The Relationship between Refugee Exclusion Law and International Law: Convergence or Divergence?

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The Relationship between Refugee Exclusion Law and International Law: Convergence or Divergence?

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Abstract

While asylum as a concept has been known since ancient times, persons with a criminal background have always been treated with suspicion and depending on the time and place would either be granted asylum in a limited form or not at all. When amorphous notions related to asylum began to become crystallized in international treaties during the 20th century, the issue of criminality, although only pertaining to a very small number of asylum seekers, caused sufficient concern to the drafters of the various instruments to warrant its mentioning in a number of provisions in such agreements. Through the lens of exclusion from refugee status, this study assesses whether refugee law has remained in step with the international and domestic regulation of criminal conduct. At the international level, crimes such as genocide, crimes against humanity, war crimes, terrorism and organized crime have become the subject of international treaties and jurisprudence. These types of crimes, as well as other areas of concern have been increasingly incorporated into domestic criminal legislation. Since refugee law is used in the same countries, which have been in the forefront of regulating these new types of criminal behaviour, refugee decision makers have had to take into account these parallel developments. The purpose of this study is to determine how successful this attempt has been by comparing the legislation and jurisprudence in a number of countries and contrast those with the regulation of similar criminal conduct outside of refugee law.
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While the writing of a PhD thesis is an insular endeavor, the process of getting to the stage whereby pen is put to paper (symbolically of course in this electronic era) and eventually having something people might want to read certainly is not. From the inspiration to undertake such a large project to assistance in discovering new and exciting areas of law to ensuring that the thesis was more than disconnected thoughts and random words, a large and dedicated team is needed. I would like to introduce this team.

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"I, Joseph Rikhot, do hereby declare that this work that is submitted for assessment is my own and that due credit has been given to all sources of information contained herein according to the rules that govern the Irish Centre for Human Rights and the Faculty of Law. I acknowledge that I have read and understood the Code of Practice dealing with Plagiarism and the University Code of Conduct of the National University of Ireland, Galway and that I am bound by them.

Signature: ___________________________  Date: 24 May 2011
TABLE OF CONTENTS

Chapter 1: Introduction

1.1: Refugee law and concepts 2
1.2: Criminality in refugee instruments 12
1.4: Methodology and structure of the study 17

Chapter 2: A legal history of exclusion in international refugee law 21

2.1: Early practice and writings 21
2.2: The period between the First and Second World Wars 23
2.3: The United Nations Relief and Rehabilitation Agency (UNRRA) 25
2.4: The International Refugee Organization (IRO) 26
   2.4.1: Drafting the Constitution of the International Refugee Organization 26
   2.4.2: The International Refugee Organization Mandate in Practice 28
2.5: The Universal Declaration of Human Rights 32
2.6: The 1951 Convention Related to the Status of Refugee 38
   2.6.1: Introduction 38
   2.6.2: The debates in the Social Committee of the Economic and Social Council and the Third Committee of the General Assembly 39
   2.6.3: The debates during the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons 42
2.7: Conclusion 47

Chapter 3: Exclusion 1F(a) - crimes against peace, war crimes and crimes against humanity as grounds for exclusion from refugee protection 53

3.1: Introduction 53
   3.1.1: Standard of proof 54
3.2: The crimes under international law 60
   3.2.1: The elements of aggression, war crimes, crimes against humanity and genocide 60
     3.2.1.1: Aggression 60
     3.2.1.2: War Crimes 62
     3.2.1.3: Crimes against Humanity 65
     3.2.1.4: Genocide 68
     3.2.1.5: The mens rea of international crimes 71
   3.2.2: Examples of specific offences for war crimes and crimes against humanity 74
     3.2.2.1: Introduction 74
     3.2.2.2: Torture 76
     3.2.2.3: Rape 78
     3.2.2.4: Inhumane acts/treatment 79
     3.2.2.5: Persecution 81
Chapter 6: Exclusion from refugee protection for acts contrary to the purposes and principles of the United Nations (article 1F(c))

6.1: Introduction

6.2: National refugee jurisprudence

6.2.1: Australia

6.2.2: Belgium

6.2.3: Canada

6.2.4: France

6.2.5: Germany

6.2.6: The Netherlands

6.2.7: United Kingdom

6.3: Conclusion

Chapter 7: Conclusion

Bibliography

Jurisprudence
Chapter 1

Introduction

While asylum as a concept has been known since ancient times, persons with a criminal background have always been treated with suspicion and depending on the time and place would either be granted asylum in a limited form or not at all. When amorphous notions related to asylum began to become crystallized in international treaties during the 20th century, the issue of criminality, although only pertaining to a very small number of asylum seekers, caused sufficient concern to the drafters of the various instruments to warrant it’s mentioning in a number of provisions in such agreements. At times, such provisions had some resemblance to concepts of criminality known in other areas of law, specifically domestic criminal law and the nascent field of international criminal law, which emerged after the Second World War. When states ratified the international refugee law treaties or when international institutions applied these instruments they had to interpret the general provisions addressing criminal behaviour while keeping in mind the purpose of asylum. They also had to ensure that these interpretations kept pace with international and domestic developments in regulating criminal conduct.

Through the lens of exclusion from refugee status, this study assesses whether refugee law has remained in step with the international and domestic regulation of criminal conduct. At the international level, crimes such as genocide, crimes against humanity, war crimes, terrorism and instances of organized crime have become the subject of international treaties and jurisprudence. These types of crimes, as well as other areas of concern have been increasingly incorporated into domestic criminal legislation. Since refugee law is used in the same countries, which have been in the forefront of regulating these new types of criminal behaviour, decision makers have had to take into account these parallel developments. The purpose of this study is to determine how successful this attempt has been by comparing the legislation and jurisprudence in a number of countries and contrast those with the regulation of similar criminal conduct outside of refugee law. As well, the approach taken with respect to refugees with a criminal background in these countries will be subject to a comparative analysis in order to reveal possible discrepancies and offer potential solutions.

The issue of criminality of asylum seekers cannot be examined in isolation. The provisions in refugee instruments dealing with this aspect form only a small portion of the entire text of such treaties while similarly it is only a small portion of the practice of refugee decision makers which deals with criminal questions. In order to place the notion of criminality in a larger context, this introduction will set out the larger picture of protection for refugee claimants.
1.1: Refugee law and concepts

The right to asylum was already contained in the Universal Declaration of Human Rights. However, the most well-known definition of a refugee can be found in the 1951 Convention related to the Status of Refugees, which states that a person who fears persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion should be granted protection against a country from where this person has fled and from which the person is unwilling or unable to seek protection. If a person is recognized as a refugee, a number of benefits will follow according to this treaty, such as the right of association (article 15), employment (articles 17-19), housing (article 21), education (article 22), social security (article 24), freedom of movement (article) and most importantly, non-refoulment, the right not to be expelled if in the country lawfully (article 32) or even without status (article 33).

The notion of a refugee should be placed in the larger context of international migration, which can be divided into two main categories, namely voluntary and involuntary migration. Involuntary or forced migration refers to movement of persons who are leaving an intolerable situation in their own country and seeking protection in another country while voluntary migration connotes situations whereby people seeking better circumstances for themselves without feeling compelled to leave their country; the latter is usually the case when people go to other countries for economic reasons or family reunion.

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1 Article 14(1), G.A. Resolution 217A (III), UN Doc A/810 at 71 (1948).
2 This convention also has a Protocol which came into force in 1967 and which clarifies some issues which had arisen since 1951.
3 Persecution is not only used in human rights instruments but also in international criminal law as one of the underlying crimes of crimes against humanity; however the contours of the international crime is narrower than the human rights violation as was made clear in a decision by the International Criminal Tribunal for the former Yugoslavia (ICTY) where the Trial Chamber was of the view that the interpretation of persecution in refugee law or human rights law was of little assistance to provide parameters for the crime against humanity of persecution as the purposes of human rights law and international criminal law are not the same (see Judgment, Kupreskić (IT-95-16), Trial Chamber, 14 January 2000, ¶ 586–598).
4 P. Boeles, M. den Heijer, G. Lodder and K. Wouters, European Migration Law (Antwerp-Oxford-Portland: Intersentia, 2009) at 3 and 13-14; see also S. Kneebone, ‘Introduction: Refugees and Asylum Seekers in the International Context’, in S. Kneebone, Refugees, Asylum Seekers and the Rule of Law, Comparative Perspectives (Cambridge: Cambridge University Press, 2009) at 23-26. Sometimes the term ‘humanitarian refugees’ is used to refer to forced migration, see for instance C. and Director of Immigration, HCAL 132/2006, 18 February 2008 (The High Court of the Hong Kong Special Administrative Region, Court of First Instance), paragraph 6; see also J. McAdam, Complementary Protection in International Refugee Law (Oxford: Oxford University Press, 2007) at 33-35. All these concepts should be distinguished from the notion of ‘irregular migration’ which is migration that takes place outside the norms and procedures established by states to manage the orderly flow of migrants into, through, and out of their territories and is often associated with migrant smuggling and trafficking in persons (see online the International Organization for Migration, ‘about migration’, ‘irregular migration’); international legal efforts to counter these phenomena are contained in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and the Protocol
On the forced migration side, three concepts need to be distinguished, namely the notions of internal displaced persons\(^5\), asylum seekers, and refugees. Internally displaced persons are defined as follows: ‘persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border’.\(^6\) While *refoulement* is technically not possible in internal displaced person situations, as such persons have not crossed any borders, the Kampala Convention obligates state parties not to engage in serious criminal activities against such persons including genocide, war crimes, crimes against humanity, torture and other forms of cruel, inhuman or degrading treatment or punishment.\(^7\)

The terms asylum seeker and refugee pertain to people who have left their own country for another country to seek protection. The difference between asylum and refugee is twofold; firstly, asylum, as opposed to refugee status, is used to refer to the right of a state to grant asylum against the exercise of jurisdiction of another state with the corresponding duty of states not to retaliate against states, which have granted asylum.\(^8\) The parameters of the exercise of the right of asylum by a state have been traditionally described as to include the right to admit a person to the state’s territory; the right to allow a person to remain in the state; the right to refuse to expel a person; the right to refuse to extradite a person to another state; and the right not to prosecute or punish the person.\(^9\)

Secondly, it also operates, like refugee status, at the individual level in the sense that it relates to protection against harm, specifically violations of human rights.\(^10\) There

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\(^7\) Article 9.1 (b) and (c).


