

Exclusion under Article 1F since 2001: two steps backwards, one step forward

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Introduction

Exclusion from refugee status is in a state of flux. From a time when, apart from a very few states,¹ it was used very rarely, it is now a regular feature in refugee status determination hearings.² The trigger for the increased use was undoubtedly the terrorist attacks in the United States on 11 September 2001 and the subsequent Security Council Resolutions that unjustifiably linked the granting of refugee status with terrorism.³ However, it also allowed states to address directly those applying for status who had participated in the various armed conflicts that had become prominent from the 1990s onwards.⁴

In the period after 2001, inclusion within Article 1A.2 of the 1951 Convention Relating to the Status of Refugees was being increasingly narrowed for a variety of reasons to do with migratory trends, while the scope of Article 1F seemed to be expanding to exclude ever more applicants for refugee status who would otherwise qualify for protection against *refoulement*. This is not to say that refugee status should not properly be confined to those not falling within Article 1F, but that Article 1F needs to be understood and interpreted in its context as part of a treaty designed to protect the rights of individuals.⁵ Fortunately, more recent decisions of courts carrying out refugee status determination have shown a greater degree of nuancing in their interpretation of Article 1F.

This paper will explore how courts have developed their interpretation of Article 1F since 2001. It will demonstrate how an originally far-reaching approach to exclusion has become more refined and how interaction with international

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1 Canada and The Netherlands combined a generous policy towards admission with a rigorous use of exclusion - *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982.

2 *Eg.* Between 2008 and 2010, the *Cour National du Droit d'Asile* dealt with fifteen cases relating to exclusion for crimes against humanity – my thanks are due to Trina Ng for this piece of information.

3 See UNSC Res. 1368, 1373 and 1377, all 2001.

4 It was not that armed conflicts took on a profoundly different nature in the 1990s, just that the practices of the various parties became more widely known and the horrors of war were seen in graphic details on television screens and in newspaper photographs around the world, such that states, rightly, had to be seen to respond thereto.

5 See Article 31 of the Vienna Convention on the Law of Treaties, 1969; 1155 UNTS 331, 8 ILM 679, entered into force 27 January 1980. Although the VCLT only applies directly to treaties concluded by states after it came into force (Article 4), it is accepted that the VCLT reflects customary international law.

human rights law has developed the protection regime. The paper starts by addressing exclusion in the framework of the Convention before exploring various themes arising from the case law since 2001: contextual interpretation in line with the Vienna Convention on the Law of Treaties; the consequences of return if excluded and their relevance to determining whether to exclude; exclusion by association, that is, whether membership of certain organizations can, in and of itself, justify exclusion; and, the relationship between exclusion and the UN Charter.

The 1951 Convention and Exclusion

Despite the fact that some governments have fused Articles 1F and 33.2 into one provision when incorporating the Convention into domestic law, they are two different grounds on which someone who fled persecution might lose the protection of the state that would otherwise offer it. It almost goes without saying that these two articles are only relevant with respect to someone who would be or, indeed, is within the definition of a refugee found in Article 1A.2 - if someone is not a Convention refugee, they do not need to be excluded.⁶ Article 1F, known as the exclusion clause although the word 'exclude' or any derivative thereof does not appear in the article, prevents someone even qualifying as a refugee.⁷ To be excluded, only "serious reasons" need to be proven that the applicant for refugee status falls within sub-paragraphs (a), (b) or (c), that is, that s/he committed a crime against peace, a war crime, a crime against humanity, a serious non-political crime or is guilty of acts contrary to the purposes and principles of the United Nations. As stated in UNHCR's 2003 Exclusion Guidelines, the standard of proof for Article 1F that is ordinarily imposed on the state where the person is seeking refugee status is not very high.⁸ Indeed, at the Arusha Expert Meeting, UNHCR was prepared to accept that,

⁶ On the "inclusion before exclusion" debate, see Gilbert, 'Current Issues in the Application of the Exclusion Clauses' (Current Issues) in Feller, Türk and Nicholson, *Refugee Protection in International Law*, 2003, (Refugee Protection) pp.425-78, at pp.464-66. See also, Expert Meeting on Complementarities between International Refugee Law, International Criminal Law and International Human Rights Law, Arusha, Tanzania, 11-13 April 2011, paragraph 33, published in 23 *IJRL* 860 (2011) at p.867.

Article 1F

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

- (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) He has been guilty of acts contrary to the purposes and principles of the United Nations.

See Gilbert, (Current Issues at pp.432 *et seq.*)

⁸ See UNHCR, Background Note to the 2003 Guidelines on the Exclusion Clauses, HCR/GIP/03/05, 4 September 2003 (Exclusion Guidelines) (with Background Note), at paragraph 107, where it is opined that the 'balance of probabilities' is too low a threshold (Exclusion Background Note). See also, *Gurung v Secretary of State for the Home Department* [2002] UKIAT 04870 HX34452-2001, 15 October 2002, (*Gurung*) at paragraph 95, holding that serious reasons 'implied something less than' the criminal or civil standards (not overruled on

in appropriate circumstances, even an acquittal might allow for exclusion.

41. An indictment by an international criminal tribunal or court is, on the other hand, generally considered to meet the 'serious reasons for considering' standard required under Article 1F of the 1951 Convention. If the person concerned is subsequently acquitted on substantive (rather than procedural) grounds, following an examination of the evidence supporting the charges, the indictment can no longer be relied upon to support a finding of 'serious reasons for considering' that the person has committed the crimes for which he or she was charged.

42. An acquittal by an international criminal tribunal or court does not mean, however, that the person concerned automatically qualifies for international refugee protection. It would still need to be established that he or she has a well-founded fear of being persecuted linked to a 1951 Convention ground. Moreover, exclusion may still apply, for example, in relation to crimes not covered by the original indictment.⁹

Given that those participating in war crimes or other gross human rights violations might fall within any of the subparagraphs of Article 1F, this paper draws on decisions based on all three.

Article 33.2, on the other hand, applies to persons who have refugee status in the state of refuge, but whose guarantee of *non-refoulement* is withdrawn; Article 33.2 does not challenge their refugee status.

33.2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

Article 33.2 requires the state of refuge to show "reasonable grounds" that the Article 1A.2 refugee is a danger to the security of the country of refuge or, having been convicted of a particularly serious crime, rather than there merely being serious reasons for considering that s/he committed a serious non-political

this part). As the United Kingdom Supreme Court said in *R (on the application of JS) (Sri Lanka) v Secretary of State for the Home Department* [2010] UKSC 15 (JS UKSC):

39. It would not, I think, be helpful to expatiate upon article 1F's reference to there being "serious reasons for considering" the asylum-seeker to have committed a war crime. Clearly the Tribunal in *Gurung* (at the end of para 109) was right to highlight "the lower standard of proof applicable in exclusion clause cases" - lower than that applicable in actual war crimes trials. That said, "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".

Cf. Oberlander v Attorney-General of Canada [2009] FCA 330 (*Oberlander*), at paragraph 20. See also, the Arusha Meeting, *supra* n6, at paragraph 34 (p.867).

