid refugee claims are excludable only if there are serious reasons for considering that they, too, have knowingly participated in excludable acts.

13 Where family members have been recognised as refugees, the excluded applicant/head of family cannot then rely on the principle of family unity to secure protection or assistance as a refugee

14 Children under eighteen can and have been excluded in special cases Under the 1989 *Convention on the Rights of the Child*, however, States Parties shall seek to establish a minimum age below which children shall be presumed not to have the capacity to to infringe penal law[4] Where this has been established, a child below the minimum age can not be considered by the state concerned as having committed an excludable offence. Where exclusion is invoked in respect of a child under the age of eighteen, caution should be exercised in its implementation.

(ii) Responsibility of States for Status Determination

15 Under the 1951 Convention and the OAU Convention, the competence to decide whether a refugee claimant falls under the exclusion clauses lies with the state in whose territory the applicant seeks recognition as a refugee.[5] That state must have "serious reasons for considering" that the applicant has committed any of the crimes or acts described in the exclusion clauses. it is implicit that those grounds must be well-founded, even though there is no requirement that the applicant be formally charged or convicted, or that his/her criminality be established "beyond reasonable doubt" by a judicial procedure It is possible that some countries will regard available information as sufficient for purposes of exclusion, while others will not[6]

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[4] Art.40 (3)(a)

[5] UNHCR has a responsibility, under Article 35 of the 1951 Convention, to assist states that may require assistance in their exclusion determinations, and to supervise their practice in this regard.

[6] Nehemiah Robinson, *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation* (New York, 1953)

(iii) UNHCR Responsibility

16 Decisions on applications for recognition of refugee status made by States are not binding on UNHCR, nor are decisions made by UNHCR binding upon States. As a matter of policy, UNHCR does not normally determine refugee status in countries that are party to the 1951 Convention or 1967 Protocol However, determination of refugee status by States and determination by UNHCR under its mandate are not mutually exclusive In some countries, UNHCR takes part in the national status determination procedures. There are also cases where the procedures and criteria applied in the national procedures are such that UNHCR undertakes determinations to ensure that the principles of international protection are observed The possibility of conflict between decisions made by States and decisions made by UNHCR can, therefore, arise

17 The UNHCR Statute provides that the competence of the High Commissioner shall not extend to certain persons on similar (but not identical) grounds. This determination therefore falls to UNHCR The wording of the Statute in this respect is less clear than the Convention wording [5] as the same categories are envisaged. UNHCR legal officers are encouraged to be guided by the Convention formulae in determining cases of exclusion

18 The exclusion clauses will be discussed under the three categories provided in the 1951 Convention (i) crimes against peace, war crimes and crimes against humanity; (ii) serious non-political crimes, and (iii) acts contrary to the purposes and principles of the United Nations.

III. The Categories: Article 1 F(a) – Crimes Against Peace, War Crimes and Crimes Against Humanity

(i) General

19 Article 1F(a) refers to persons with respect to whom there are serious reasons to believe that they 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*". Several instruments exist today which define or elaborate on the notion of "crimes against peace, war crimes and crimes against humanity". Some of these instruments are listed in Annex VI of the *Handbook* One of the most comprehensive is the 1945 Charter of the International Military Tribunal (the London Charter), Article 6 of which is reproduced in the *Handbook* Other well-known relevant international instruments which may be used to interpret this exclusion clause are

- the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide* (the *Genocide Convention*).

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[5] Statute, para. 7(d): "...the competence of the High Commissioner...shall not extend to a person in respect of whom there are serious reasons for considering that he has committed a crime covered by the provisions of treaties of extradition or a crime mentioned in article VI of the London Charter of the International Military Tribunal or by the provisions of article 14, paragraph 2, of the Universal Declaration of Human Rights."

- the four 1949 *Geneva Conventions for the Protection of Victims of War*;
- the 1973 *International Convention on the Suppression and Punishment of the Crime of Apartheid*,[10]
- the 1973 *Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity*;[11]
- the 1977 *Additional Protocol to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I)*,
- the *1984 Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (the Convention against Torture)*,
- the *1985 Inter-American Convention to Prevent and Punish Torture*; and
- the *1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*

20 Relevant non-binding but authoritative sources are the 1950 *Report of the International Law Commission (the ILC) to the General Assembly*, and the *Draft Code of Crimes against the Peace and Security of Mankind*, which was provisionally adopted by the ILC in 1991.[12]

21 More recently, the phrase "crimes against peace, war crimes and crimes against humanity" has been defined or clarified by the following international instruments.

- The *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991* (the Statute of the International Criminal Tribunal for former Yugoslavia);
- The *Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994* (the Statute of the International Criminal Tribunal for Rwanda); and
- The ILC's *Draft Statute for an International Criminal Court*, adopted by the ILC in 1994 (These documents are available from the Division of International Protection's General Legal Advice Section on request).

22 It is interesting to note that all the three crimes under this exclusion clause are included in the draft Statute for the proposed permanent international criminal court. The proposed court would have within its jurisdiction genocide, crimes against humanity, war crimes[13] and crimes against peace.[14]

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[10] While *apartheid* was generally cited and considered as a crime against humanity, the Convention itself had very limited applicability, and is now less significant in light of developments in South Africa.

[11] GA Res. 3074 (XXVIII), 3 Dec. 1973.

[12] Originally the *1954 ILC Draft Code of Offenses against the Peace and Security of Mankind*. *Report of the International Law Commission on the work of its forty-seventh session 2 May-21 July 1995* (GAOR, Supp No 10, Doc. A/50/10) (New York, 1995).

[13] The ILC draft Statute refers to this category as "serious violations of the laws and customs applicable in armed conflict."

[14] The ILC draft Statute refers to this category as "aggression".

These crimes were extensively debated in April 1996 by the Preparatory Committee on the Establishment of an International Criminal Court [15]

23 The individual scope and legal status of the above documents and instruments differs. Thus, treaties and Security Council decisions are legally binding, while General Assembly resolutions, ILC reports or drafts are not. While treaties and conventions formally bind only the signatory states, they may reflect customary international law, and may encompass norms deemed *jus cogens* (universal, peremptory norms of international law) All these, however, are relevant sources for interpreting international law in general.