\(^10\) G.S. Goodwin-Gill and J. McAdam at 354-368 and A. Grahl-Madsen, *The Status of Refugee in International Law, Volume II* at 356. One international instrument sets out both concepts of refugee
have been long standing efforts to incorporate into the notion of asylum not only a state obligation to allow people to seek asylum but also a further obligation to grant such a status as part of a more durable solution in the sense of admission to residence and lasting protection against persecution, but these efforts have not come to fruition so far. Apart from the fact that asylum does not include the right to be granted a permanent solution compared with granting of refugee status, asylum rights are typically fewer or more limited than the ones granted under the Refugee Convention. For instance, under German law it is possible to claim asylum under its Basic Law (in addition to refugee protection) but this is only possible for political persecution, while the French constitution allows asylum for the persecuted person in relation to their actions in pursuit of liberty. The Italian constitution states that ‘an alien who is denied the effective exercise of the democratic liberties guaranteed by the Italian Constitution in his or her own country has the right of asylum in the territory of the Italian Republic in accordance with the conditions established by law.’

While asylum will not play an important role in countries, which are party to the Refugee Convention, there remains a need for this concept where no other

\[\text{\textsuperscript{11}}\text{A. Grahl-Madsen, The Status of Refugee in International Law, Volume II at 79-81 and 107-109 as well as G.S. Goodwin-Gill and J. McAdam at 343 and 358-369. The only exceptions are two regional conventions, the first one of which is the American Convention on Human Rights which contains a limited form of asylum in article 22.7 which says: ‘every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes.’ Article 22.8 addresses the issue of refoulement in the following terms: ‘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’. The second is the African Charter on Human and People’s Rights which says in article 12.3 that ‘every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions’ while article 12.4 adds: ‘a non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.’}

\[\text{\textsuperscript{12}}\text{One author indicates that apart from the right to non-refoulement, asylum would also include basic rights such as freedom of thought, expression, assembly, movement and privacy, see A. Grahl-Madsen, The Status of Refugee in International Law, Volume II at 107-108 and 148-149.}

\[\text{\textsuperscript{13}}\text{See Asylum Procedures: Report on Policies and Practices in IGC Participating States (2009) (Geneva: Intergovernmental Consultations on Migration, Asylum and Refugees, 2009), at 174 and 184; see also H. Lambert, F. Massineo and P. Tiedemann, ‘Comparative Perspectives of Constitutional Asylum in France, Italy, and Germany: Requiescat in Pace?’, 27 Refugee Survey Quarterly (2008) at 26-32 and Bundesverwaltungsgericht (Federal Administrative Court), BverwG 10 C48.07, 14 October 2008 at paragraphs 39-40. This limited approach can also been seen in one regional instrument, namely the 1954 Caracas Convention on Territorial Asylum which refers in article 2 to persecution for beliefs, opinions or political affiliations and in article 3 to persecution for political reasons or offences.}

\[\text{\textsuperscript{14}}\text{Asylum Procedures at 152; see also H. Lambert, F. Massineo and P. Tiedemann at 17-21.}

\[\text{\textsuperscript{15}}\text{H. Lambert, F. Massineo and P. Tiedemann at 22.}
international or regional refugee instrument can be relied upon, specifically in Asia.\textsuperscript{16} The Supreme Court of India recognized this in 1996 when it was called upon to determine whether persons who had been displaced from Bangladesh to India could be forcibly removed back to their country of origin. The court was of the view that the right to life and liberty enshrined in the Indian constitution also applies to persons who are not citizens of India and as a result non-citizens cannot be expelled.\textsuperscript{17}

While the 1951 Refugee Convention is the most widely used instrument for refugee protection, there are also three regional arrangements,\textsuperscript{18} which have expanded on the Convention’s definition of refugee. These are the 1966 Bangkok Principles on Status and Treatment of Refugees, which is a non-binding document adopted by the Asian-African Legal Consultative Organization (AALCO), applicable in Asia; the 1969 Convention on the Specific Aspects of Refugee Problems in Africa; and the 1984 Cartagena Declaration on Refugees, applicable in Latin America.

The Bangkok Principles use the Refugee Convention definition while adding as affected groups those defined by colour, ethnic origin and gender in article 1. In article 2 it states that ‘the term “refugee” shall also apply to every person, who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality’. The 1969 African convention gives in article I.1 the same definition as the Refugee Convention but then includes in article I.2 the same description as article 2 of the Bangkok Principles.\textsuperscript{19} The Cartagena Declaration, while not a binding treaty, has considerable moral authority in Latin America\textsuperscript{20} and recommends the following to be included in Conclusion 3 as part of the definition of refugee, again in addition to the Refugee Convention parameters: ‘persons who have fled their country because their lives, safety or

\textsuperscript{16} 144 countries have ratified the Convention, see UNHCR, United Nations High Commissioner for Refugees, \textit{States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol}.


\textsuperscript{18} The European Union has also recognized the right of asylum in the Charter of Fundamental Rights of the European Union, article 18, which refers to the 1951 Refugee Convention and its 1967 Protocol.


\textsuperscript{20} G.S. Goodwin-Gill and J. McAdam at 38.
freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.21

So far the overview of refugee protection has centered on the obligation of providing persons fleeing persecution (both nationals of a country of refuge or stateless persons who can also obtain protection under the Refugee Convention22) a permanent solution by granting refugee status. However, as not all issues arising out of situations of turmoil causing refugee movements are covered by the Refugee Convention, new concepts such as complementary, temporary and subsidiary protection have been developed to fill the gap between new realities and the existing Convention’s legal regime.23

Complementary protection is an umbrella term to connote protection granted by states based on an international protection need, which cannot be granted under the Refugee Convention. The main components of complementary protection are temporary protection, subsidiary protection and international human rights protection from refoulement.24

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21 For a historical overview of this definition, see I.C. Jackson at 395-404 and 414-415.
22 The Refugee Convention (article 1A(2), as well as the regional instruments in Asia and Africa, extend refugee protection to people ‘who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it’. Two Conventions have regulated the status of such persons, namely the 1961 Convention on the Reduction of Statelessness and the 1964 Convention related to the Status of Stateless Persons. For further information on this issue, see A. Grahl-Madsen, The Status of Refugee in International Law, Volume I, The Status of Refugees in International Law (Leiden: A.W. Sijthoff, 1966) at 93-94 and 315-317; P. Boeles, M. den Heijer, G. Lodder and K. Wouters at 20-23; G.S. Goodwin-Gill and J. McAdam at 67-70 and UNHCR, United Nations High Commissioner for Refugees, Expert Meeting, The Concept of Stateless Persons under International Law, Summary Conclusion, Expert meeting organized by the Office of the United Nations High Commissioner for Refugees, Prato, Italy, 27-28 May 2010.
23 The Supreme Court of Canada in the case of Attorney General v. Ward [1993] 2 SCR 689 used the term ‘surrogate’ protection in the sense that international protection will be provided when national protection is not available to an individual. In spite of criticism of this terminology (see G.S. Goodwin-Gill and J. McAdam at 10-11), the lower court levels in Canada still used this notion as recent as 2010 (at the Federal Court, see Aguirre and the Minister of Citizenship and Immigration, 2010 FC 916, while at the Federal Court of Appeal level, see the Minister of Citizenship and Immigration and Zeng and Feng, 2010 FCA 118).
24 J. McAdam at 21-23 and 49-52; this writer also includes the concept of ‘the best interest of the child’ as set out in the 1989 Convention on the Rights of the Child within the notion of complementary protection at 173-196; see also G.S. Goodwin-Gill and J. McAdam at 285-298. It should be pointed that the notions of complementary and subsidiary protection are not used in a consistent manner by academics and governments; an examination of the 17 countries of the Intergovernmental Consultations on Migration, Asylum and Refugees (IGC) (in Asylum Procedures) reveals that while the term ‘complementary’ is used often in the European Union context as an overarching concept (although Germany uses the two terms interchangeably), non-EU countries such as Australia, Canada, New Zealand and the United States connote this term with non-refoulement obligations under international treaties such as the Convention against Torture and the International Covenant on Civil and Political Rights while Norway use the term subsidiary protection for the same purpose and Denmark calls this protected status; Spain uses the term subsidiary protection to indicate forms of risk not contained in the 2004 European Qualification Directive; countries such as Belgium, France, and
Temporary protection was already mentioned as a concept by the scholar Grahl-Madsen in 1972 when he said that this type of protection could only be given ‘in times of civil unrest or other upheavals, and only as a protection against violent mobs, groups of insurgents, guerrilla units, marauding bands, etc, or against unauthorized pursuit by local authorities, local military commanders, or their like, acting on their own; but not as a protection against the duly authorized agents of a government exercising effective authority’. This type of protection has not undergone major changes and is still considered an ‘exceptional, emergency, time-bound response of granting protection to a mass influx of asylum seekers fleeing armed conflict, endemic violence, or a serious risk of systematic or generalized violations of human rights’. In the European Union, the details of temporary protection are set out in the Temporary Protection Directive including the fact that it will only come into effect when the Council of the European Union designates a particular flow of refugees as a mass influx, which has not occurred as of yet, and the fact that the duration of temporary protection is for one year with a possible extension of two more years.