34. For exclusion to be justified, it must be established, on the basis of clear and reliable evidence, that the person concerned incurred individual responsibility for acts which fall within one of the three categories under Article 1F of the 1951 Convention.

⁹ *Supra* n6, at p.869.

crime for 1F(b), s/he constitutes a danger to the community of that country. It places a heavier burden on the state now wishing to be rid of the refugee. Furthermore, given that Article 33.2 simply removes the guarantee found in Article 33.1, customary *non-refoulement*, which some would deem, at least in some circumstances, to be a peremptory norm of international law, is not affected.¹⁰

While the consequence of the application of Articles 1F or 33.2 might appear to be very similar, there is a fundamental difference that explains in part some of the reaction of UNHCR to the events of 11 September 2001. Article 1F prevents a person qualifying as a refugee; the applicant does not obtain that status. Article 33.2, though, does not challenge refugee status, just its principal benefit. The *travaux préparatoires* to the 1951 Convention it make clear that Article 1F was drafted to ensure that only the deserving were deemed to be refugees;¹¹

10See Lauterpacht and Bethlehem, 'The scope and content of the principle of *non-refoulement*: Opinion' (*Non-Refoulement*) in Feller, Türk and Nicholson, *Refugee Protection*, at pp.87-179. And see Guy Goodwin-Gill's arguments on the principles of humanity established by the *Corfu Channel Case* (United Kingdom v Albania) [1949] ICJ Rep 4, 'The Right to Seek Asylum: Interception at Sea and the Principle of *Non-Refoulement*', An Inaugural Lecture given at the *Palais des Académies, Bruxelles* 16 February 2011, pp.10-11, *Fondation Philippe Wiener – Maurice Anspach Chaire W. J. Ganshof van der Meersch*.

11For the *travaux*, see RefWorld <<http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain>>. There is an intrinsic link "between ideas of humanity, equity and the concept of refuge" - see Standing Committee *Note on the Exclusion Clauses*, 8th Meeting, 30 May 1997, paragraph 3. The second aim of the drafters was to ensure that those who had committed grave crimes in World War II, other serious non-political crimes or who were guilty of acts contrary to the purposes and principles of the United Nations did not escape prosecution - Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Twenty-fourth Meeting, A/CONF.2/SR.24, 27 November 1951, statements of Herment, Belgium, and Hoare, United Kingdom. However, there was a degree of confusion between the fear that asylum might confer immunity upon serious international criminals and the issue of priority between extradition treaties and the 1951 Convention, although that was inevitable where extradition was the sole method of bringing perpetrators of such serious crimes before a court with jurisdiction to prosecute - see A/CONF.2/SR.24, SR.29 and SR.35, Item 5(a), 27 and 28 November and 3 December 1951, Conference of the Plenipotentiaries. See also, Weis, *The Refugee Convention, 1951: the Travaux Préparatoires Analysed with a Commentary* (1995), at p.332. Cf. SCIP Interim Report on Implementation of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, EC/SCP/66, 22 July 1991.

54 Most States which have replied permit the extradition of refugees in accordance with relevant legislation and/or international arrangements if the refugee is alleged to have committed an extraditable offence in another country. A number of States, however, exclude the extradition of a refugee if, in the requesting State, he or she would be exposed to persecution on the grounds mentioned in Article 1 of the Convention, if he or she would not be given a fair trial (Article 6 of the European Human Rights Convention) or would be exposed to inhuman and degrading treatment (*ibid*, Article 3). One State generally prohibits the extradition of a refugee to his/her country of origin. In two States, the extradition of a refugee is specifically excluded: in one because refugees, as regards extradition, are treated as nationals of the country and, therefore, by definition, cannot be extradited; in the other because refugees are protected against extradition by the constitution. Two States, on the other hand, permit the extradition of a refugee to a 'safe third country', *ie.* a country other than the country of origin.

See also, Fitzpatrick, *The Post-Exclusion Phase: Extradition, Prosecution and Expulsion*, 12 IJRL (Supp) 272 (2000).

paragraph 7d of the 1950 Statute had a similar purpose with respect to international protection through mandate status by UNHCR. As will be discussed below, the question arises as to whether Article 1F can be used as a revocation clause for a refugee who ceases to be “deserving”.

Despite the fact that Articles 1F and 33.2 had been part of the Convention since 1951 and that existing domestic legislation applying the Convention had included both forms of exclusion, after 11 September 2001 states brought in new legislation that emphasised exclusion from refugee status.

Case Law since 9/11

Exclusion from refugee status has been the subject of cases in domestic courts, while human rights treaty monitoring bodies have also dealt with the potential removal of those who have applied for refugee status and been excluded under the 1951 Convention. Some of the first cases decided after 11 September 2001 suggested that the courts might prove a bulwark of protection against legislatures tightening up procedures relating to refugees so as to be seen to be doing something in the fight against terrorism.¹² However, several subsequent judgments suggested that the courts have rejected a purposive approach to interpreting the ordinary meaning of the terms 1951 Convention in their context and have restricted the protection that ought to be available to those with a well-founded fear of persecution. Much of the subsequent case law saw judges adopt a more far-reaching application of Articles 1F and 33.2. Nevertheless, the tide seems to be turning again, with an acknowledgement that some of the previous cases need nuancing.

Interpreting the 1951 Convention in conformity with international law:

The purposive approach is no more than an acknowledgement of the obligation in Article 31 of the VCLT to give the terms of a treaty their ordinary meaning in context in the light of its object and purpose.¹³ The 1951 Convention was established to provide international protection for those unable or unwilling to avail themselves of the protection of their country of nationality for the stated reasons. As such, any limitation on such humanitarian provisions should be interpreted restrictively. Furthermore, another part of the context of the 1951 Convention is to be found in the opening paragraph of its preamble:

Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination

When the 1951 Refugee Convention was concluded, there was no extant international human rights treaty in force. The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), a regional mechanism, came into force in 1953, and the Universal Declaration of Human Rights of 1948, is, as its title makes clear, a mere declaration of the General

¹²See Gilbert, “The “Law” and “Transnational Terrorism” - 26 *Netherlands Yearbook of International Law* 3-32 (1995).

¹³ See *IH (s.72; ‘Particularly Serious Crime’) Eritrea* [2009] UKAIT 00012 (09 March 2009).

Assembly—in and of itself, it is not binding in international law.¹⁴ In the intervening period of sixty years, however, international human rights law has undergone the most dramatic development. Human rights are fundamental to refugee protection and the developments in international human rights law since 1951 require courts dealing with refugee status determination to understand Article 1F in the light of those changes. If international human rights law would not allow the *refoulement* of a person, no matter what their previous conduct, international refugee law that is the root source of *non-refoulement* needs be interpreted in a consistent fashion.¹⁵ This is not to say that Article 1F cannot be applied where international human rights law would prevent deportation, for refugee *status* is more than just *non-refoulement*. It is more in relation to Article 33.2, which leaves refugee status untouched, that international human rights standards should be more influential.