24. It should be noted when using this section of the Note that some crimes may fall under more than one category. This overlap is particularly noticeable between war crimes and crimes against humanity: genocide, for example, is both.

(ii) Crimes Against Peace

25 This category is defined by the London Charter as

> "planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements, or assurances or participation in a common plan or conspiracy for any of the foregoing."

"Aggression" was defined by UN General Assembly as

> "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any manner inconsistent with the Charter of the United Nations."[16]

The ILC's Draft Code of Crimes against the Peace and Security of Mankind retains this definition.[17]

26 Crimes against peace are a well-defined category, and can be committed in the context of the planning or waging of aggressive wars or armed conflicts. Armed conflicts are only waged by states or state-like entities in the normal course of events, and this provision can therefore only be applied in the cases of individuals representing a state or state-like entity (see further Liability, below).

27 There are few precedents for exclusion of individuals under this category, and UNHCR is not aware of any jurisprudence dealing with crimes against peace as an exclusionary provision

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[15] The Committee is meeting with a view to finalizing a Convention for an International Criminal Court, to be considered by a conference of plenipotentiaries, possibly in 1998.

[16] G.A.Res. 3312 (XXIX), 1974

[17] Draft Code, Art.15. The specific acts of aggression subsequently enumerated in the draft article remain the subject of discussion.

(iii) War Crimes

28 A war crime involves the violation of international humanitarian law or the laws of armed conflict Article 6(b) of the London Charter includes within this category murder or ill-treatment of civilian populations, murder or ill-treatment of prisoners of war, the killing of hostages, or any wanton destruction of cities, towns or villages or devastation that is not justified by military necessity.

29 Other acts identified as war crimes are the "grave breaches" specified in the *1949 Geneva Conventions* and *Additional Protocol I*, namely wilful killing, torture or other inhuman treatment (including biological experiments), and wilfully causing great suffering or serious injury to body or health [18] The 1993 Statute of the International Tribunal for former Yugoslavia defines as war crimes wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health; extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; compelling a prisoner of war or a civilian to serve in the forces of a hostile power; wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial; unlawful deportation or transfer or unlawful confinement of a civilian; and taking civilians as hostages.[19] Additional Protocol I also includes attacks on, or indiscriminate attack affecting the civilian population or those known to be *hors de combat*, population transfers, practices of *apartheid* and other inhuman and degrading practices involving outrages on personal dignity based on racial discrimination, and attacking non-defended localities and demilitarized zones.

30 War crimes were originally defined only in the context of an international armed conflict However, it is now generally accepted that war crimes may be committed in internal, as well as in international, armed conflicts. The International Criminal Tribunal for Former Yugoslavia has confirmed the recent views of commentators that war crimes are not limited or defined by the nature of the conflict in which they occur [20] It should also be recalled that war crimes can be committed against military as well as civilian persons

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[18] Article 22 of the ILC's Draft Code of Crimes against the Peace and Security of Mankind lists "serious war crimes" as any of the following acts (a) acts of inhumanity, cruelty or barbarity directed against the life, dignity or physical or mental integrity of persons, (b) establishment of settlers in an occupied territory and changes to the demographic composition of an occupied territory; (c) use of unlawful weapons, (d) employing methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment, (e) large-scale destruction of civil property; and (f) willful attacks on property of exceptional religious, historical or cultural value Following discussions at the ILC's last session, this category may be changed from "serious war crimes" to the more commonly used "war crimes."

[19] Article 2. Grave breaches of the Geneva Conventions of 1949

[20] In the case of *Dusko Tadic*, the defence argued, unsuccessfully, that the accused could not be tried for violations of the laws or customs of war under the Statute of the International Criminal Tribunal for former Yugoslavia because such violations could only be committed in the context of an international conflict. The Tribunal held, however, that the laws or customs of war, commonly referred to as war crimes, include prohibitions of acts committed both in international and internal armed conflicts. See *Dusko Tadic*, Case No IT-94-I-T (Dec. of 10 August 1995 on the Jurisdiction of the International Criminal Tribunal for former Yugoslavia)

(iv) Crimes against humanity

31 The London Charter was the first international instrument to use the term "crimes against humanity" as a distinct category of international crimes. Article 6(c) of the Charter defined crimes against humanity as follows:

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

32 Crimes against humanity are distinct from war crimes, although in time of armed conflict a single act could constitute both. While there is no universally accepted definition of crimes against humanity, they generally refer to any fundamentally inhumane treatment of the population, often grounded in political, racial, religious or other bias. The Statute of the International Tribunal for Former Yugoslavia defines its responsibility for crimes against humanity "when committed in armed conflict, whether international or internal in character, and directed against any civilian population" as encompassing murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial and religious grounds, and other inhumane acts".[21] The Statute of the International Tribunal on Rwanda refers to crimes "committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds."[22]

33 Genocide, a crime against humanity, is defined as:

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

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group "[23]

34 Crimes against humanity should be distinguished from isolated offenses or common crimes. The acts in question must be part of a policy of persecution or discrimination, targeted against the civilian population, and carried out in a widespread or systematic fashion. An inhumane act committed against an individual may constitute a crime against humanity if it is part of a coherent system or a series of systematic and repeated acts with the same political, racial, religious or cultural

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[21] Statute of the International Tribunal for Former Yugoslavia, Article 5.

[22] Article 3.