In countries outside the European Union, the use of temporary protection varies. Two western European countries, which are not part of the European Union, Norway and Switzerland, both have a form of temporary protection. In the five main refugee receiving common law countries apart from the UK, South Africa does not have this status in its Refugee Act of 1998 while neither New Zealand nor Canada have a temporary refugee protection possibility in their legislation but the highest executive organs can provide such protection on an individual basis in extreme circumstances

Sweden use subsidiary protection to use the same terminology as in the Qualification Directive and nothing more while Finland, Germany, Greece, the Netherlands and the United Kingdom use the concepts from the Qualification Directive and add other forms of protection while calling the added portion either complementary or humanitarian protection; neither Ireland not Switzerland mention any type of added protection.


G.S. Goodwin-Gill and J. McAdam at 340-343 and J. McAdam at 3 and 41-44.

As a result of the Treaty of Amsterdam, which came into force in 1999, asylum and immigration matters were moved from the jurisdiction of the individual states of the European Union and became the subject of legally binding instruments of harmonization by one of the legislative organs of the European Union, the Council of the European Union, as part of a Common European Asylum System (CEAS); as part of this asylum harmonization the Council has adopted five measures which sets out minimum standards for members of the European Union, namely the Temporary Protection Directive in 2001, the Receptions Conditions Directive in 2003 (dealing with conditions and rights for asylum seekers pending the asylum procedure), the Dublin Regulation in 2003 (regulating which member state is responsible for examining an asylum claim), the Qualification Directive in 2004 (addressing eligibility for protection) and the Asylum Procedures Directive in 2005 (dealing with the rules of procedure during examination of asylum claims (see G.S. Goodwin-Gill and J. McAdam at 39-40 and P. Boeles, M. den Heijer, G. Lodder and K. Wouters at 321-322; the latter also describe in detail these measures at 323-357).

Article 5.1 of the Directive.

Articles 4.1 and 4.2 of the Directive. Most countries of the EU have implemented this Directive although some such as Denmark and Greece not yet, see Asylum Procedures at 108 and 195.

Asylum Procedures at 285 and 350.
under other provisions of their legislation. Australian immigration law has the possibility to issue a temporary safe haven visa for persons who have been displaced by upheaval in their country of origin. This visa is provided for a temporary stay on the understanding that holders return to their home country when the Australian government considers it safe to do so. In the United States, the Secretary of Homeland Security can designate a country or a part of a country for temporary protected status if there is an ongoing armed conflict in that country or an environmental disaster and that country requests designation while it is unable temporarily to adequately handle the return of its nationals.

As another form of complementary protection, the European Qualification Directive provides additional or subsidiary protection (in addition to refugee protection) to persons who are subjected to serious harm, identified as follows:

(a) death penalty or execution; or
(b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
(c) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

The international human rights protection from non-refoulement is a form of alternative protection, which goes beyond the protection envisaged in the Refugee Convention and finds its inspiration in other sources of human rights, including treaties dealing with non-refoulement. The Refugee Convention says the following about refoulement: ‘No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion’.

31 Asylum Procedures at 91 for Canada and at 262 for New Zealand.
32 Asylum Procedures at 42.
33 Asylum Procedures at 416. It has been noted that this regime is different from what is contemplated under international refugee law, see G.S. Goodwin-Gill and J. McAdam at 340, note 394.
35 Article 33.1; article 32.1 serves a similar purpose by stating that ‘the contracting party shall not expel a refugee lawfully in their territory ...’. Article 22.8 of the American Convention on Human Rights has very similar wording as does article II.3 the 1969 Convention on the Specific Aspects of
The limitation in the last portion of this article leaves open the possibility of people removed who might be exposed to other human rights abuses or who fall outside the groups mentioned in this provision. As a result reliance has been placed on three international treaties and one regional treaty to fill this gap. The three international treaties are the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture (CAT), and the International Convention for the Protection of All Persons from Enforced Disappearance, while the regional treaty is the European Convention on Human Rights (ECHR).

The operative section in the ICCPR is article 7, which states that ‘no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation’. This article has been interpreted by the Human Rights Committee of the United Nations, the monitoring body of the ICCPR, to also include a prohibition against refoulement. Similarly, article 3 of the CAT, which has been given further meaning by the Committee against Torture of the United Nations, indicates 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.’ Along the same lines the Enforced Disappearance Convention states in article 16.1 that ‘no State Party shall expel, return (“refouler”), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance’.

Refugee Problems in Africa although the latter ties the instances of refoulement to its wider definition of refugee; the Bangkok Principles use the same terminology as the Refugee Convention.

There also exists the Inter-American Convention to Prevent and Punish Torture, which prohibits refoulement in article 13 ‘when there are grounds to believe that his life is in danger, that he will be subjected to torture or to cruel, inhuman or degrading treatment, or that he will be tried by special or ad hoc courts in the requesting States’ but this provision only applies to extradition.

While the International Convention on the Elimination of All Forms of Racial Discrimination does not mention the issue of refoulement, the Committee on the Elimination of Racial Discrimination mentions in its General Recommendation No.30: Discrimination Against Non Citizens, 10 January 2004, paragraph 27 that ‘non-citizens are not returned or removed to a country or territory where they are at risk of being subject to serious human rights abuses, including torture and cruel, inhuman or degrading treatment or punishment’.

For a judicial consideration of the overlap between the Refugee Convention and the Torture Convention is a situation where only the latter applies, see Secretary for Security and Prabakar, [2004] HKCA 43, June 24, 2004 (Court of Final Appeal of the Hong Kong Special Administrative Region), paragraphs 14-17; for a commentary on this case, see K. Loper, ‘Human Rights, Non-refoulement and the Protection of Refugees in Hong Kong’, 22 International Journal of Refugee Law (2010) at 414-416.

The imposition of the death penalty and some manners of execution are not prohibited under article 6 of this instrument but extradition to a country which employs this type of punishment without seeking assurances that it will not carry out this penalty could amount to prohibited refoulement under article 6, the right to life, see K. Wouters, International Legal Standards for Protection from Refoulement (Antwerp-Oxford-Portland: Intersentia, 2009) at 377-379 and 380.

K. Wouters at 359-360.
The ECHR, article 3, in very similar words stipulates that ‘no one shall be subjected to torture or to inhuman or degrading treatment or punishment’, which has also been developed jurisprudentially as a non-refoulement principle. The latter provision has application within the countries of the Council of Europe and has been the subject of extensive interpretation by the European Court of Human Rights.

Outside Europe, South Africa does not have any provisions preventing the removal of persons beyond the Refugee Convention grounds, while Canada has extended protection against refoulement to persons who are at risk of torture or cruel and unusual treatment or punishment. The United States, which has not ratified the Refugee Convention, will not remove a refugee to his or her country of origin if the life or freedom of that person would be threatened in that country because of that person’s race, religion, nationality, membership in a particular social group, or political opinion. Also, a person can obtain protection from removal if the person fears torture in the country of origin.

In New Zealand, the new Immigration Act 2009 has the following two provisions: ‘a person must be recognised as a protected person in New Zealand under the Convention Against Torture if there are substantial grounds for believing that he or she would be in danger of being subjected to torture if deported from New Zealand’ and ‘a person must be recognised as a protected person in New Zealand under the Covenant on Civil and Political Rights if there are substantial grounds for believing that he or she would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand’.