There is another aspect of “ordinary meaning” that has particular relevance to the interpretation of Articles 1F and 33.2 since 2001. On its face, it seems as if Article 1F deals with the activities of the applicant that took place before s/he arrived in the state where s/he is seeking refuge, while Article 33.2 would be more appropriate for post-refugee status activities. Indeed, in relation to Article 1F(b), it is the case that it only applies to serious non-political crimes committed “outside the country of refuge prior to his admission to that country as a refugee”. The 2003 Exclusion Guidelines, however, indicate that Article 1F(a) and (c) can be used to revoke refugee status where the refugee subsequently commits war crimes, crimes against humanity or crimes against peace or if s/he is guilty of acts contrary to the purposes and principles of the United Nations. While the concept of revocation seems to be part of cessation under Article 1C, none of the sub-clauses are appropriate for revocation based on activities in the state of refuge – Article 1C.5 deals with a change of circumstances in the source state. Nonetheless, in a March 2011 decision of the German Federal Administrative Court,¹⁶ it was held that the wording used in incorporating Article 1C.5 into German law could be triggered by subsequent behaviour that fell within Article 1F(a) or (c) (paragraph 20). The argument centres on whether the “circumstances in connexion with which he has been recognized as a refugee

14 Given the date of its adoption by the General Assembly, 10 December, one might like to think of it as Eleanor Roosevelt’s wish list to Father Christmas for 1948. Never before or since, though, has a ‘wish list’ had such a spectacular impact in the world as regards both states and individuals.

15 See *Saadi v Italy*, Application no. 37201/06, European Court of Human Rights (Grand Chamber), 28 February 2008.

127. As the prohibition of torture and of inhuman or degrading treatment or punishment is absolute, irrespective of the victim’s conduct (see *Chahal*, cited above, § 79), the nature of the offence allegedly committed by the applicant is therefore irrelevant for the purposes of Article 3 (see *Indelicato v Italy*, no. 31143/96, § 30, 18 October 2001, and *Ramirez Sanchez v France* [GC], no. 59450/00, §§ 115-116, 4 July 2006).

148. Furthermore, it should be pointed out that even if, as they did not do in the present case, the Tunisian authorities had given the diplomatic assurances requested by Italy, that would not have absolved the Court from the obligation to examine whether such assurances provided, in their practical application, a sufficient guarantee that the applicant would be protected against the risk of treatment prohibited by the Convention (see *Chahal*, cited above, § 105). The weight to be given to assurances from the receiving State depends, in each case, on the circumstances obtaining at the material time.

16 *Dr M v Federal Republic of Germany*, BVerwG 10 C 2. 10, 10 March 2011.

have ceased to exist” includes cases where acts that lead to exclusion under Article 1F can, if committed subsequent to recognition, render the refugee outside the protection of the Convention. The Court also relied on Article 14 of the European Communities Qualification Directive,¹⁷ (paragraph 23) which seems more justifiable in so far as it is recognised that Article 14 goes beyond the language of Article 1C.5 and Article 1F taken alone or combined:

14.3 Member States shall revoke, end or refuse to renew the refugee status of a third country national or a stateless person, if, after he or she has been granted refugee status, it is established by the Member State concerned that:

(a) he or she should have been or *is* excluded from being a refugee in accordance with Article 12; (emphasis added)

While it is undoubtedly the case that the strict language of Article 1F(a) and (c) does permit it to be used in relation post-entry crimes, unlike sub-paragraph (b), there are serious questions about whether that avoids, in an unwarranted manner, the specific provisions found in Article 33.2. Moreover, the attempt by the Federal Administrative Court to harmonise this within the language of Article 1C.5 is clumsy and unhelpful. As stated, all provisions of a treaty should be interpreted in line with their ordinary meaning *in context* according to Article 31 of the Vienna Convention on the Law of Treaties; for sure, applying Article 1F(a) or (c) to activities after the grant of refugee status would fit the ordinary meaning of that treaty provision, but it does not take into account the context which must include other provisions of the 1951 Convention, to wit, Article 33.2. It seems clear that anyone suspected of war crimes, crimes against peace, crimes against humanity or acts contrary to the purposes and principles of the UN would be regarded “as a danger to the security of the country in which he is”, either because there will be direct impact on that state from the activities or it will affect the relationship of that state with another state with respect to which the refugee’s activities are having an impact – it may even be that the refugee will have been convicted of a particularly serious crime, the other limb of Article 33.2 of the 1951 Convention, because the nature of these crimes is that universal jurisdiction attaches, even mandatory universal jurisdiction in the case of grave breaches of the 1949 Geneva Conventions. Thus, given that the refugee can be dealt with under Article 33.2 in these cases, it fits better the context of the 1951 Convention as a whole to utilize it rather than Article 1F.

The consequences of return:

Double balancing is the process whereby the courts could take into account the consequences of returning the refugee or applicant for refugee status to the country of nationality.¹⁸ In *Zaoui*,¹⁹ though, the New Zealand Supreme Court concluded

¹⁷ Council Directive 2004/83/EC, of 29 April 2004, on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (EC QD or Qualification Directive).

¹⁸ See Gilbert, (Current Issues at pp.450-455).

¹⁹ *Attorney-General v. Zaoui and ors* [2005] NZSC 38 (*Zaoui*) at paragraph 42. See also, Haines, ‘National Security and *Non-Refoulement* in New Zealand: Commentary on *Zaoui v. Attorney-General (No.2)*’ in McAdam, (Forced Migration, pp.63-91).

that the judgment or assessment to be made under article 33.2 is to be made on its own terms, by reference to danger to the security, in this case, of New Zealand, and without any balancing or weighing or proportional reference to the matter dealt with in article 33.1, the threat, were Mr Zaoui to be expelled or returned, to his life or freedom on the proscribed grounds

Given that Article 33.2 expressly revokes the guarantee of *non-refoulement*, an accepted rule of customary international law if not a peremptory norm,²⁰ it is even more regrettable that the Supreme Court took a narrow view of the role of decision makers, to apply Article 33.2 “on its own terms”.

The German Federal Administrative Court in paragraphs 32 and 33 of its reference,²¹ raised this issue, but under the Qualification Directive.

In this Court’s opinion, the exclusion clauses are fundamentally mandatory, and leave the authorities in charge no room for discretion. The requirements of constituent fact are founded on an abstract proportionality test. If the requirements of constituent fact are met, it must be assumed that the individual is not deserving of refugee status. Nevertheless, the application of the exclusion clauses in a given case cannot contravene the principle of proportionality recognised in international and European law. This principle requires that every measure must be suitable and necessary, and in reasonable proportion to the intended purpose. ... [Primarily] the misconduct charged against the individual must be weighed against the consequences of exclusion.