[23] Art II of the Convention on the Prevention and Punishment of the Crime of Genocide, 1948

motive Crimes against humanity may be identified from the nature of the acts in question, the extent of their effects, the motive of the perpetrator(s), or any combination of the above. they involve the essential values of human civilization and the dignity of man.[24]

35 While they are defined in the London Charter as acts committed "before or during [a] war", it is now accepted that crimes against humanity can be committed not only in the context of an international or an internal conflict[25], but also in peacetime or in a non-war context.[26] This development is confirmed by the ILC Draft Code, which includes as crimes against humanity acts unlinked to conflict, making this category the broadest of the headings under Article 1 F(a) of the 1951 Convention

IV. Individual Liability

36 Crimes against humanity can be perpetrated by individuals without any connection to a state, as well as by persons acting on behalf of a state. In particular, individuals involved in paramilitary or armed revolutionary movements can be guilty of excludable acts under this heading [27] An individual acting independently of the State can also be guilty of a crime against humanity, as has been recognised since the Nuremberg trials [28]

37 Often, the question of exclusion hinges on the extent to which the individual is liable. The adjudicator will need to assess whether or not certain persons are excluded by virtue of their positions, actions or inaction, or links to particular parties and entities, such as former senior officials of repressive regimes or governments accused of genocide or gross human rights violations, and persons who are associated with groups which commit crimes or advocate violence [29] In excluding an individual, it is important that the degree of involvement is subject to

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[24] Report of the International Law Commission, 41st Session, Doc. A/44/10(1989) at 151

[25] Art. 5, Statute of the International Tribunal for Former Yugoslavia.

[26] See the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity: G.A. Res.2391 (XXIII) 26 Nov. 1968, art.1(b)

[27] Under the Nuremberg Charter, individuals or members of organisations can be held responsible if they have participated "in the formulation or execution of a common plan or conspiracy" to commit the crimes in question

[28] See Draft Code, Art.21

[29] The Case of Persecutors: There are circumstances in which evidence comes to light that individuals seeking refugee status were themselves guilty of acts of persecution before fleeing. Those who had themselves persecuted others were expressly excluded from the protection of the International Refugee Organization. Some countries also have similar exclusion provisions in their legislation. For example, the United States Government excludes "persecutors" from refugee status under the U.S. Immigration and Nationality Act if such persons ordered, incited, assisted or otherwise participated in the persecution of another person on account of race, religion, nationality, membership in a particular social group, or political opinion. (US Immigration and Nationality Act, Sec. 101(a)(42)(a) and 243 (h)(2)(A), 8 C.F.R. Sec. 208.16(c)(2)(i) Under U.S. case law, former Nazis have been barred from asylum as persecutors See, e.g., *Matter of Laipenieks*, 18 I & N Dec. 433 (BIA 1983), *U.S. v. Brever*, 829 F. Supp. 773 (E.D. Pa 1993) See also *U.S. v. Koreh*, 856 F. Supp. 891 (D.N.J. 1994) (finding that an editor of a Hungarian newspaper that published anti-Semitic propaganda during World War II assisted in persecution). See also discussion of this issue under Art. 1 F(c)

careful analysis, and not swayed by the fact that acts of an abhorrent and outrageous nature have taken place.

38. The International Military Tribunal did not attribute collective responsibility in the cases of "persons who had no knowledge of the criminal purposes or acts of the organization and those who were drafted by the State for membership, unless they were personally implicated" in the commission of the acts in question. According to the Nuremberg Tribunal, "The criterion for criminal responsibility...lies in moral freedom in the perpetrator's ability to choose with respect to the act of which he is accused."[30]

(i) Complicity

39 Article 2 of the International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind sets out the limits of individual responsibility. This covers the positive acts of incitement, planning and assistance, but the only *passive* form of culpability envisaged is

> "failure to take all necessary measures within one's power to prevent or repress the commission of such a crime when the accused was the superior of the principal offender and knew or should have known that the subordinate was committing or was going to commit such a crime." (Art 2(c), emphasis added)

Complicity therefore entails, in almost every case, a positive act and a conscious intention. The elements of knowledge, and of personal involvement, are reinforced in current jurisprudence.[31]

(ii) Association: Senior Officials of Repressive Regimes

40 The exclusion clauses do not envisage the automatic exclusion of persons purely on the basis of their position. In certain cases, it has been argued that senior officials, by virtue of their high position, bear collective responsibility for their government's actions, irrespective of the availability of any evidence indicating wrongdoing on their part, and even if they were not personally involved in the prohibited acts in question. One state has already enacted legislation giving effect to the concept of "guilt by association".[32] UNHCR does not support this interpretation.

41 A proper application of the exclusion clauses entails making individual determinations of exclusion for the officials in question. In order to fall under the exclusion clauses, an individual need not personally have committed the crime(s) in question. There may be sufficient grounds for exclusion if the individual had personal knowledge of the crimes and contributed to them, or, being in a

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[30] Quoted in Weisman, op.cit.22 at p.132.

[31] See Goodwin-Gill, p.101. See also Weisman, N., *Article 1 F(a) of the 1951 Convention Relating to the Status of Refugees in Canadian Law*, International Journal of Refugee Law Vol 8 No 1/2, Jan-April 1996

[32] Canada recently enacted a law which had the effect of excluding, *ipso facto*, all former senior officials of repressive regimes. (See Bill C-86 of 1993 and Bill C-44 of 1994). The officials affected by this legislation include senior diplomats, cabinet ministers, heads of state and their advisers, senior bureaucrats and military officers as well as members of the judiciary.

position to do so did not take measures to prevent or help stop them (i.e was passive) where the crimes were committed by subordinates

42. It is a prerequisite for exclusion that a moral choice was in fact available to the individual. An individual examination is required precisely in order to ascertain whether the applicant knew of the acts committed or planned, tried to stop or oppose the acts, and/or deliberately removed him/herself from the process. A moral choice may not be considered to have been available where an individual could oppose or disengage from such a process only at risk of grave danger to his or her life, or to the lives of his or her family members Persons who are found to have performed, engaged in, participated in orchestrating, planning and/or implementing, or condoned or acquiesced in the carrying out of any specified criminal acts by subordinates, should rightly be excluded.[33]

43 Voluntary continued membership of a part of a government engaged in criminal activities may constitute grounds for exclusion where the member cannot rebut the presumptions of knowledge and personal implication. The Nuremberg Tribunal distinguished membership of, or a senior position in, a government from voluntary membership of *a part of the Government engaged in criminal acts, where these acts were generally known*. Thus, it declared certain formations of the Nazi Schutzstaffel (SS) to be criminal organisations, excluding those who were drafted into the organisation by the State [34]