Australia has no such legislation at the moment but in 2009 the Migration Amendment (Complementary Protection) Bill 2009 was introduced in parliament which would entitle a person to a protection visa (and not be removed) if there are ‘grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that

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41 K. Wouters at 187-188. Other articles in this instrument have been sporadically used in the refoulement context, such as the right to a fair trial (article 6), right to private life (article 8) and right to religion; K. Wouters at 348-353.
43 Section 115(1) of the Immigration and Refugee Protection Act (IRPA).
44 Section 241(b)(3)(A) of the Immigration and Nationality Act (INA).
45 Section 241(b)(3)(A) of the INA in conjunction with paragraph 208.16(c) of Title 8 of the Code of Federal Regulations.
46 Section 130(1).
47 Section 131(1). While this protection is contained in legislation for the first time, these international obligations had already been recognized judicially by the Supreme Court of New Zealand in Attorney-General v Zaoui & Ors [2005] NZSC 38 at paragraph 93; for a review of this case, see R. Haines, ‘National Security and Non-Refoulement in New Zealand: Commentary on Zaoui v Attorney-General (No. 2)’, in J. McAdam (ed.), Forced Migration, Human Rights and Security (Oxford and Portland, Oregon: Hart Publishing, 2008) at 63-92.
the non-citizen will be irreparably harmed because of a matter mentioned in subsection 2A’. These matters are set out in the Bill thus:

(a) the non-citizen will be arbitrarily deprived of his or her life;
(b) the non-citizen will have the death penalty imposed on him or her and it will be carried out; or
(c) the non-citizen will be subjected to torture; or
(d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
(e) the non-citizen will be subjected to degrading treatment or punishment.\(^{48}\)

Two observations can be made with respect to the issue of non-refoulement both at the international and domestic level. First of all, apart from the fact that this type of removal is universally prohibited, the contents of what constitutes non-refoulement in the refugee context is also becoming clearer in that a consistent pattern is emerging in the types of activities feared upon return to the country of refuge. All jurisdictions examined, with the exception of South Africa, have moved beyond the concept contained in article 33 of the Refugee Convention and have recently added human rights non-refoulement notions borrowed from the CAT and the ICCPR, although the U.S. has only incorporated a prohibition to torture. There are some differences in the manner and in how much detail these human rights precepts have been incorporated legislatively. For instance New Zealand expresses this prohibition by a direct reference to the international instruments while Australia tracks the wording of them very closely without specifically mentioning them. Canada and the U.S. use a more general wording while the word ‘degrading’ has been deleted from the non-refoulement provision in former’s legislation.

Secondly, there is at times a very close connection between the grounds for protection, which allows a person to stay in the country of refuge and the reasons why a person should not be removed. This stands to reason since although there might be legal differences between these concepts for a refugee claimant, the consequences of each would ultimately be illusory (having certain benefits as a refugee but still subject to refoulement) if there was not some congruency between the two notions. While under the Refugee Convention the grounds for these two types of concepts are identical,\(^{49}\) this connection has been lost in other international instruments, which extends protection beyond what is contained in the Refugee Convention while at the same time using the wording of the Refugee Convention for non-refoulement. This is the case in the Bangkok Principles,\(^{50}\) while neither the Convention on the Specific

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48 Headings 11 and 13 of the Bill; at the moment there is policy not to remove persons to such situation which is contained in Direction [no. 41]- Visa refusal and Cancellation under S. 501, 3 June 2009, paragraphs 10(1)(d)(ii) and 10.4.3; under section 499 of the Migration Act, the Minister for Immigration and Citizenship may give written direction to any person or body with powers under that Act by virtue of which the Minister has issued Direction 41.

49 See for instance in Australia the case of Shahrooei v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 996, at paragraph 25 and in the U.S. the case of Castellano-Chacon v. Ashcroft, 341 F.3rd 533 (6th Circuit, 2003), although in the latter a higher standard of proof for refoulement is required.

50 Article III.1.
Aspects of Refugee Problems in Africa nor the Cartagena Declaration contain a provision regarding *refoulement*, and the Qualification Directive only says that states shall respect the principle of non-*refoulement* in accordance with their international obligations.\(^{51}\)

The same discrepancy, albeit at a less fundamental level, can also be seen at the domestic level in for instance Canada and the U.S. In Canada protection is given on the basis of torture, a risk to life or to a risk of cruel and unusual treatment or punishment, but the reference to life is omitted in the *non-refoulement* provision. Similarly, in the United States, a refugee is defined as a person subject to ‘persecution or a well-founded fear’ only to be replaced in the *refoulement* language by ‘threat to or freedom’.\(^{52}\)

### 1.2: Criminality in refugee and refugee type instruments

While the above refugee and human rights instruments provide protection and benefits to persons seeking asylum, none of them do this in an absolute fashion. The main treaty in this area, the Refugee Convention, sets limits on the circumstances where protection can be extended. These limits fall into two distinct categories, the first being that a person is not entitled to refugee protection *ab initio* while the second pertains to a situation where persons has been granted refugee status but in spite of this status can still lose their benefits or can be forced to leave the country of refuge.

These two categories can in turn be further subdivided with a criminal and non-criminal component in each category.\(^{53}\) Regarding the latter sub-category, the Convention says with respect to *ab initio* type disentitlement, called exclusion, that persons are not entitled to protection if they receive assistance from other United Nations agencies or organs other than the United Nations High Commissioner for Refugee (UNHCR).\(^{54}\) As well, 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’ cannot obtain refugee status either.\(^{55}\) The Convention employs the concept of cessation, which is applied to persons who have obtained refugee status but can be returned to their country of origin in the following circumstances:

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51 Article 21.1.

52 Section 101(a)(42) of the Immigration and Nationality Act.


54 Article 1D.

55 Article 1E.
(1) he has voluntarily re-availed himself of the protection of the country of his nationality; or
(2) having lost his nationality, he has voluntarily reacquired it; or
(3) he has acquired a new nationality, and enjoys the protection of the country of his new nationality; or
(4) he has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or
(5) he can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality.  

Criminal conduct also has consequences in the Refugee Convention. Article 1F is the key section of the Convention and contains three types of criminal exclusionary provisions:

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’

Given the general reference to various forms of criminality in this article as well as the specific mention of the international crimes of crimes against peace, war crimes and crimes against humanity and the connection between criminality and the United Nations, it provides the most logical framework for the examination in this thesis of the interaction between refugee law and international and domestic criminal law.

Forcible removal for criminality of persons who have obtained refugee status is regulated in articles 32 and 33 of the Convention. Article 32 pertains to refugees who are lawfully present in the country of refuge and allows expulsion on grounds of national security or public order. Article 33 deals with refoulement and makes an exception to the principle of non-removal if ‘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’.  

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56 Article 1C. Although the concept is not contained in the Refugee Convention, refugee law also knows the device of vacation or cancellation whereby a person who made misrepresentations during the refugee process can have this status removed and if the misrepresentation included criminal activities, exclusion can be applied as part of the vacation/cancellation process; see UNHCR, United Nations High Commissioner for Refugees, Cancellation of Refugee Status, March 2003, PPLA/2003/02 at 11-12.
57 Article 33.2.
Such crime-related exceptions from the benefits in refugee type instruments are by no means unique. The Universal Declaration of Human Rights granted the right to asylum on the one hand, but at the same time restricted it by saying that 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’.

The Statute of the UNHCR, which provides it with the authority to carry out refugee status determination in countries which have ratified the Refugee Convention but which are not willing or able to engage in this work themselves, allows for the exclusion of 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’.

A slightly different pattern with respect to criminal exceptions can be seen in the regional refugee instruments. While the Bangkok Principles have the same wording regarding exclusion, refolement and expulsion as the Refugee Convention, the 1969 Convention on the Specific Aspects of Refugee Problems in Africa has only similar exclusionary wording in its definition of refugees as the Convention but no provision for refolement based on criminality. The Cartagena Declaration is silent on criminality.

Instruments dealing with issues such as internally displaced persons, asylum and statelessness also contain provisions re criminality. The 1967 United Nations Declaration on Territorial Asylum repeats article 1F in its entirety, as does the Convention related to the Status of Stateless Persons. The Kampala Convention, which deals with internally displaced persons, also contains a prohibition against protection on the basis of criminality, although it is framed as a state obligation to ensure that internally displaced persons do not engage in subversive activities.

The situation is no different in the area of complementary protection both at regional and national level. The Temporary Protection Directive of the European Union excludes persons from benefits for the same reasons as article 1F of the Refugee Convention while adding the following for serious political crimes: ‘the severity of the expected persecution is to be weighed against the nature of the criminal offence of which the person concerned is suspected. Particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-

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58 Article 14(2).
59 Article 7(d).
60 Article I.7.
61 Article III.1 and V.4 although the latter only applies for situations of national security.
62 Article I.5 although it adds a clause excluding persons who are guilty of acts contrary to the purposes and principles of the Organization of African Unity. Furthermore article III contains a prohibition to carry out subversive activities while in the country of refuge.
63 Article I.2.
64 Article 2.iii
65 Article 3.1(f).
political crimes. This applies both to the participants in the crime and to its instigators.\textsuperscript{66} It then goes on to incorporate the wording of article 33.2 of the Refugee Convention as a further ground for exclusion.\textsuperscript{67} This Directive also refers to non-refoulement twice by a general reference to the member states’ obligations in this regard.\textsuperscript{68}

The Qualification Directive of the European Union follows a similar approach with respect to exclusion as the Temporary Protection Directive both for refugee status and for subsidiary protection with some differences, namely:

- with respect to the serious non-political crime component the reference to participants and instigators in the crime has been removed and has become a separate paragraph which now applies to all forms of criminality; this applies to both refugee and subsidiary protection status;\textsuperscript{69}
- with respect to the same crime, this has been reduced to only ‘serious crime’ for subsidiary protection;\textsuperscript{70}
- the reference to acts contrary to the purposes and principles of the United Nations has been augmented by the words ‘as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations’ for both types of protection;\textsuperscript{71}
- the section 33.2 Convention wording only applies to subsidiary protection as part of exclusion and is reframed as follows: ‘he or she constitutes a danger to the community or to the security’;\textsuperscript{72}
- for the subsidiary part the following is added: ‘member States may exclude a third country national or a stateless person from being eligible for subsidiary protection, if he or she prior to his or her admission to the Member State has committed one or more crimes, outside the scope of paragraph 1, which would be punishable by imprisonment, had they been committed in the Member State concerned, and if he or she left his or her country of origin solely in order to avoid sanctions resulting from these crimes;\textsuperscript{73}
- article 28.2 of the Temporary Protection Directive regarding the requirements for personal conduct and proportionality is not repeated.\textsuperscript{74}

This Directive also uses criminal behaviour to allow member states to revoke, end or to refuse an already granted status. This ending of refugee status is mandatory if this

\begin{flushleft}\textsuperscript{66} Article 28.1(a)(ii).
\textsuperscript{67} Article 28.1(b); it also says in article 28.2: ‘The grounds for exclusion referred to in paragraph 1 shall be based solely on the personal conduct of the person concerned. Exclusion decisions or measures shall be based on the principle of proportionality’.
\textsuperscript{68} Articles 3.2 and 6.2.
\textsuperscript{69} Article 12.2(b) in conjunction with article 12.3 for refugees; article 17.1 in conjunction with article 17.2 for subsidiary protection.
\textsuperscript{70} Article 17.1(b).
\textsuperscript{71} Article 12.2(c) and 17.1(c).
\textsuperscript{72} Article 17.1(d).
\textsuperscript{73} Article 17.3.
\textsuperscript{74} For further analysis of these provisions see H. Battjes at 262-265; H. Storey, EU Refugee Qualification Directive: a Brave New World, 20 International Journal of Refugee Law (2008) at 10 and 23-25.\end{flushleft}
status should not have been granted pursuant to the above exclusion clauses, but only discretionary in situations described in section 33.2 of the Refugee Convention. It is mandatory for all types of exclusion for subsidiary status. In addition, the refoulement provision for both types of protection has the same contents as section 33.2 of the Refugee Convention.

While in international human rights law there are exceptions in the ICCPR and ECHR they only allow derogation in a state of emergency and even then these exceptions do not apply to the articles dealing with non-refoulement. The CAT does not allow any exception at any level.

At the domestic level, countries generally tend to reflect the wording of the exclusion and refoulement provisions of the Refugee Convention more or less faithfully in their legislation, with some exceptions. Switzerland, while not being a member of the European Union, has also added the refoulement provisions of the Refugee Convention to the regular exclusion provisions, while the U.S. has used a similar approach to exclusion by combining article 1F(b) activities (serious non-political crimes including specifically the recruitment of child soldiers), article 33.2 offences (including specifically activities related to terrorism) as well as participation in the persecution of others, the latter of which is defined as ‘ordering, inciting, assisting or otherwise participating in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.’

With respect to refoulement the same activities used for exclusion can be used for this purpose as well as participation in Nazi persecution and genocide.

In Canada, the refoulement provision, which not only applies to the refugee type non-refoulement but also to human rights prohibitions, has been extended from the

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75 Article 14.3(a) and 19.3(a).
76 Article 14.4 as well 14.5 where no status has been conferred yet.
77 Article 18.3(a) with the exception for unique type of exclusion set out in article 17.3 (as indicated by article 18.2) which makes this type of ending the subsidiary status discretionary.
78 Article 21.2.
79 Articles 4 and 15 respectively.
80 Article 2.
83 See R. Germain, AILA Asylum Primer, A Practical Guide to U.S. Asylum Law and Procedure (Washington: American Immigration Lawyers Association, 2007) at 104-119. Exclusion is called mandatory bar to asylum while refoulement is called mandatory bar to withholding of removal; both are usually argued at the same time during the refugee claim procedure.
84 Section 208(b)(2)(A)(i) of the INA.
85 R. Germain at 130. Section 244(c)(2)(A)(iii) of the INA also disallows temporary protection for the same grounds.
86 As a result of a combination of section 115(1) and (2) of IRPA, even though it had already been recognized by the Supreme Court of Canada before IRPA came into force in June 2002 that the prohibition for refoulement to torture was absolute in international law in Suresh v. Canada (Minister of Citizenship and Immigration), 2002 SCC 1 at paragraph 75 although it allowed for a narrow
section 33.2 parameters to add a third category namely ‘the nature and severity of acts committed’, while it has mixed the application of *refoulement* and exclusion provisions by introducing an eligibility provision which could prevent refugee claimants from accessing the refugee determination system if they have committed the Canadian equivalent of immigration inadmissibility provisions which bear a close resemblance to exclusion and section 33.2 activities.

As with the discussion of non-*refoulement* above, two observations can also be made here. The first one is that some of the incongruence between the wording pertaining to protection and non-*refoulement* can be seen here as well when describing exclusion and criminal behaviour as part of *refoulement*. However, this gap in defining the contours of criminality in article 1F and 33.2 is diminishing in the Temporary Protection Directive and Qualification Directive in Europe as well as in the United States and Canada. Even when the traditional distinction between exclusion and *refoulement* (taking into account that exclusion still tends to be applied in practice to acts committed before coming to and outside the country of refuge while *refoulement* typically is used for criminal behaviour carried out in the country of refuge after having obtained refugee status) is applied there always was and still is some overlap in practice between exclusionary and *refoulement* crimes.

Secondly, while there has been some experimenting with the application and overlapping of these two concepts the main features of both exclusion and *refoulement* as used in the Refugee Convention have remained remarkably constant and as such an examination based on the interpretation of these notions can provide useful conclusions not only in the context of the Refugee Convention but also as part of a more general approach.

### 1.3: Methodology and structure of the study


Section 115(2)(b) of IRPA.

Section 101(1)(f) of IRPA.
Convention deemed it necessary after the Second World War to limit the rights of persons in the refugee context if they had been involved in criminal activities.

The comparative analysis will focus primarily on the interpretation by national refugee tribunals and courts of one of the sections in the Refugee Convention, which deal with criminality, namely article 1F. This comparative analysis will by necessity include forays into other areas of law such as international criminal law (for exclusion ground 1F(a)), domestic extradition law (for exclusion ground 1F(b)), and public international law (for exclusion ground 1F(c)), thereby providing a more overarching and comprehensive treatment of the law than has been the case in academic writing to date.

The emphasis in examining these areas of law at the domestic level will be on court decisions rendered in refugee cases as refugee law provides a more fertile and consistent research environment since, as noted above, virtual all major aspects dealing with criminality eventually trace their way back to article 1F. On the other hand, the immigration law of domestic jurisdictions in the area of criminality have many more permutations thereby making it difficult to discern patterns, which can be used to reach meaningful conclusions. At times it will be necessary to use some immigration jurisprudence in order to elucidate a point with respect to refugee criminality, as for instance will be the case when relying on Australian immigration case-law regarding criminal associations, on inadmissibility based on membership in terrorist and criminal organizations in Canada and on article 1F in the Netherlands, where it is not only applied in exclusion but is also one of the grounds for immigration inadmissibility.

This study will examine the refugee status determination processes at the national level, primarily in the European Union and the common law countries of Australia, Canada, New Zealand and the United States. According to the UNHCR, of the 154 countries for which data was available for 2008, governments were solely responsible for carrying out refugee status determination in 90 countries, the UNHCR was the only responsible body for status determination processing in 44 countries and a shared responsibility occurred in 20 countries. Most of the refugee claims were

81 Section 34(1)(f) and 37(1)(a) of IRPA.
83 UNHCR Statistical Yearbook 2008 - Chapter IV: Asylum and Refugee Status Determination at 42.
submitted in European Union and common law countries while the development of the legal issues surrounding exclusion have taken place for the most part in the same jurisdictions. The countries investigated in depth, which have contributed the most to concepts of exclusion are Australia, Belgium, Canada, France, Germany, the Netherlands, New Zealand, the United Kingdom and the United States, while others will be mentioned in passing.

In most situations it will be sufficient to rely on decisions given by the courts in the above countries given the volume of jurisprudence. This is the case in Canada, the Netherlands, Germany and the United States. Where there is paucity of judicial decision making, administrative tribunals will also be relied upon to determine trends in exclusion as done for Australia, Belgium, France, New Zealand and the United Kingdom.

Chapter 2 of this study comprises a historical overview, examining the concepts of asylum and its exceptions throughout history, tracing multinational efforts to address refugee situations between the First World War and the Second World War, and examining in detail the work of the International Refugee Organization in its efforts to resettle large numbers of displaced persons in Europe immediately after the Second World War. From this practical work, the study will turn to providing an insight in the negotiations of both the Universal Declaration of Human Rights and the Refugee Convention, both of which took place within a very short time period of each other and both of which provide valuable information as to the thinking of the diplomatic delegations to include criminality provisions in both documents.