Nevertheless, the ECJ went on to reject the proportionality argument.²² If the principle of proportionality cannot be invoked, it is worth considering whether Goodwin-Gill’s arguments in favour of the principle of humanity might in the future provide a fresh avenue by which to address the question of double balancing.²³

Membership of a terrorist organization or ‘exclusion by association’:

The Canadian Supreme Court in *Suresh*²⁴ was dealing with the Convention Against Torture, not the 1951 Convention, but it accepted that membership alone would not necessarily suffice:

‘110. We believe that it was not the intention of Parliament to include in the s.19 class of suspect persons those who innocently contribute to or become members of terrorist organizations. This is supported by the provision found at the end of s. 19, which exempts from the s. 19 classes ‘persons who have satisfied the Minister that their admission would not be detrimental to the national interest’. Section 19 must therefore be read as permitting a refugee to establish that his or her continued residence in

²⁰See Lauterpacht and Bethlehem, *Non-Refoulement*.

²¹BVerwG 10 C 48.07, to the European Court of Justice on exclusion under the EC QD.

²²See *Judgment of the Court (Grand Chamber) of 9 November 2010 (reference for a preliminary ruling from the Bundesverwaltungsgericht - Germany) - Bundesrepublik Deutschland v B (C-57/09), D (C-101/09)*, paragraph 3 of the operative part of the judgment.

²³*Supra* n10.

²⁴*Suresh*, at paragraphs 75 and 110. Some parts of the following text are taken from the author’s chapter, ‘Exclusion and Evidentiary Assessment’ at pp.161-177 in Noll, *Proof, Evidentiary Assessment and Credibility in Asylum Procedures*, 2005.

Canada will not be detrimental to Canada, notwithstanding proof that the person is associated with or is a member of a terrorist organization. This permits a refugee to establish that the alleged association with the terrorist group was innocent. In such case, the Minister, exercising her discretion constitutionally, would find that the refugee does not fall within the targeted s. 19 class of persons eligible for deportation on national security grounds.'

Comparison should be drawn, however, with the decision of the New Zealand Refugee Status Appeals Authority (RSAA) in *Refugee Appeal No.70405/97*:²⁵

'Because the appellant has freely admitted to active involvement in the *Sendero Luminoso* from May 1992 to February 1995 and to having taken part in armed attacks against innocent civilians, the Authority is duty-bound to consider whether Article 1F (a) operates to exclude the appellant from the Refugee Convention. A brief description of the *Sendero Luminoso* is required

The significance of this information is that when the appellant joined the *Sendero Luminoso* in May 1992 he could have been in no doubt whatsoever of its then 12-year history of violence, terror, human rights abuses and glorification of violence. Thereafter, the appellant's willing, active and armed involvement in the intimidation of civilians and theft of property is the clearest evidence of his knowledge of and deep complicity in the activities of the *Sendero Luminoso*. *In short, there was personal and knowing participation in an organization principally directed to a limited, brutal purpose and the wholesale breach of Common Article 3 of the four Geneva Conventions of 1949*. We are satisfied on the facts therefore that there are serious reasons for considering that the appellant has committed crimes against humanity, as defined in the International Instruments drawn up to make provision in respect of such crimes and as interpreted and applied by the principal decisions of the Canadian Federal Court of Appeal, namely *Ramirez v. Canada (Minister of Employment and Immigration)* [1992] 2 FC 306 (FC:CA); *Moreno v. Canada (Minister of Employment and Immigration)* [1994] 1 FC 298 (FC:CA) and *Sivakumar v. Canada (Minister of Employment and Immigration)* [1994] 1 FC 433 (FC:CA). (emphasis added)

The Swedish authorities have equally held that membership of *Sendero Luminoso* was enough to exclude.²⁶ In *Zrig*,²⁷ the Canadian Federal Court of Appeal allowed exclusion through association with a terrorist group carrying out the Article 1F(b) crimes. According to the Court,

[94] In order to exclude persons covered by Article 1F(a) and (b), it will be necessary to show that there are "serious reasons for considering" that the serious crimes identified were committed, but it will not be necessary to attribute any one specifically to the claimant. This test applies to both Article 1F(a) and Article 1F(b).

²⁵ 29 May 1997. Cf. *MH*, where membership of the PKK alone was not sufficient.

²⁶ See *Paez v. Sweden*, 29482/95, European Commission of Human Rights 18 April 1996.

²⁷ *Zrig v. Canada (Minister of Citizenship and Immigration)* (CA) [2003] FCA 178 (*Zrig*). See the pre-2001 case cited in *Zrig* (paragraph 56), *Bazargan v. Canada (Minister of Citizenship and Immigration)* (1996), 205 N.R. 282 at paragraphs 11-12 (FCA).

[96] In my view, the interpretation of Article 1F(b) which the [applicant] is asking the Court to adopt *conflicts with the very wording of the Article*. (emphasis added)

The appellant had argued that only crimes for which extradition might be sought fell within 1F(b). While that proposition cannot be sustained, the court's view is equally questionable - Article 1F(b) speaks of there being serious reasons for considering that the applicant for refugee status "has committed a serious non-political crime", not just that one can be "ascribed to him as an accomplice by association".²⁸ The strict literal interpretation of Article 1F should cut both ways. It should be noted that while Decary JA concurred in the result, he did so by reference to Article 1F(c) and rejected complicity by association.²⁹

The German Federal Administrative Court in 2011 held that

32 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 ... 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.³⁰

The Court of Appeal for England and Wales dealt with this issue in some depth in 2009, expanding on the IAT decision in *Gurung*. In *The Queen on the Application of JS (Sri Lanka) v SSHD*,³¹ the Court of Appeal had to deal with the exclusion of a

28Zrig, at paragraph 102. See also, *El Hayek v. Canada (Minister of Citizenship and Immigration)* 2005 FC 835, at paragraphs 17 and 18, June 17 2005, and *Jaouadi v. Canada (M.C.I.)* 2005 FC 1256 at paragraph 4, September 16 2005:

4. The general principle in matters of exclusion is that mere membership in an organization implicated in the commission of international crimes is not sufficient to establish a basis for exclusion. There is however an exception to the general rule when the very existence of the organization in question is principally directed to a limited, brutal purpose. There is then an irrebuttable presumption of complicity.

Cf. MH, where membership of the PKK alone was not sufficient.

29Zrig, at paragraph 137:

In short, complicity by association is a method of perpetrating a crime which is recognized in respect of certain international crimes and applied in the case of international crimes covered by Article 1F(a), and by analogy in the case of acts contrary to the international purposes and principles sought by Article 1F(c).

This method of perpetration is not recognized as such in traditional criminal law.

See also, *Tantoush v. Refugee Appeal Board*, High Court of South Africa (Transvaal Provincial Division) Case No: 13182/06 (*Tantoush*), 14 August 2007.

30 *Supra* n16.

31 [2009] EWCA Civ 364 (*JS CA*). On this specific point, the Court of Appeal was upheld in the Supreme Court – see *supra* n8 at paragraph 8.

trusted member of the intelligence unit in the LTTE. The approach in *Gurung* (paragraphs 112-14) had been to focus on the organization to which the applicant for refugee status belonged and see whether it had an ultimate political agenda in line with liberal democracy or no political agenda and a focus on terrorism. *JS* rejected this approach of placing the organization on some sort of continuum and opted to look at whether there would be serious reasons for thinking the applicant would be guilty within the terms of the Rome Statute.