44 Individuals are excludable, therefore, where there is a clear nexus of the individual to the act(s), or the actions of the individual are determining or decisive. The mere fact of a former position in a repressive regime does not constitute the "serious reasons" required for exclusion. To conclude otherwise is to judge people based on their title, rather than their actual responsibilities, actions or activities As already mentioned, the consequences flowing from exclusion are so grave that ordinary principles of fairness, natural justice and due process of law require a prior investigation of the actual role played by these officials before passing judgment on their responsibility for grave human rights violations or other criminal acts

(iii) Association: Groups which Commit Crimes/Advocate Violence

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[33] In establishing that the acts in question were voluntary or that no choice was available for the applicant, relevant questions may therefore include: Were the acts part of official government policy of which the official was aware? Was the official in a position to influence this policy one way or the other? To what extent would the official's life or that of family members have been endangered if (s)he had refused to be associated with or involved in the perpetration of the crime(s)? Did the official make any attempt to distance him or herself from the policy, or to resign from the government?

[34] With regard to the specified parts of the Nazi SS, the International Military Tribunal stated the following: "The Tribunal finds that knowledge of these criminal activities was sufficiently general to justify declaring that the SS was a criminal organization to the extent hereinafter described. It does appear that an attempt was made to keep secret some phases of its activities, but its criminal programmes were so widespread, and involved slaughter on such a gigantic scale, that its criminal activities must have been widely known. It must be recognized, moreover, that the criminal activities of the SS followed quite logically from the principles on which it was organized." Judgment of the International Military Tribunal, p.78

45 As with membership of a particular government, membership *per se* of an organization which advocates or practices violence is not necessarily decisive or sufficient to exclude a person from refugee status. The fact of membership does not, in and of itself, amount to participation or complicity. The adjudicator will need to consider whether the applicant had close or direct responsibility for, or was actively associated with, the crimes specified under the exclusion clauses.

46 UNHCR has consistently emphasised that an applicant should not be excluded if (s)he is able to give a plausible explanation that (s)he did not commit, and was not directly or closely associated with, the commission of any crime specified under Article 1F of the 1951 Convention.[35] A plausible explanation regarding the applicant's non-involvement or dissociation from any excludable acts, coupled with an absence of serious evidence to the contrary, should remove the applicant from the scope of the exclusion clauses.

47 Notwithstanding the above, the purposes, activities and methods of some groups or terrorist organizations are of a particularly violent and notorious nature. Where membership of such groups is voluntary, the fact of membership may be impossible to dissociate from the commission of terrorist crimes. Membership may, in such cases, amount to the personal and knowing participation or acquiescence amounting to complicity, in the crimes in question.[36]

48 Again, great caution must be exercised in this regard. Care should be taken to consider defences to exclusion, notably factors such as duress or self-defence.[37] Moreover, regard must also be had to the fragmentation of certain terrorist groups. In some cases, the group in question is unable to control acts of violence committed by militant wings. "Unauthorized acts" may also be carried out in the name of the group.

VII. Article 1 F (b): Serious Non-Political Crimes

49 Article 1F(b) provides for exclusion of persons who have committed a "serious non-political crime" outside the country of refuge prior to being admitted to that country as a refugee. The issues for determination here are: (i) what constitutes a serious crime; (ii) whether the crime in question is of a *non-political* nature, and (iii) the meaning of the phrase "outside the country of refuge prior to his admission". State practice on what constitutes a "serious non-political crime" for purposes of the

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[35] 1988 reissue: *Determination of Refugee Status of Persons Connected With Organizations or Groups Which Advocate and/or Practice Violence* (UNHCR IOM/FOM/78/71)

[36] See also *Ramirez v. M.E.I.*, [1992] 2 F.C. 317 (C.A.): "mere membership in an organization which from time to time commits international offences is not normally sufficient for exclusion from refugee status"; "no one can commit international crimes without personal and knowing participation". The Court found, further, that mere presence at the scene of an offence is insufficient to qualify as personal and knowing participation. The Court also held however that "where an organization is principally directed to a limited, brutal purpose, such as a secret police activity, mere membership may by necessity involve personal and knowing participation in persecutorial acts."

[37] For example, in one Canadian case the applicant, who had been forcibly conscripted into the Salvadoran army, deserted at the first possible opportunity after finding out that the army used torture. The court considered this a relevant factor in concluding that the applicant was not guilty of the commission of war crimes or crimes against humanity: *Moreno v. Canada* (Minister of Employment and Immigration), Action A-746-91 (F.C.A., 14 Sept. 1993)

exclusion clauses has not always been transparent or consistent. The intention of the Article is to reconcile the conflicting aims of, on the one hand, rendering due justice to a refugee even if (s)he has committed a crime and, on the other, to protect the community in the country of asylum from the danger posed by criminal elements fleeing justice. For this reason, several different variables are to be considered in the individual case.[38]

(i) Serious Crime

50 The term "serious crime" obviously has different connotations in different legal systems The IRO Constitution excluded "ordinary criminals who are extraditable by treaty " This is echoed in the language of the UNHCR Statute, which excludes a person in respect of whom there are serious reasons for considering that he has committed a crime covered by the provisions of treaties of extradition Similar language in regard to extraditable crimes was not retained for the 1951 Convention, which describes the nature of the crime with greater precision In the light of developments in extradition law, the fact that a crime is covered by an extradition agreement will not of itself constitute a ground for exclusion. It must meet the "serious, non-political crime" criterion

51 The *Handbook* specifies that a "serious" crime refers to a capital crime or a very grave punishable act. Examples would include homicide, rape, arson and armed robbery. Certain other offenses could also be deemed serious if they are accompanied by the use of deadly weapons, serious injury to persons, evidence of habitual criminal conduct and other similar factors. It is evident that the drafters of the 1951 Convention did not intend to exclude individuals simply for committing non-capital crimes or non-grave punishable acts. The seriousness of the crime can be deduced from several factors, including the nature of the act, the extent of its effects, and the motive of the perpetrator The overriding consideration should be the aim of withholding protection only from persons who clearly do not deserve any protection on account of their criminal acts [39] While there are risks in seeking to define crimes which would not be thus covered, crimes such as petty theft, or the possession and use of soft drugs should not be grounds for exclusion under Article 1F(b), because they do not reach a high enough threshold to be regarded as serious