The main chapters of this study are concerned with exclusion. The approach to each of the three exclusion clauses of article 1F of the Refugee Convention will be different. For article 1F(a) dealing, in the words of the Refugee Convention, with crimes against peace, war crimes and crimes against humanity, it is felt that for a better understanding of these crimes and their surrounding elements, an overview of the main concepts of international criminal law is useful. As a result, separate discussions of the three crimes, and genocide, even though it is not mentioned in article 1F(a), their contextual or international elements, and the underlying crimes will take place in chapter 3. This is followed by an examination of the parameters of extended liability in criminal law in chapter 4. The structure of these two chapters will be the same, namely an overview of international criminal law in this area and the jurisprudence in the nine domestic jurisdictions on the issues of international crimes and extended liability. These chapters will conclude with a comparison of the tenets of international criminal law and how these have been transferred into refugee law while teasing out discrepancies and the impact of these discrepancies.

94 UNHCR Statistical Yearbook 2008 - Chapter IV: Asylum and Refugee Status Determination at 43-44.
95 For an overview of the work of the UNHCR in RSD see G.S. Goodwin-Gill and J. McAdam at 53 and 426-436; for a historical overview of the UNHCR work see I.C. Jackson at 143-228 and 235-239 for the period 1961-1975 and at 243-415 for the period 1975-1985; for a critical examination of the UNHCR in the wake of the 1994 Rwanda genocide, see K. Wagner, ‘UNHCR’s Involvement in the Great Lake Refugee Crisis’, 21 Pace International Law Review, 2009 at 375-378.
The examination of the exclusion ground (b) in article 1F dealing with serious non-political crimes is the subject of chapter 5 and will canvass the national court and administrative tribunal decisions of the selected jurisdictions. The areas of interest are the meaning of ‘serious’, ‘non-political’ and ‘crime’. Article 1F(b), as well as article 1F(c), have been used to counter the phenomenon of refugee claimants being involved in terrorism so that an inquiry into the international and domestic regimes dealing with such activities will need to be carried out to ascertain the interplay between them. The conclusion of this chapter will be a comparative analysis of domestic practice with a view to determining whether this practice is consistent and whether reasons can be found to explain any fault lines.

While the subject matter of chapter 6, exclusion clause 1F(c), which addresses acts against the purposes and principles of the United Nations, superficially looks difficult to apply because of its very broad wording, it has found unexpected uses in some quarters, such as in Canada for serious crimes committed within that country (and which were not part of article 1F(b) as that clause has a requirement that a crime has to be committed outside of and before coming to the country of refuge) and in France where it has been one of the primary vehicles used to penalize perpetrators of international crimes in addition to those in articles 1F(a) and 1F(b).

In the final chapter of this study, trends arising out of the historical and comparative analysis of exclusion will be identified. Solutions will be proposed to address possible divergent trends as well as determining whether the balance arrived at so far in the international and domestic practice between the individual rights of the criminal refugee and the collective rights of the society in which he has claimed asylum is an appropriate one with suggestions for improvement. Comparing this larger framework at the time of the Refugee Convention with the present situation might provide a better insight into whether the main precepts regarding criminality, which underlie exclusion, are still valid or whether new solutions are necessary.
Chapter 2

A legal history of exclusion in international refugee law

2.1: Early practice and writings

The custom of giving asylum was well known in antiquity, in the Middle East, Greece and several other countries, and it could be granted on a religious or secular basis. Religious asylum or sanctuary was sought internally at holy places against powers within the same territory as the place of asylum and was allowed because of the respect of the seeker for a particular deity or a church. The secular version, external asylum, was given by kingdoms, republics and free cities to protect persons from outside their territory from persecution. Territorial asylum can also be seen as part of a larger immigration movement since time immemorial, where aliens with well-established skills and talents were welcomed by political entities. Such aliens were given limited rights, partially in recognition of the fact that the subjects of these same entities required protection when engaged in trade and commerce elsewhere.

These practices became the subject of debate by writers from the 15th century on, such as Franciscus de Vitoria, Franciscus Suarez, Hugo Grotius, Samuel Pufendorf, Christian Wolff and Emerich de Vattel. The writings of Grotius, Pufendorf and Vattel are especially useful in understanding the various approaches taken in the legal and philosophical literature to the issues of asylum and refuge over these years.

Grotius, who had been a refugee himself, and was therefore sympathetic to the plight of asylum seekers, was of the view that ‘victims of unmerited persecution’ or suppliants had a right to asylum and favourable treatment under certain conditions, including submission to established law and order and following any regulations which were necessary to avoid strife. Furthermore, he argued that refugees had no right to demand a share in the government. The inviolable nature of asylums was, however, not designed for those who had committed crimes injurious to mankind and destructive to society.

100 H. Grotius, The Law of War and Peace in Three Books (1625), translated into English by F. W. Kelsey (1925) (online), Book 2, Chapter 2, Section XVI and Book 2, Chapter 21, Section IV, 8; A. Grahl-Madsen, The Status of Refugee in International Law, Volume II at 13 and T. Einarsen at marginal note 5. This limitation for asylum in Grotius’ work was also noted in Germany by the Bundesverwaltungsgericht (Federal Administrative Court), BverwG 10 C 24.08, 11 November 2009, paragraph 24 and in the UK in IG (Exclusion, Risk, Maoists) Nepal [2002] UKIAT 04870, paragraph 30.
Pufendorff, on the other hand, was of the view that each state is first and foremost an agent of its own interests. The grant of asylum to non-criminal strangers driven from their homes might well be a commendable 'act of humanity', but not something the State should be obliged to do. As well, he felt that refugees should keep quiet and be content with what they had received in the state of reception. Consequently, while Grotius advocated that states should follow common principles of law in their reception of refugees, Pufendorf reduced the notion of asylum to an issue of governmental discretion where the balance of self-interest and reasonableness had to be struck exclusively by the state itself.\footnote{S. Pufendorf, *Eight On the Law of Nature and Nations Books* (1672), translated by B. Kennett (1703), Book VIII, Chapter XI, Sections 3 and 5; T. Einarsen at marginal note 5.}

Vattel recognized the natural rights of a banished or exiled person to live elsewhere. He was of the view that there was neither an absolute right for the individual to seek asylum nor a complete discretion for the receiving state to refuse such a person when he has been forced to flee his country. Vattel concluded that a person has a conditional right to seek asylum and that only if a state had justifiable reasons it could reject a claim for asylum. In addition, he makes an exception to the right of asylum for those criminals who, by the character and frequency of their crimes, are a menace to public security everywhere and proclaim themselves enemies of the whole human race. He considered poisoners, assassins, incendiaries and pirates to fall within this category.\footnote{E. de Vattel, *The Law of Nations or the Principles of Natural Law applied to the Conduct and Affairs of Nations and Sovereigns* (1758), translated from French by J. Chitty, Esq, based on the 1797 edition (online), Book I: ‘Of Nations Considered in Themselves’, Chapter XIX, §§ 231-233; A. Grahl-Madsen, *The Status of Refugee in International Law, Volume II*, at 14-15.}

In canvassing these doctrines it becomes clear that writers such as Grotius and Vattel, who are most disposed towards a state obligation to grant asylum in deserving cases, do not consider such a right absolute, requiring refugees to obey the laws of the country of refuge and being of the view that serious criminals should not be given such a right.

State practice continued to evolve throughout the period of these writings and quite possibly because of them. It has been said that the modern era of asylum began in 1685 when Louis XIV of France signed a law repealing the earlier edict of Nantes, which had resulted in the persecution of Huguenots in France. This example of allowing Huguenots to establish themselves was followed by almost a dozen non-Catholic countries by 1708.\footnote{A. Grahl-Madsen, *The Status of Refugee in International Law, Volume II* at 8-10.} This granting of asylum to religious minorities was expanded upon after the French revolution where, as a result of both aristocrats and others opposed to the various regimes in power, political asylum became much more prominent. The contours of political asylum became intertwined with the concept of sending people back to the country of origin because of crimes committed there. This nascent extradition law fluctuated from sending back political refugees to refusing to return any asylum seekers to finding the compromise, first reached in 1833 in
Belgium, of not extraditing persons for political crimes. This approach was soon followed by a number of European countries between 1833 and 1849.\textsuperscript{104}

2.2: The Period between the First and Second World Wars

As a result of the very large number of people displaced after the First World War and the difficulty of returning them, especially 800,000 Russians, to their countries of origin due to changes in the political climate, the Council of the recently established League of Nations decided to convene a conference on June 21, 1921 on the Question of Russian Refugees and to authorize the President of the Council to appoint Dr. Fridtjof Nansen as the first League of Nations High Commissioner for Russian Refugees.\textsuperscript{105} In 1922 the first League of Nations’ international arrangement to alleviate the situation of post-war refugees was put in place, namely the ‘Arrangement with regard to Issue of Certificates of Identity to Russian Refugees’.\textsuperscript{106} This was followed two years later by a similar arrangement for Armenian refugees.\textsuperscript{107} The provisions of these two instruments were expanded and strengthened by the ‘Arrangement of 12 May 1926 relating to the Issue of Identity Certificates to Russian and Armenian Refugees’\textsuperscript{108} which applied to the following categories of persons:

Russian: Any person of Russian origin who does not enjoy or who no longer enjoys the protection of the Government of the Union of Socialist Soviet Republics and who has not acquired another nationality.