115. The starting point for a decision maker addressing the question whether there are serious reasons for considering that an asylum seeker has committed an international crime, so as to fall within article 1F(a), should now be the ICC Statute.³² The decision maker will need to identify the relevant type or types of crime, as defined in articles 7 and 8; and then to address the question whether there are serious reasons for considering that the applicant has committed such a crime, *applying the principles of criminal liability set out in articles 25, 28 and 30 and any other articles relevant in the particular case.* (emphasis added)

The Court of Appeal went on to look at Article 25(d) of the Rome Statute and the concept of joint criminal enterprise as expounded by the ICTY to determine the scope of guilt by association, “that is, where a crime was committed as a foreseeable way of effecting a shared criminal intent and the defendant knowingly took the risk of this happening”.³³ This understanding of exclusion by association only expressly applied to Article 1F(a), but it marked a more individualistic approach more in keeping with the language of the 1951 Convention and international criminal law. When the case went to the Supreme Court,³⁴ they accepted the basic argument of the Court of Appeal.

30. Rather, however, than be deflected into first attempting some such sub-categorisation of the organisation, it is surely preferable to focus from the outset on what ultimately must prove to be the determining factors in any case, principally (in no particular order) (i) the nature and (potentially of some importance) the size of the organisation and particularly that part of it with which the asylum-seeker was himself most directly concerned, (ii) whether and, if so, by whom the organisation was proscribed, (iii) how the asylum-seeker came to be recruited, (iv) the length of time he remained in the organisation and what, if any, opportunities he had to leave it, (v) his position, rank, standing and influence in the organisation, (vi) his knowledge of the organisation's war crimes activities, and (vii) his own personal involvement and role in the organisation including particularly whatever contribution he made towards the commission of war crimes.

With respect to involvement through joint criminal enterprise, however, the

³² Author's footnote - see also, *SK (Zimbabwe) v SSHD* [2010] UKUT 327.

³³ *JS* CA, at paragraph 118. And see paragraphs 119-22, too. The concept of joint criminal enterprises was nowhere near as developed at the time of *Gurung*, so it is unsurprising that the earlier case did not rely on it with respect to exclusion. See also *AG (Minister of Immigration) v Tamil X and the RSAA* [2010] NZSC 107 at para. 50 and following.

³⁴ *JS* (SC), *per* Lord Brown with whom the Court concurred. Looking at the nature of the organization to which the applicant belonged may have more relevance to exclusion under Article 1F(b) where there are serious reasons for considering that s/he committed a “serious non-political crime”, but the Court of Appeal and Supreme Court are right to reject it in relation to 1F(a) and, in all likelihood, 1F(c).

Supreme Court adopted a broader understanding than the Court of Appeal.

38. ... 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.³⁵

At the Arusha Expert Meeting,³⁶ there was a more thorough discussion of joint criminal enterprise in comparison to aiding and abetting:

49. International jurisprudence provides guidance on the criteria for establishing individual responsibility in those cases where the commission of a crime is brought about by two or more persons, and in particular, the different forms of joint criminal enterprise (JCE). The notions of JCE I, II and III were developed primarily by the ICTY in a manner independent of domestic law, in recognition of the collective nature of the commission of the most serious crimes and the need to punish those most responsible for international crimes. By contrast, the criteria for aiding and abetting, as interpreted and applied by both the ICTY and the ICTR, are more closely related to the ways in which individual responsibility is established at national levels for persons who make a substantial contribution to the commission of crimes by others.

50. The first pronouncements of the ICC on issues of individual responsibility indicate a shift away from joint criminal enterprise towards greater reliance on concepts such as co-perpetration or indirect perpetration of international crimes, although it is not yet fully clear to what extent the ICC's criteria for determining the responsibility, especially of persons in positions of authority as well as those contributing to the commission of the acts in various other ways, are different from those developed and applied by the ICTY and ICTR. Further analysis will be needed.

The Expert Meeting went on to find that domestic courts are increasingly referring to decisions of the international courts and tribunals, although the simpler inchoate crimes of aiding and abetting would usually suffice.

Thus, the nature of the organization should not be determinative. Rather, what matters is the part played in the organization by the person seeking refugee status and whether that facilitated the commission of crimes or acts that fell within Article 1F. In *SK (Zimbabwe)*, the applicant had taken part in the eviction of white farmers in Zimbabwe. In finding that this amounted to a crime against humanity, the court also looked to her specific role in the eviction.

42. The Appellant was not merely present. She was on each occasion a voluntary, even if reluctant, actual and active participant in beatings; even

³⁵ See also, *AA-R (Iran) v SSHD* [2013] EWCA Civ 835. Cf. *Oberlander*, FCA, at paragraph 18. For a detailed comparison of the approach of the United Kingdom Supreme Court *vis à vis* other appellate courts in the Anglo-American system of law, see Rikhof, *Complicity gets complicated: the impact of the JS case of the Supreme Court of the United Kingdom*, conference paper delivered at York University, Toronto, 2010 (in the possession of the author). See also, *SK Zimbabwe* and *Ezokola v Minister of Citizenship & Immigration* [2013] SCC 40.

³⁶ *Supra* n6, at pp.870-71. And see now, *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, 14 March 2012.

taking her evidence at face value, beating many people hard as part of the aim of driving them away. She specifically tried to demonstrate her loyalty to Zanu-PF in her actions.

43. She is plainly criminally liable on a joint enterprise domestic law basis.

The United States case of *In re S-K*³⁷ dealt with a statutorily extended understanding of exclusion through association. The BIA held that the applicant for refugee status was barred from receiving protection because she had provided material support to a terrorist organization, despite the fact that the organization in question, the Chin National Front, was seeking the overthrow of the Burmese military junta, a government that the United States government does not recognize as legitimate. As Vice-Chairman Osuna's concurring opinion put it:

In sum, what we have in this case is an individual who provided a relatively small amount of support to an organization that opposes one of the most repressive governments in the world, a government that is not recognized by the United States as legitimate and that has engaged in a brutal campaign against ethnic minorities. It is clear that the respondent poses no danger whatsoever to the national security of the United States. Indeed, by supporting the CNF in its resistance to the Burmese junta, it is arguable that the respondent actually acted in a manner consistent with United States foreign policy. And yet we cannot ignore the clear language that Congress chose in the material support provisions; the statute that we are required to apply mandates that we find the respondent ineligible for asylum for having provided material support to a terrorist organization.³⁸

At Osuna V-C's suggestion, the Department for Homeland Security filed a statement acknowledging that applicant was not ineligible for asylum, Congress having expressly determined that the CNF was not a terrorist organization. Nevertheless, the broad language of the material support bar remains - "the statutory language is breathtaking in its scope".³⁹

Finally in this section, mere presence at the scene of a crime should not be sufficient to invoke the exclusion clauses. According to cases at the end of World War II, presence was not enough on its own to justify a finding of guilt.⁴⁰ In *Prosecutor v Brdjanin*,⁴¹ the Appeals Chamber of the ICTY held that to be guilty

³⁷ 23 I&N Dec.936 (BIA 2006) (*S-K*).