52. Article 1 F(b) should be seen in parallel with Article 33, which permits the return of a refugee if there are reasonable grounds for regarding him as a danger to the security of his country or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country

53 The primary question in determinations under Article 1F(b) is whether the criminal character of the refugee outweighs his/her need for international protection or character as a *bona fide* refugee. As

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[38]UNHCR Eligibility Manual, 1962, p.138

[39]The President of the Conference of Plenipotentiaries for the 1951 Convention stated. "When a person with a criminal record sought asylum as a refugee, it was for the country of refuge to strike a balance between the offences committed by that person and the extent to which his fear of persecution was well-founded " UN Document A/Conf 2/SR 29, p.23.

stated in the *Handbook*, it is important to strike a judicious balance between the nature of the crime in question, and the likely persecution feared by the applicant. Thus, if the applicant has reason to fear severe persecution, a crime must be very serious in order to exclude the applicant.

(ii) Non-political Crime

54 For exclusion, the serious crime must also be non-political, which implies that other motives - such as personal reasons or gain - predominate. Increasingly, extradition treaties specify that certain crimes, notably acts of terrorism, are to be regarded as non-political for the purpose of applying extradition treaties, although such treaties typically also contain protective clauses in respect of refugees. For the purpose of the refugee definition, the nature of the crime should be assessed in each case, taking all factors into account.[40]

55 For a crime to be regarded as political, the political objective must also - for purposes of this analysis - be consistent with human rights and fundamental freedoms. A political goal which breaches fundamental human rights cannot form a justification. The IRO Constitution specified that grounds for refugee protection were "persecution, or fear...of persecution because of race, religion, nationality or political opinions, *provided these opinions are not in conflict with the principles of the United Nations*, as laid down in the Preamble of the Charter of the United Nations."[41] This is consistent with provisions of other human rights instruments specifying that their terms shall not be interpreted as implying the right to engage in activities aimed at the destruction of human rights and fundamental freedoms.[42]

(iii) Expiation

56 Article 1 F b itself offers no guidance as to the role of expiation, whether through the sentence having been served for the commission of the crime, an amnesty, the lapse of time, or other rehabilitative measures. The *Handbook* specifies that:

In evaluating the nature of the crime presumed to have been committed, all the relevant factors - including any mitigating circumstances - must be taken into account. It is also necessary to have regard to any aggravating circumstances as, for example, the fact that the applicant may already have a criminal record. The fact that an applicant convicted of a serious non-political crime has already served his sentence or has been granted a pardon or has benefited from an amnesty is also relevant. In the latter case, there is a presumption that the

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[40] *McMullen v. I.N.S.*, 788 F. 2d 591 (9th Cir. 1986)

[41] Annexe 1, Section C (1) (a), IRO Constitution, 1946

[42] A test enunciated by a court in one case dealing with the question was as follows:

Under this standard, a "serious non-political crime" is a crime that was not committed out of "genuine political motives," was not directed toward the "modification of the political organization or structure of the state," and in which there is no direct, "causal link between the crime committed and its alleged political purpose and object." In addition, even if the preceding standards are met, a crime should be considered a serious non-political crime if the act is disproportionate to the objective, or if it is "of an atrocious or barbarous nature." (*McMullen v. I.N.S.*, op. cit. 44)

exclusion clause is no longer applicable, unless it can be shown that, despite the pardon or amnesty, the applicant's criminal character still predominates.[43]

The original UNHCR Eligibility Guide (1962) noted that UNHCR practice was to interpret this exclusion clause as applying chiefly to fugitives from justice, and not to those who had already served their sentences unless they were regarded as continuing to constitute a menace to a new community

(iv) Outside the country of refuge

57 The exclusion clauses also require that the offence have been committed "outside the country of refuge prior to his admission to that country as a refugee." As the *Handbook* points out in paragraph 153, "outside the country of refuge" would normally be the country of origin, although it also could be another country. However, it can never be the country where the applicant seeks recognition as a refugee. Refugees who commit serious crimes within the country of refuge are subject to that country's criminal law process, and to Articles 32 and 33(2) of the Convention in the case of particularly serious crimes; not to the exclusion clauses under Article 1 (F) [44]

58 In rare cases, domestic courts have interpreted Article 1F(b) of the 1951 Convention to mean that any serious non-political crime committed *before the formal recognition as a refugee* would lead automatically to the application of Article 1F(b). Under this interpretation, an applicant who committed a serious non-political crime *in the country of asylum*, but *before formal recognition as a refugee*, would be excluded. UNHCR does not endorse this interpretation of the exclusion clauses. It would not be correct to use the phrase "prior to admission as a refugee" to refer to the period in the country prior to *recognition* as a refugee, as the recognition of refugee status is declarative and not constitutive. "Admission" may therefore include mere physical presence in the country

VIII. Article 1 F (c): Acts Contrary to the Purposes and Principles of the United Nations

59 Article 1F(c) excludes from protection as refugees persons who have been "guilty of acts contrary to the purposes and principles of the United Nations." The purposes and principles of the United Nations are spelt out in Articles 1 and 2 of the UN Charter [45] The broad, general terms of the purposes and principles of the UN offer little guidance on the types of acts which would deprive a

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[43] Para 157.

[44] "The Conference eventually agreed that crimes committed before entry were at issue " Goodwin-Gill, p.102

[45] The purposes of the United Nations are: to maintain international peace and security; to develop friendly relations among nations; to achieve international co-operation in solving socio-economic and cultural problems, and in promoting respect for human rights; and to serve as a center for harmonizing the actions of nations

The principles of the United Nations are: sovereign equality; good faith fulfillment of obligations, peaceful settlement of disputes; refraining from the threat or use of force against the territorial integrity or political independence of another state; and assistance in promoting the work of the United Nations

person of the benefits of refugee status.[46] Under the Universal Declaration of Human Rights, also, the right to seek and to enjoy in other countries asylum from persecution "may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations."