Armenian: Any person of Armenian origin formerly a subject of the Ottoman Empire who does not enjoy or who no longer enjoys the protection of the Government of the Turkish Republic and who has not acquired another nationality.\textsuperscript{109}

The purpose of this and the previous arrangements was to have states recognize the so-called Nansen certificate or passport as an identity document, which was valid for one year but could be extended by the High Commissioner’s office, and to issue a return visa to these refugees if they wanted to leave and then come back to their

\textsuperscript{104} A. Grahl-Madsen, \textit{The Status of Refugee in International Law, Volume II} at 8-10.
\textsuperscript{106} 13 League of Nations Treaty Series 237, ratified by 54 countries.
\textsuperscript{107} Plan for the Issue of a Certificate of Identity to Armenian Refugees (League of nations Official Journal, No. 7-10, 1924, 969-970), ratified by 38 states; see L.W. Holborn, \textit{Refugees: A Problem of Our Time} at 9.
\textsuperscript{108} 89 League of Nations Treaty Series 47.
\textsuperscript{109} Article 2.
country of refuge. This identity document allowed this category of refugees to travel and resettle in other countries.

As a result of an Intergovernmental Conference on the Legal Status of Refugees on June 28, 1928, similar arrangements were made for refugees of Assyrian, Assyro-Chaldean, Syrian, Kurdish and Turkish origin, while there were also the beginnings of efforts to regulate the legal status of Russian and Armenian refugees with respect to some civil rights in the country of refuge. As all these arrangements were ad hoc and did not set out in any detail the status of the persons who had been given a Nansen certificate, and because refoulement became more prominent due to the economic crisis at the time, an Intergovernmental Conference in October 1933 was instrumental in creating the more general ‘Convention of 28 October 1933 relating to the International Status of Refugees’. This treaty does not give a definition of refugee but makes reference to holders of Nansen certificates. It also provides that such persons are entitled to the most favourable treatment given to nationals of a foreign country residing in the country of refuge. As well, such persons have a right not to be expelled or refouled, except ‘by reasons of national security or public order’. Regarding the notion of public order, the drafters of the convention were of the view that it should not be applied to trivial matters but only in extreme cases, and that a criminal conviction in itself should not automatically result in expulsion or refoulement. This is reflected in the following commentary:

Taking into consideration that refugees as a rule had nowhere to go, once they were expelled, it was obviously the intention of the drafters that expulsion should only be resorted to in those extreme cases where the continued presence of the refugee would to some extent upset the very equilibrium of society.

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110 Article 3; this article allowed for exceptions to returning in special cases.
111 The technical aspects of the main benefit of resettlement, the finding of employment, were carried out by the International Labour Organization, see L.W. Holborn, Refugees: A Problem of Our Time at 16.
113 The instrument is called the ‘Arrangement concerning the Extension to Other Categories of Refugees of Certain Measures taken in Favour of Russian and Armenian Refugees of 28 June 1928’ (89 League of Nations Treaty Series 63), which was recognized by 13 governments; for more detail, see I.C. Jackson at 15-18; G.S. Goodwin-Gill and J. McAdam at 16-18.
114 Arrangement of 30 June 1928 relating to the Legal Status of Russian and Armenian Refugees (89 League of Nations Treaty Series 53)
116 Article 2.
117 Articles 4-10.
118 J. Hathaway, The Rights of Refugees under International Law at 87-91; G.S. Goodwin-Gill and J. McAdam at 203.
119 Article 3.
120 UNHCR, Commentary of the Refugee Convention 1951 at 123-124.
121 UNHCR, Commentary of the Refugee Convention 1951 at 124.
The Nansen certificate approach was extended to refugees from the Saar in 1935, from Germany in 1938 and from Austria in 1939. The Convention related to German refugees (implicitly followed by the Austrian Protocol) reflected the most recent developments in international refugee law at that time in that it was the most extensive instrument and incorporated elements of earlier arrangements. On the one hand, it followed the description in earlier treaties of what constitutes a refugee by an evaluation of an objective situation in a given country plus the two requirements of being a national of that country and not being able to find protection in that country, while, on the other hand, it included the benefits, including the prohibition against refoulement taken from the 1933 Refugee Convention. This prohibition contains an exception, like the 1933 Convention, for national security or public order.

2.3: The United Nations Relief and Rehabilitation Agency (UNRRA)

In 1943, during the Second World War, the governments of 44 allied nations created the United Nations Relief and Rehabilitation Agency (UNRRA) to deal with the issue of displaced persons in Europe. It was designed as a temporary agency with the limited goal of assisting the return of people belonging to allied countries. It had a Council as its policy making body and a Director General with executive authority. It ceased activities in 1947.

In August 1945 the Council adopted a resolution, which stated:

the Administration will not assist displaced persons who may be detained in the custody of the military or civilian authorities of any of the United Nations on charges of having collaborated with the enemy or having committed other crimes against the interests or nationals of the United Nations.

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123 Called the ‘Convention concerning the Status of Refugees Coming From Germany’ (192 League of Nations Treaty Series 59), ratified by three states (see A. Grahl-Madsen, The Status of Refugee in International Law, Volume II at 96, footnote 38). For the negotiation background see UNHCR, Commentary of the Refugee Convention at 111-112.
124 Called the ‘Additional Protocol to the Provisional Arrangement and to the Convention concerning the Status of Refugees Coming from Germany’ (198 League of Nations Treaty Series 141); see A. Grahl-Madsen, The Status of Refugee in International Law, Volume at 131-133; I.C. Jackson at 18-21; and G.S. Goodwin-Gill and J. McAdam at 18-19.
125 Articles 1 and 6-16.
126 Article 5.2.
127 Agreement for United Nations Relief and Rehabilitation Administration, 9 November 9 1943, articles III and IV.
128 A. Roversi at 30; L.W. Holborn, Refugees: A Problem of Our Time at 23-26; and L.W. Holborn, The International Refugee Organization at 12-27.
129 Resolution 71, paragraph 2(a), see A. Grahl-Madsen, The Status of Refugee in International Law, Volume I at 271.
This resolution was amended in May 1946 to the effect that merely a determination of being a collaborator by military authorities was sufficient to deny assistance irrespective of being in custody.\textsuperscript{130}

2.4: The International Refugee Organization (IRO)

The idea of creating an international refugee organization was first discussed on 7 May 1945 during the San Francisco conference at which the Charter of the United Nations was drafted. Because of the importance of refugee issues, a considerable amount of time was devoted to a discussion of this problem during the first session of the General Assembly of the United Nations on 15 December 1945. This lead to a resolution accepting an agreement for interim measures to establish an international refugee organization and referring the matter on 19 January 1946 for further debate to the Third Committee, given its mandate over social, humanitarian and cultural questions.\textsuperscript{131}

2.4.1: Drafting the Constitution of the International Refugee Organization

The very first debate in the Third Committee showed differences of approach between western nations and eastern bloc countries. For example, the Netherlands proposed that the resettlement of refugees should be the responsibility of an international organization while the Soviet Union wanted to make such resettlement conditional on the consent of the country of origin. The Soviet Union also introduced a draft resolution on 4 February 1946 to the effect that:

\begin{quote}
quislings, traitors and war criminals, as persons dishonoured for the collaboration with the enemies of the United Nations in any form, should not be regarded as refugees who are entitled to get protection from the United Nations, and that quislings, traitors and war criminals who are still hiding, under the guise of refugees, should be immediately returned to their countries.\textsuperscript{132}
\end{quote}

The United States proposed a compromise indicating that forcible repatriation should not occur but there should be no interference with the surrender and punishment of war criminals, quislings and traitors in conformity with international arrangements.\textsuperscript{133}

On 12 February 1946, after a report by the Third Committee, the General Assembly passed a resolution in which it was recognized that the problem of refugees and displaced persons was one of immediate urgency and that there was a necessity to distinguish between genuine refugees and displaced persons on the one hand and war criminals, quislings and traitors on the other. The Assembly also recommended that

\textsuperscript{130} Resolution 92, paragraph 5; see A. Grahl-Madsen, \textit{The Status of Refugee in International Law, Volume I}, at 271.

\textsuperscript{131} L.W. Holborn, \textit{The International Refugee Organization} at 30-31; see also T. Einarsen at marginal notes 12-17.

\textsuperscript{132} L.W. Holborn, \textit{The International Refugee Organization} at 32.