³⁸ *S-K*, at 950. On a related note, in January 2007 Kenya deported to Somalia not only a "key international terror suspect", but also wives and children - BBC News website 6309299.stm, 2007/01/29 10:56:39.

³⁹ *S-K*- at 948

⁴⁰ *L and Others*, Supreme Court in the British Occupied Zone, 14 December 1948, cited in Cassese *International Criminal Law* (2nd edition, 2008) at p.215.

⁴¹ Case No. IT-99-36-A, 3 April 2007.

273. The Trial Chamber might have intended to apply in this case the theory of aiding and abetting by tacit approval and encouragement. An accused can be convicted for aiding and abetting a crime when it is established that his conduct amounted to tacit approval and encouragement of the crime and that such conduct substantially contributed to the crime. This form of aiding and abetting is not, strictly speaking, criminal responsibility for omission. In the cases where this category was applied, the accused held a position of authority,

through presence, the accused would have to hold a position of authority and be found to be giving tacit approval and encouragement.

Exclusion and the UN Charter – Article 1F(c)

Article 1F(c) raises interesting questions in international law. Exclusion arises where there are serious reasons for considering that the applicant ‘is guilty of acts contrary to the purposes and principles of the United Nations’. Article 103 of the United Nations Charter provides:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Thus, Article 1F(c) reflects this Charter-based obligation.⁴² The question is whether the purposes and principles extend beyond what is found in the Preamble and Articles 1 and 2 of the Charter. Is it arguable that the General Assembly or the Security Council can add to the purposes and principles and thereby extend the limitation in Article 1F(c) to a humanitarian provision? While academically interesting, however, there is little to be gained from exploring the issue further here, since any expansion by either organ can be explained in terms of providing a gloss to the purposes and principles as set out in the Charter—for instance, when the Security Council indicated that international terrorism was contrary to the purposes and principles of the United Nations, it was in the context of a Chapter VII resolution passed in order to maintain international peace and security.⁴³ Courtesy of article 25 of the Charter, all member states are bound by Chapter VII resolutions. Thus, if a court carrying out a refugee status determination were to hold that an international terrorist was excluded under Article 1F(c), then that is foursquare within Article 1.1 of the Charter. Nevertheless, Article 24.2 of the Charter sets out that the Security Council must always act in accordance with the Purposes and Principles of the United Nations, in particular, Preambular paragraph 2 and Article 1.3, both of which refer to respect for fundamental human rights. That is not to say, though, that Article 1F(c) could simply be used as an anti-terrorism measure. There still needs to be careful consideration as to whether one can attribute *guilty acts* to the applicant. In *KJ (Sri Lanka) v SSHD*,⁴⁴ the court considered whether mere membership of an organization that in part engaged in acts of terrorism should exclude the applicant:

38. However, the LTTE, during the period when KJ was a member, was not ... an organisation [engaged solely in terrorism]. It pursued its political ends in part by acts of terrorism and in part by military action directed against

he was physically present on the scene of the crime, and his non-intervention was seen as tacit approval and encouragement. (footnotes omitted).

42 See Lauterpacht J, sitting as an *ad hoc* judge on the International Court of Justice in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Further Requests for the Indication of Provisional Measures, Order of 13 September 1993, where he gives paramountcy to Security Council Resolutions under Chapter VII *vis à vis* treaty obligations, such as the 1951 Convention in this context, but not over norms of *jus cogens* if such apply with respect to *non-refoulement* to torture (paragraph 100).

43 For example, UN Security Council Resolution 1377 (2001):

Declares that acts of international terrorism constitute one of the most serious threats to international peace and security in the twenty-first century.

See also, the German Federal Administrative Court in the *Dr M* case, *supra* n16, at paragraph 35.

44 [2009] EWCA Civ 292. See also, *MH (Syria) v SSHD* [2009] EWCA Civ 226, and *SSHD v DD (Afghanistan)* [2010] EWCA Civ. 1407, at paragraphs 55-65.

the armed forces of the government of Sri Lanka. The application of Article 1F(c) is less straightforward in such a case. 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. Of course, the higher up in the organisation a person is the more likely will be the inference that he agrees with and promotes all of its activities, including its terrorism. But it seems to me 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.

40. ... The word 'complicit' is unenlightening in this context. In my judgment, the facts found by the Tribunal showed no more than that [KJ] had participated in military actions against the government, and did not constitute the requisite serious reasons for considering that he had been guilty of acts contrary to the purposes and principles of the United Nations.

The *SSHD v DD (Afghanistan)*⁴⁵ case raised Article 1F(c) questions in relation to armed conflicts. The Court of Appeal held that the attacks carried out on the Afghan armed forces were not terrorist acts. However, the attacks on the International Special Assistance Force (ISAF), which had been mandated by the Security Council to provide and maintain security in Afghanistan, were contrary to the purposes and principles of the UN and, therefore, allowed for exclusion under Article 1F(c). However, as further evidence that the courts are not prepared to let Article 1F be used as a blanket power to exclude, even here it would be a case-by-case study.

65. Indeed, 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. (emphasis added)

If the argument that Article 1F(c) should only be used against heads of state or government or their equivalents has been lost,⁴⁶ then courts carrying out refugee status determination must not let it be used so broadly that any individual could not foresee the potential consequence of loss of refugee status. Not every General Assembly or even Security Council Resolution reflects a purpose or principle of the United Nations such that acts contrary thereto automatically fall within Article 1F(c).

Human Rights Treaty Bodies and Exclusion

Almost without fail, human rights treaty bodies, when presented with the opportunity, have barred the transfer of people who would be excluded from refugee status and the protection offered by Article 33 in terms of *non-refoulement*. Assuming, therefore, that there is a human rights treaty body with jurisdiction, the full consequences of exclusion can be avoided.

⁴⁵ [2010] EWCA Civ. 1407. The appeal in *DD* was dismissed by the Supreme Court on 21 Nov. 2012 ([2012] UKSC 54).

⁴⁶ *Georg K v The Ministry of the Interior*, 71 ILR 284.

It should be noted, though, that where it has been considered, the human rights treaty monitoring bodies have held they have no remit to review the fairness of the refugee status determination hearing. Protection, as will be seen, comes, where applicable, through the substantive human rights treaty obligations. The right to a fair trial under the European Convention for the Protection of Human Rights and Fundamental Freedoms is found in Article 6.