60 The *travaux préparatoires* reflect a lack of clarity in the formulation of this clause. It is suggested that, by their nature, these purposes and principles can only be violated by persons who have been in a position of power in their countries or in state-like organizations.[47] The *Handbook* also suggests in paragraph 163 that "an individual, in order to have committed an act contrary to these principles, must have been in a position of power in a member State and instrumental to his State's infringing these principles." The fact that the Charter of the United Nations addresses itself to States also suggests that references to "acts contrary to purposes and principles" imply a State-like or quasi-State capacity. The delegate who, at the Conference of Plenipotentiaries, pressed for the inclusion of this clause likewise specified that it was not aimed at the "man in the street."

61 Implicit in the comments of some delegates is the notion that persecutors themselves should not become refugees, and this concept of refusing protection to persecutors has subsequently been echoed in some States' caselaw, both recently and in the more distant past. In the 1950s, a number of persons were excluded under this Article where their denunciations of individuals to the occupying authorities had had serious consequences, including death.

62 Commentators underline that even if non-State actors could be regarded as having committed acts contrary to the purposes and principles of the UN, there is a qualitative difference between the many and varied acts that could be so described. The acts in question must be criminal acts. It was suggested by the drafters that these were human rights violations short of crimes against humanity.[48]

63 This particular exclusion clause is rarely used. The broad wording of Article 1 F (c), the hesitation of the drafters and their assumption that this clause could be invoked only very rarely, strengthens the case for limiting the application of Article 1 F C.[49]

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[46] The wording of the Statute differs in referring to *prosecutions genuinely arising from non-political crimes or* from acts contrary to the purposes and principles of the United Nations.

[47] Grahl-Madsen writes: "It appears from the records that those who pressed for the inclusion of the clause had only vague ideas as to the meaning of the phrase 'acts contrary to the purposes and principles of the United Nations. (. . .) It is easily understandable that the Social Committee of the Economic and Social Council expressed genuine concern, feeling that the provision was so vague as to be open to abuse. It seems that agreement was reached on the understanding that the phrase should be interpreted very restrictively." *The Status of Refugees in International Law*, Sijthoff, Leiden, 1972, p.283

[48] The delegate of Pakistan, concurring with the representative of Canada, said the phrase was "so vague as to be open to abuse by governments wishing to exclude refugees". (E/AC.7/SR.160, p.16, quoted in Eligibility Manual 1962 p.143).

[49] According to the (non-binding) 1994 *Declaration on Measures to Eliminate International Terrorism* (A/Res/49/60)."Acts, methods and practices of terrorism constitute a grave violation of the purposes and principles of the United Nations..."

VI. Other Crimes: Developing Areas under Article 1 F(a) and (b)

64 Certain other acts are emerging as crimes under international law, and thus universally punishable . The Draft Articles on State Responsibility (ILC) establish a category of international crimes, in cases of "a serious breach on a wide-spread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide or apartheid." The ILC refers to a crime under international law as the breach of "a norm of international law accepted and recognized by the international community of states as a whole as being of such a fundamental character that its violation attracts the criminal responsibility of individuals " In its recent deliberations, while reiterating the need for

"a comprehensive legal instrument for the suppression of exceptionally serious crimes in view of the increase in serious crimes against the peace and security of mankind perpetrated by individuals who very often acted with impunity."[50]

deep disagreement persisted on which crimes should be defined as "crimes against the peace and security of mankind. " in particular, in respect to international terrorism and drug trafficking which it was suggested, should not be placed on the same level as "large-scale violations of humanitarian norms such as those that had occurred in the former Yugoslavia or Rwanda."[51]

65 Crimes of this nature may fall within the terms of 1 F, but not every act under the broad headings below suffices for exclusion: this will depend on all the circumstances. While the magnitude of certain acts and their inherently political nature clearly places them beyond the "serious non-political crimes" described in Article 1 F(b) of the Convention, the very purpose of current legal developments is to criminalize certain acts - whether politically-driven or not. As regards Article 1 F (a), not all acts discussed under this heading constitute crimes against humanity. Pending further deliberations on international crimes, the specific crimes discussed here must be considered on a case by case basis, bearing in mind the background provided in this paper on the ambit of each of the exclusion clauses

(i) Terrorism

66 There is, as yet, no internationally-accepted legal definition of terrorism The final report of the International Law Commission on the Draft Code of Crimes Against the Peace and Security of Mankind did not include a crime of "terrorism" During deliberations on the Draft Code in the Sixth Committee, general support was however expressed for the inclusion of acts of terrorism in the category of crimes against humanity.[52] While this has remained stymied by the lack of a legal definition, the focus has turned to the various prohibited acts broadly described as terrorism.[53]

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[50] Report of the International Law Commission on the Work of its Forty-Seventh Session (1995), A/CN.4/472 of 16 February 1996, para. 7

[51] Ibid., para 23

[52] Ibid., para 131.

[53] One delegation noted that the international community has, instead, concluded individual conventions "that identify specific categories of acts that the entire international community condemns, regardless of the motives of the perpetrators, and that require the parties to criminalize the specified conduct, prosecute or extradite the transgressors and

67 The UN continues to devote considerable attention to the issue of terrorism.[54] In a recent report, the Secretary-General of the United Nations has noted that efforts to adopt international instruments addressing the problem of international terrorism have failed, whether under the auspices of the League of Nations or of the United Nations However, there are currently thirteen global or regional treaties pertaining to international terrorism (although twelve are in force, many are far from universal in terms of ratification)[55]

- 1963 *Convention on Offences and Certain Other Acts Committed on Board Aircraft*
- 1970 *Convention for the Suppression of Unlawful Seizure of Aircraft*;
- 1971 *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*;
- 1973 *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*;
- 1979 *International Convention against the Taking of Hostages*; and
- 1979 *Convention on the Physical Protection of Nuclear Material*
- 1988 *Convention for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation*
- 1988 *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*
- 1988 *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*
- 1991 *Convention on the Marking of Plastic Explosives for the Purpose of Detection* (not yet in force)
- 1977 *European Convention on the Suppression of Terrorism*
- 1971 OAS *Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are Internationally Significant*
- 1987 SAARC *Regional Convention on the Suppression of Terrorism.*

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cooperate with other States for the effective implementation of these duties... By focusing on specific types of action that are inherently unacceptable..., the existing approach has enabled the international community to make substantial progress in the effort to use legal tools to combat terrorism. Ibid. para 123.