Article 6 - Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

The European Court of Human Rights has consistently held that a status determination hearing is not the determination of a civil right or obligation or of a criminal charge.⁴⁷

In General Comment 32,⁴⁸ the Human Rights Committee reviewed Article 14 of the International Covenant on Civil and Political Rights. The language of Article 14 is broader, referring to 'his rights and obligations in a suit at law' and might have afforded review of fair trial guarantees in cases dealing with refugee status.⁴⁹ Indeed, General Comment 32 asserts in paragraph 3 that "[the] first sentence of paragraph 1 [of Article 14] sets out a general guarantee of equality before courts and tribunals that applies regardless of the nature of proceedings before such bodies". However, General Comment 32 goes on to provide at paragraph 17 as follows:

17. On the other hand, the right to access a court or tribunal as provided for by article 14, paragraph 1, second sentence, does not apply where domestic law does not grant any entitlement to the person concerned. ... This guarantee furthermore does not apply to extradition, expulsion and deportation procedures. Although there is no right of access to a court or tribunal as provided for by article 14, paragraph 1, second sentence, in these and similar cases, other procedural guarantees may still apply.⁵⁰

⁴⁷*Maaouia v France* 39652/98, 5 October 2000, at paragraph 40.

⁴⁸CCPR/C/GC/32, 23 August 2007.

⁴⁹International Covenant on Civil and Political Rights, UNGA Res.2200A(XXI), UNGAOR, 21st Sess., Supp.No.16, 52 (1966); 999 UNTS 171; 6 ILM 368 (1967); 61 AJIL 870 (1967); hereinafter, ICCPR.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law

In *Kwame Williams Adu v Canada*, CCPR/C/60/D/654/1995, 18 July 1997, at paragraph 6.3 the Human Rights Committee found the communication inadmissible for non-exhaustion of domestic remedies and that it therefore did not have to decide if Article 14 applied.

⁵⁰Paragraph 62 of General Comment 32 provides that

Insofar as domestic law entrusts a judicial body with the task of deciding about expulsions or deportations, the guarantee of equality of all persons before the courts and tribunals as enshrined in article 14, paragraph 1, and the principles of impartiality, fairness and equality of arms implicit in this guarantee are applicable - see Communication No. 961/2000, *Everett v Spain*, paragraph 6.4.

The HRC concluded in its observations on Georgia as follows:

"[That states] adopt effective legislative and *procedural* safeguards to ensure that nobody is returned to a country where there are substantial grounds to believe that they are at risk of being arbitrarily deprived of their life or being tortured or

Nevertheless, a further argument can be made specific to Articles 1F and 33.2 of the 1951 Convention and Article 6 of the ECHR. The European Court of Human Rights has repeatedly held that the way a hearing is designated under domestic law is not conclusive for Strasbourg.⁵¹ The Court will decide whether the proceedings in question, although not designated criminal, could be seen to have the characteristics of a criminal hearing, having particular regard to penalties. As was stated in *Engel* at paragraph 82, the Court's supervision would generally prove to be illusory if it did not also take into consideration the degree of severity of the penalty that the person concerned risks incurring.

Where an applicant for refugee status can be excluded and potentially returned to a state where her/his life or freedom would be threatened because there are serious reasons for considering that s/he has committed a war crime, a crime against peace, a crime against humanity, a serious non-political crime or is guilty of acts contrary to the purposes and principles of the United Nations, then there is a strong argument that the refugee status determination proceeding should be treated as a 'criminal charge against him' - unlike extradition law, *refoulement* would not necessarily result in a trial to determine whether s/he has committed a crime under Article 1F(a) or (b) or is guilty of 1F(c) acts, so status determination is much closer to a criminal trial with the possibility of the most serious of consequences.⁵² On that basis, it is suggested that Article 6 of the ECHR and Article 14 of the ICCPR even more so should properly be engaged in cases where someone is excluded from refugee status. Interestingly, in *Sufi and Elmi v UK*,⁵³ a European Court of Human Rights case dealing with expulsion of two men seeking to prevent their return to Somalia for fear they would face persecution having allegedly committed serious offences in the United Kingdom, the Court applied its own Article 3 jurisprudence in *MSS v Belgium and Greece*⁵⁴ to assess whether the United Kingdom's approach under its refugee law had been correct.

Where applicable, international human rights law treaties guarantee rights to everyone within the jurisdiction of a state party, including applicants for refugee status and even excluded applicants for refugee status. In February 2008, the European Court of

subjected to other cruel, inhuman or degrading treatment or punishment"
(emphasis added)

Concluding Observations on: Georgia, CCPR/C/GEO/CO/3, 15 November 2007, paragraph 7(a).

51 See *Engel v. The Netherlands*, Series A, vol.22, at paragraph 81, European Court of Human Rights, 18 June 1976.

52 On the relationship between Article 1F and extradition law, see Gilbert, (Current Issues, at pp.446-49). While there can be no direct correlation between the political offence exemption and the meaning of serious non-political crime, they are clearly related terms. If a direct correlation were intended, one would expect to see a replication of the language in Paragraph 7(d) of the UNHCR Statute 1950 that expressly refers to extradition law. On the other hand, one of the leading British cases on the political offence exemption is a case dealing with exclusion from refugee status – see *T v SSHD* [1996] 2 All ER 865; see also, *Ahani v Canada*, Canadian Federal Court (Trial Division), [1995] 3 FC 669, and *Singh v Minister for Immigration and Multicultural Affairs*, Federal Court of Australia, [2000] FCA 1125.

Cf. The concurring opinion of Bratza J in *Maaouia*

53 Application Nos 8319/07 and 11449/07, European Court of Human Rights (Fourth Section) 28 June 2011, esp paras 252 ff,

54 Application No 30696/09, European Court of Human Rights (Grand Chamber), 21 January 2011.

Human Rights held in *Saadi v Italy*⁵⁵ no-one could be deported to where there was a serious risk that their right to be free from torture, inhuman or degrading treatment or punishment would be violated contrary to Article 3 ECHR. Article 3 of the Convention Against Torture establishes an absolute prohibition on return to Article 1 Torture. In *Agiza v. Sweden*,⁵⁶ the Committee Against Torture went so far as to hold that:

13.4 ... The procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk.

The Human Rights Committee in *Alzery v. Sweden*⁵⁷ dealt with the potential breach of Article 7 ICCPR as a consequence of expulsion, even in the light of diplomatic assurances:

11.4 ... The State party in fact relied on the diplomatic assurances alone for its belief that the risk of proscribed ill-treatment was sufficiently reduced to avoid breaching the prohibition on *refoulement*.

11.5 The Committee notes that the assurances procured contained no mechanism for monitoring of their enforcement. Nor were any arrangements made outside the text of the assurances themselves which would have provided for effective implementation. The visits by the State party's ambassador and staff commenced five weeks after the return, neglecting altogether a period of maximum exposure to risk of harm. The mechanics of the visits that did take place, moreover, failed to conform to key aspects of international good practice by not insisting on private access to the detainee and inclusion of appropriate medical and forensic expertise, even after substantial allegations of ill-treatment emerged. In light of these factors, the State party has not shown that the diplomatic assurances procured were in fact sufficient in the present case to eliminate the risk of ill-treatment to a level consistent with the requirements of article 7 of the Covenant. The author's expulsion thus amounted to a violation of article 7 of the Covenant.

This active involvement post-surrender has been reflected in a Resolution on the Transfer of Persons of the former Sub-Commission for the Protection and Promotion of Human Rights.⁵⁸

55Saadi.

148. Furthermore, it should be pointed out that even if, as they did not do in the present case, the Tunisian authorities had given the diplomatic assurances requested by Italy, that would not have absolved the Court from the obligation to examine whether such assurances provided, in their practical application, a sufficient guarantee that the applicant would be protected against the risk of treatment prohibited by the Convention The weight to be given to assurances from the receiving State depends, in each case, on the circumstances obtaining at the material time.

See also, *DD and AS v SSHD* SIAC SC/42 and 50/215, 27 April 2007.

56*Agiza v. Sweden*, Communication No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003 (2005). This decision (see paragraph 13.5) marked a change of approach from its earlier decision in *Hanan Ahmed Fouad Abd El Khalek Attia v. Sweden*, Communication No. 199/2002, U.N. Doc. CAT/C/31/D/199/2002 (2003). More effective again would be for the State seeking assurances to persuade the other State to ratify the draft Optional Protocol to the Convention Against Torture permitting regular visits to all places of detention by the Subcommittee on Prevention of Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture - adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199.

57CCPR/C/88/D/1416/2005, 10 November 2006.

4. Confirms that where torture or cruel, inhuman or degrading treatment is widespread or systematic in a particular State, especially where such practice has been determined to exist by a human rights treaty body or a special procedure of the Commission on Human Rights, there is presumption that any person subject to transfer would face a real risk of being subjected to such treatment and recommends that, in such circumstances, the presumption shall not be displaced by any assurance, undertaking or other commitment made by the authorities of the State to which the individual is to be transferred;⁵⁹
6. Strongly recommends that, in other cases, where the question of a real risk of torture arises in a particular case, no transfer shall be carried out unless:
- a) The State authorities effecting the transfer seek and receive credible and effective assurances, undertakings or other binding commitments from the State to which the person is to be transferred that he or she will not be subjected to torture or cruel, inhuman or degrading treatment;⁶⁰
 - (b) Provision is made, in writing, for the authorities of the transferring State to be able to make regular visits to the person transferred in his/her normal place of detention, with the possibility of medical examination, and for the visits to include interviews in private during which the transferring authorities shall ascertain how the person who has been transferred is being treated;
 - (c) The authorities of the transferring State undertake, in writing, to make the regular visits referred to

Thus, it can be seen that mere paper assurances should not prove sufficient. Indeed, it is arguable that where the person would be surrendered to a State with a persistent record of torture or inhuman and degrading treatment, it is hard to believe that there could ever be a system that could provide effective, verifiable monitoring. Furthermore, obtaining diplomatic assurances for the individual to be surrendered implicitly condones the torture or inhuman and degrading treatment that is endemic in that society.

Conclusion

According to the Supreme Court of Canada in *Suresh*,⁶¹ it is international law, not just the Convention Against Torture, that rejects *refoulement* to torture. As such, even where the refugee has committed a particularly serious crime and is a danger to the community or if he is a threat to the security of that country, he still should not be sent back to the frontiers of a territory where he would face

⁵⁸E/CN.4/Sub.2/2005/L.12, 4 August 2005. See also, Human Rights Watch's report, *Still at Risk*, referred to in *The Guardian* p.19, 15 April 2005.

⁵⁹NB. Transfer of certain persons to the United States from where they might be subject to extraordinary rendition to a State where they face torture or other inhuman or degrading treatment or punishment should also be outlawed by this requirement. See *The Guardian* p.4, 12 March 2002; p.14, 4 October 2003.

⁶⁰[Author's note.] The adequacy of such assurances must be subject to review by a court according to *Turkish National Extradition Case (Case No.4)* 106 *International Law Reports* 298 at 301. *Cf.* The United States handed a Guantanamo detainee back to Egypt without contacting his lawyer and he cannot now be traced, although the Pentagon did claim that appropriate assurances had been received that Sami al-Laithi would continue to be treated humanely - BBC News website 4307310.stm, 2005/10/04 09:05:20.

⁶¹*Suresh*. See paragraph 75: "We conclude that the better view is that international law rejects deportation to torture, even where national security interests are at stake". *Cf.* The New Zealand Supreme Court adopting a literalist approach in *Zaoui*,

torture. Therefore, in early 2002 there had been reason to believe that while politicians might not have realized that the 1951 Convention provided all necessary measures to address the situation where an applicant for refugee status might have been involved in terrorism, the judges would apply the exclusion clauses restrictively, as befits a limitation on a fundamental right.⁶² However, while the Tribunal in *AA* expressly referred to the 1951 Convention as a living document that could adapt to the needs of the times whether in terms of the exclusion clauses or protection needs, in that case by reference to terrorism as contrary to the UN's principles, the judges have tended only to use a generous interpretation where it broadens the exclusion clauses, not the scope for protecting the individual through a purposive approach.⁶³

The decisions of domestic courts and tribunals since 11 September 2001 placed great emphasis on the literal language of the 1951 Convention, as if the judges and adjudicators were simply applying an automatic rule with no room for discretion. There is no assumption here that judges should be neutral. One would hope that they were always impartial, but judges are part of the state structure and will defend that against threats to its existence.⁶⁴ However, the criticism is that a literalist stance is just as much a form of judicial interpretation. The judge or adjudicator has decided to apply the exclusion clause strictly and hides behind the self-proclaimed "original meaning" of the text.⁶⁵ Such an approach contrasts sharply with the more purposive approach taken towards Article 1A.2 when interpreting inclusion - for instance, why should generalized conditions in a state not amount to persecution given that the five grounds for persecution are a separate element in the test? Fortunately, more recent cases, such as *JS* indicate that courts are applying a stricter test generally to Article 1F that may disadvantage applicants in some respects, but which does recognize that exclusion is based on serious reasons for considering that the applicant "committed" a crime, was not just a member of an organization that commits them.

⁶²See also, *Tantoush*.

⁶³The Tribunals in *KK* and *AA* adopted a broad approach to Article 1F(c), not limiting it, as one might have hoped, to acts by senior figures in a state given that the applicant for refugee status has to be "guilty of acts contrary to the purposes and principles of the United Nations" and those are set out in the Charter that is binding on states parties. Further, the Tribunals held that the purposes and principles of the UN were not limited to Articles 1 and 2 of the Charter, but could be extended through Resolutions.

⁶⁴Griffith, *The Politics of the Judiciary*, (Politics) at pp.292 and 343 (1997).

Neither impartiality nor independence necessarily involves neutrality. Judges are part of the machinery of authority within the State and as such cannot avoid the making of political decisions [The judges'] principal function is to support the institutions of government as established by law The confusion arises when it is pretended that judges are somehow neutral between those who challenge existing institutions and those who control those institutions.

⁶⁵For a fuller discussion of judicial interpretation and judicial legislation, see Kennedy, *A Critique of Adjudication {fin de siècle}*, 1997, especially Chapters 5-8. Nor should judges be allowed to justify their restrictive approach by referring to the general mood at the time. Judges do not make snap decisions, they have time to reflect and their obligation is to the rule of law, not the populace as it is for politicians.