[54] See also the (nonbinding) *Declaration on Measures to Eliminate International Terrorism*, GA Res 49/60 of 9 December 1994, which declares that

"2. Acts, methods and practices of terrorism constitute a grave violation of the purposes and principles of the United Nations, which may pose a threat to international peace and security, jeopardize friendly relations among States, hinder international cooperation and aim at the destruction of human rights, fundamental freedoms and the democratic bases of society;

3. Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic or any other nature that may be invoked to justify them."

[55] The Report of the Secretary-General (*Measures to Eliminate International Terrorism*, A/51/336 of 6 September 1996) includes an analysis of each of these conventions, information received from Member States, and a bibliography on international terrorism.

68 Those committing terrorist acts as defined within these instruments are, in principle, excludable from refugee status, although the basis for exclusion under Article 1F will depend on the act in question and all surrounding circumstances. As with the crimes enumerated under Art. 1 F (a) above, the personal and knowing involvement of the individual in acts of terrorism is required for exclusion

(ii) Hijacking

69 Hijacking, covered by some of the conventions listed above, is considered an international crime An act of hijacking does not automatically exclude the culprit from refugee status It is evident that hijacking poses a grave threat to the life and safety of innocent passengers and crew; it is for this reason that there is so much opprobrium attached to acts of hijacking. Thus, the threshold for the proportionality test should be extremely high, and only the most compelling circumstances can justify non-exclusion for hijacking. Among issues for consideration are the following

- whether the applicant's life was at stake for persecution-related reasons;
- whether the hijacking was a last and unavoidable recourse to flee from the danger at hand (i.e., whether there were other viable and less harmful means of escape from the country where persecution was feared);
- whether there was serious physical, psychological or emotional harm to other passengers or crew

70 While hijacking is illegal under international law, there also is a well-established legal principle to protect refugees and not return them to places where they may face persecution. It has been argued that the methods of flight condemned under international law, in the absence of grave or life-threatening action, do not preclude granting asylum to deserving individuals.[56]

(iii) Torture

71. Torture deserves special mention as several recent recommendations for exclusion are based on acts of torture The relevance of torture also lies in the fact that certain provisions of the *Convention against Torture* are directly related to issues of exclusion. In particular, the UN Committee against Torture, an international human rights treaty body established as a monitoring body under the *Convention against Torture*, reinforces the principle of *non-refoulement*.

72. The *Convention against Torture* defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person" for certain purposes when "such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." Thus, to qualify as torture in the

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[56] Arthur C. Helton. "The Case of Zhan Zhenai: Reconciling the International Responsibilities of Punishing Air Hijacking and Protecting Refugees", 13 (4)
Loyola L.A. International & Comparative Law Journal 849 (June 1991).

context of this Convention, an act must have been carried out with the involvement of a person acting in an official, rather than a private, capacity.

73. It is evident from the definition that acts of torture carried out on a systematic scale against an identifiable group of persons constitute crimes against humanity under Article 1F(a). Under other circumstances, acts of torture could constitute serious non-political crimes under Article 1F(b)

74 A considerable number of international conventions proscribe torture, and the prohibition against torture is now also considered to be part of customary international law Torture is described as a crime against humanity in the Statutes of the International Criminal Tribunals for former Yugoslavia and for Rwanda, and in the draft Code of Offences of the ILC. The *Convention against Torture* considers it a criminal offence which cannot be justified by any exceptional circumstances whatsoever

V. Defences to Exclusion

75 In certain circumstances, there are valid defences to the crimes in question, notably where the criminal intent (*mens rea*) is absent These defences relate to crimes committed under duress, or in self-defence, lack of knowledge of the nature of the actions, or lack of responsibility due to, for example, immaturity or mental or psychological handicap. Self-defence is another limited and self-explanatory defence

(i) Superior Orders

76 A commonly-invoked defence is that of "superior orders" or coercion from higher governmental authorities. However, it is an established principle of law that the defence of superior orders does not absolve individuals of blame. According to the Nuremberg Principles,

"The fact an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility under international law, *provided a moral choice was in fact possible for him*."[57]

77 Article 7(4) of the Statute of the International Criminal Tribunal for former Yugoslavia provides, "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."

(ii) Coercion/Duress

78 The defence of coercion was often linked with that of superior orders during the postwar trials. For a defence of coercion to be sustained, "the perpetrator of the incriminating act must be able to show that he would have placed himself in grave, imminent and irremediable peril if he had offered any resistance." In addition, the perpetrator must not have "contributed to the emergence of this

[57] Principle IV, Nuremberg Principles (emphasis added)

peril".[58] Moreover, the harm caused by obeying the illegal order cannot be greater than the harm which would result from *disobeying* the order.[59] There are, therefore, three stringent conditions which must be met for the defence of coercion or duress to have validity

(iii) Necessity

79 In the case of crimes committed as a means of, or concomitant with, the process of flight for fear of persecution, the factors to be taken into account include: whether the means used were the most reasonable or logical, or there were alternative means of achieving the ultimate goal; whether the gravity of the offence was proportionate to the political goal; and whether there was a close and direct link between the offence and its alleged political objective.

(iv) Lack of awareness of criminal nature of act

80 Where an individual is totally unaware of the criminal nature or consequences of the acts in question, or of links to such acts, this defence may be raised

IX. Temporal Aspect of Exclusion

81 Whereas Article 1 F B specifies that the crime in question is one committed prior to admission, the other exclusion clauses contain no temporal references. In general, the exclusion clauses are applicable to acts committed prior to entry. The Convention makes provision for the handling of crimes committed by the refugee following admission.[60] A refugee committing a crime in the country of refuge is subject to due process of law in that country. Therefore, in the event that a recognized refugee were to commit such crimes, the principle generally applicable is that of the obligation of the host country to bring to trial, or to extradite the individual, subject to the *non-refoulement* principle.

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[58] Article 9, Draft Code.

[59] Weisman, op.cit. 22, p.132.

[60] "The issue of acts committed by the refugee in the host country is extensively discussed in Grahl-Madsen, pp. 148-178, including acts of violence, military activities, and propaganda. The author discusses the responsibility of the host State under international law, noting in particular that

"Just as a State does not incur international responsibility by receiving refugees in its territory and granting them asylum, it will be no more responsible for injurious acts committed by refugees than it is for acts committed by anyone else in its territory. A State is not obliged to be more suspicious of the average refugee (as a potential author of acts injurious to other States or their nationals) than of other persons, and it has consequently no duty to keep refugees under constant surveillance in order to forestall any mischief on their part. Only in the case of refugees with known terroristic or revolutionary leaning the authorities of the host country may have to be more on the alert." p.184. "In cases where the host State, by the willful co-operation or culpable negligence on the part of its organs, becomes internationally responsible for acts committed by refugees, it may not be demanded of it that it ends the asylum by expelling the refugees or by extraditing them to the offended State. Its duty is simply to provide redress by the normal means, applicable in cases of international responsibility, notably the payment of damages and/or the punishment of the guilty individuals." p.187.

82. Facts which would have justified exclusion may, however, become known only subsequently. The Handbook indicates that

> Normally it will be during the process of determining a person's refugee status that the facts leading to exclusion under these clauses will emerge. It may, however, also happen that facts justifying exclusion will become known only after a person has been recognized as a refugee. In such cases, the exclusion clause will call for a cancellation of the decision previously taken.[61]

X. Other Protections

83 A person falling under the exclusion clauses is nevertheless entitled to basic human rights. While as a rule States enjoy almost complete freedom to expel aliens from their territory, there are a number of restrictions to this Among the restrictions applicable to the expulsion of persons other than recognized refugees are the following:

- Article 3(1) of the UN *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* provides that no State party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture;[62]
- Article 22(8) of the *American Convention on Human Rights* provides that in no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions;
- According to the established case-law of the European Commission and Court of Human Rights, the expulsion or extradition of a person to a country where he risks to be subjected to torture or to inhuman or degrading treatment or punishment violates Article 3 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms;*
- The return of a person to face a death penalty may be prohibited under applicable international human rights law, as may return to a serious danger of inhuman or degrading treatment or punishment, or execution;
- The European Court of Human Rights has also held that the expulsion of an alien may involve a breach of Article 8 of the European Convention, conveming the right to private and family life;
- Several international instruments embody the principle that no alien who is lawfully present in the territory of a State (or, as the case may be, no alien coming under the specific category covered by the instrument) may be expelled therefrom except in pursuance of a decision reached in accordance

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[61] Para 141.

[62] On the first occasion on which the Committee against Torture considered the case of an asylum-seeker under the *Convention against Torture*, authorities were obliged to refrain from removing a rejected asylum-seeker to his country of origin or to any other country where the asylum-seeker run the risk of being expelled or returned to the country of origin or of being subjected to torture *(Balabou Mutombo v. Switzerland* (Communication No 13/1993 of 27 April 1994), reprinted in 7 *International Journal of Refugee Law* 322 (1995) In another recent case, the Committee found an obligation to refrain from forcibly returning the applicant to his country. (*Tahir Hussain Khan v Canada* (Communication No. 15/1994 of 18 November 1994)

with the law.[63] Some of these instruments provide that the expulsion of such an alien may not be made except on grounds of national security or public order.

- Various international instruments enshrine the principle that the collective expulsion of aliens is prohibited. In addition, the principle that an expulsion must be carried out in a manner least injurious to the person affected was well established by the beginning of the century.[64]

84 Execution of a decision to return a refugee claimant (including pursuant to an extradition order) should be suspended until a final decision on refugee status is made The applicant should always benefit from the principle of *non-refoulement* in the interim because the refugee status determination is declarative, not constitutive. Only a negative decision after examination of the individual's application may remove the applicant from the benefits of refugee status

(i) Extradition

85 UNHCR Executive Committee Conclusion No. 17 (XXXI) recognises that cases in which the extradition of a refugee is requested may give rise to special problems. noting that "refugees should be protected in regard to extradition to a country where they have well-founded reasons to fear persecution .. "[65] States are called on to take account of the principle of *non-refoulement* in treaties relating to extradition and in their national legislation. In situations where prosecution is likely to be politically manipulated, the "refugee claim should not be dismissed as raising a simple issue of 'fear of prosecution or punishment', but should instead be examined on its merits."[66] This does not prejudice the need for States to ensure that such individuals are tried and punished for serious crimes.

86 In certain circumstances. the country of asylum should be encouraged to try the asylum-seeker for the alleged crime. For example, the *Convention against Torture* allows for universal jurisdiction over perpetrators of torture, making it an obligation for state members to try offenders who are present on their territory Another ground for jurisdiction is provided by Security Council Resolution 978 (1995), which urges states to arrest and detain and, where appropriate. prosecute persons found within their territory against whom there is sufficient evidence that they were responsible for genocide and other grave human rights violations (in this case, in Rwanda).

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[63] International Covenant on Civil and Political Rights Art. 13; Protocol No. 7 to the European Convention on Human Rights. Art. 1(1); American Convention on Human Rights Art 22(6); African Charter on Human and People's Rights Art.12(4)' 1954 Convention relating to the Status of Stateless Persons Art 31

[64] Borchard. Edwin M., The Diplomatic Protection of Citizens Abroad, The Banks Law Publishing Co . New York. 1919 p. 60.

[65] *Problems of Extradition Affecting Refugees*, EXCOM Conclusion No. 17 (XXXI) 1980.

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