\textsuperscript{133} L.W. Holborn, \textit{The International Refugee Organization} at 32-33.
the Economic and Social Council (ECOSOC) establish a Special Committee on Refugees and Displaced Persons to examine all aspects of this issue.\textsuperscript{134}

This Special Committee’s deliberations resulted in a report with a draft constitution for a non-permanent organization to be called the International Refugee Organization and established as a specialized agency of the United Nations. Its report was considered by the Economic and Social Council at its second session in June 1946; ECOSOC approved the draft constitution on 21 June 1946, submitted it to governments for comments, approved an amended version of it on 3 October 1946 and transmitted the document to the General Assembly via the Third Committee for final adoption the same day.\textsuperscript{135} The General Assembly accepted the proposal on 15 December 1946.\textsuperscript{136}

During the debates in the Third Committee in November 1946, the concern that war criminals, quislings and traitors should not be assisted by the IRO was repeated by a number of countries, such as Brazil, Belgium, France, the Netherlands and Argentina, while the U.S.S.R. went further and suggested the addition of a paragraph which would name certain military formations which had ‘the blood of thousands of people on their hands’. This proposal was supported by other Eastern bloc countries, such as Yugoslavia, Ukraine, Byelorussia and Poland, but was rejected by the majority, which was of the view that those groups were already covered by the Constitution.\textsuperscript{137}

The earlier debates in the Special Committee dealt mainly with the nature of the organization, the definition of refugees, and the distinction between genuine refugees and objectionable persons. With respect to the first question the discussion centered on the options of making this organization a permanent body integrated within the United Nations or a temporary agency with a special arrangement with the U.N. The latter view carried the day.\textsuperscript{138} The issue of definition was related to the desire of certain countries to go beyond the pre-Second World War arrangements, which only defined objective categories of refugees without identifying the subjective element of fear of persecution. The compromise reached was to include ‘victims of persecution for reasons of race, religion, nationality or political opinions’ as one category among five of which the other four were still objectively oriented by for instance stating ‘victims of Nazi or fascist regimes’ or ‘Spanish Republicans or other victims of the Falangist regime in Spain’.\textsuperscript{139} The definition in the Constitution of the IRO as finally adopted by the General Assembly maintained this approach by only including the above three instances within the definition of refugee (and eliminating the words victims of persecution). As a result, the definition of refugee read:

\textsuperscript{135} S. Kapferer, ‘Article 14(2) of the Universal Declaration of Human at 60.
\textsuperscript{136} I.C. Jackson at 30-31 and L.W. Holborn, The International Refugee Organization at 43-46.
\textsuperscript{137} Ibidem at 60.
\textsuperscript{138} L.W. Holborn, The International Refugee Organization at 35-36.
\textsuperscript{139} I.C. Jackson at 30, see also 33-39.
term "refugee" 'applies to a person who has left, or who is outside of, his country of nationality or of former habitual residence, and who, whether or not he had retained his nationality, belongs to one of the following categories:

(a) victims of the nazi or fascist regimes or of regimes which took part on their side in the second world war, or of the quisling or similar regimes which assisted them against the United Nations, whether enjoying international status as refugees or not;
(b) Spanish Republicans and other victims of the Falangist regime in Spain, whether enjoying international status as refugees or not;
(c) persons who were considered refugees before the outbreak of the second world war, for reasons of race, religion, nationality or political opinion.  

The clarification of the distinction between genuine refugees and war criminals had to do with whether political dissidents who had not actively assisted the enemy during the war but who opposed the new regimes after the war should come within the mandate of the new refugee organization. Western states were of the view that political dissidents were entitled to protection, although leaders of groups of dissidents should be denied assistance while the Eastern Bloc countries indicated that only persons who wanted to return to their home countries were entitled to assistance with the result that any other person was a quisling, war criminal, collaborator or traitor. This issue was resolved by including a limited form of exclusion from the mandate of the IRO, namely people who after the war:

(a) have participated in any organization having as one of its purpose the overthrow by armed force of the country of their origin, being a Member of the United Nations; or the overthrow by armed force of the Government of any other Member of the United Nations, or have participated in any terrorist organization;
(b) have become leaders of movements hostile to the government of their country of origin being a Member of the United Nations or sponsors of movements encouraging refugees not to return to their country of origin.

2.4.2: The International Refugee Organization mandate in practice

The International Refugee Organization, which operated between 1947 and 1952 and dealt with the urgent needs of more than 1.5 million persons, based its mandate

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140 Annex 1 to the IRO Constitution, Part I, Section A, paragraph 1.
142 Annex 1 to the IRO Constitution, Part II, article 6 which also has this non-criminal portion in paragraph c: 'at the time of application for assistance, are in the military or civil service of a foreign state'.
143 It was operational between 1 July 1947 and February 1952 while it spent another year and a half, until September 1953 to liquidate its operations (see L.W. Holborn, *The International Refugee Organization* at 68); at its peak it employed between 2,500 and almost 3,000 personnel, assisted by another 3,200 local staff and so-called indigenous labour for the maintenance of camps and other IRO installations in allied occupied countries, which number in Germany alone was over 90,000 (ibidem at 87); as of 31 December, 1951, the organization had registered 1,619,008 persons of which 1,208,586 were resettled or repatriated (ibidem at 202).
on its Constitution. The structure of Annex I of the Constitution,\textsuperscript{144} which sets out the manner in which assistance is to be provided to refugees and displaced persons, starts with the principle that the Organization will provide assistance in the repatriation of such persons unless they had expressed a valid objection against their countries of nationality or former habitual residence to returning to those countries. The main valid objection to return was ‘persecution, or fear, based on reasonable grounds 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.’\textsuperscript{145}

The IRO would not provide assistance to a certain persons as set out in six categories four of which pertain to criminal activities,\textsuperscript{146} namely the members of organizations mentioned above, as well as:

1. war criminals, quislings and traitors.
2. any other persons who can be shown:
   (a) to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations;
   (b) to have voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations.
3. ordinary criminals who are extraditable by treaty.\textsuperscript{147}

The Annex itself contains one interpretative note with respect to the criminal exclusion, namely in respect to paragraph 2(b) and states:

Mere continuance of normal and peaceful duties, not performed with the specific purpose of aiding the enemy against the Allies or against the civil population of territory in enemy occupation, shall not be considered to constitute "voluntary assistance". Nor shall acts of general humanity, such as care of wounded or dying, be so considered except in cases where help of this nature given to enemy

\textsuperscript{144} The Constitution itself is primarily organizational while the criteria for which persons come within its mandate are contained in Annex I to this constitution; see also L.W. Holborn, \textit{The International Refugee Organization} at 47-53.

\textsuperscript{145} Annex 1 to the IRO Constitution, Part I, Section C, paragraph 1(a)(i).

\textsuperscript{146} The non criminal categories are:
4. Persons of German ethnic origin, whether German nationals or members of German minorities in other countries, who:
   (a) have been or may be transferred to Germany from other countries;
   (b) have been, during the second world war, evacuated from Germany to other countries;
   (c) have fled from, or into, Germany, or from their places of residence into countries other than Germany in order to avoid falling into the hands of Allied armies.
5. Persons who are in receipt of financial support and protection from their country of nationality, unless their country of nationality requests international assistance for them.’

The Annex also contains a cessation clause in Part I, Section D, which is very similar to the one in the later Refugee Convention, mentioned in Chapter 1.

\textsuperscript{147} Annex 1 to the IRO Constitution, Part II; see also A. Grah-Madsen, \textit{The Status of Refugee in International Law, Volume I} at 271-272; S. Kapferer, ‘Article 14(2) of the Universal Declaration of Human Rights at 58-61. The exclusion of war criminals in this document has been noted in Germany by the Bundesverwaltungsgericht (Federal Administrative Court), BverwG 10 C 24.08, 11 November 2009, paragraph 25.
nationals could equally well have been given to Allied nationals and was purposely withheld from them.

A more detailed interpretation of the contents of these provisions can be found in an internal manual, which was used in the field. This manual considers that the expression ‘war criminals’ applies to persons who have committed crimes against peace (namely those who have planned aggressive war), violations of the accepted rules of warfare, which according to the manual includes ‘murder of prisoners, murder of hostages and other crimes of which there is a list of about 20’ and crimes against humanity which includes ‘internment of civilians in inhuman conditions, extermination of Jews in gas chambers’. The manual also makes it clear that a conviction for such crimes is not a requirement for excluding a person but people who have been accused or suspected can also fall within the ambit of that provision, although it is not clear in which circumstances such a accusation or suspicion will result to exclusion or what process is required to make such a determination.

According to this document,

quislings are generally understood to be persons who, while occupying high public office, have committed acts which amount to treason under the laws of their respective countries of origin, and in doing so, have acted in that office under the direction –or in coordination with- the enemy. In other words, quislings were leaders or key men of governments or semi-governmental organizations, which were in sympathy with and actually helped the Nazis.

This is further expanded upon when considering a case file by indicating it also includes a government whose creation had been sponsored by the enemy, that the policy of that government resulted in assistance to the enemy and that government officials had accepted their positions without compulsion or duress. Traitors are persons who have been convicted or charged for high treason but do not include desertion from military forces.

The terms assistance and voluntary are the subject of detailed instructions. Assistance needs to be substantial and given with the intention of helping the enemy. It could fit within three categories: military, administrative and economic. Military assistance

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149 Ibidem at 31, paragraph 5.
150 Ibidem at 31, paragraph 6.
151 Ibidem at 32, paragraph 12.
152 Ibidem at 32(1).
153 Ibidem at 32, paragraph 14.
154 Ibidem at 34, paragraph 32.
included voluntary enlistment in the German Army or other forces, or other acts designed to help the German Army.\textsuperscript{155} Administrative assistance is considered support given by members of the local administration to the occupying army with the specific intent of helping them win the war but mere continuance of normal or peaceful duties does not fall within this rubric.\textsuperscript{156} Similarly, not all forms of economic assistance are seen as negative, only those types which aided the enemy forces in their operations. It was primarily directed at the arms manufacturer segment of society.\textsuperscript{157}

While motivation is irrelevant, other factors such as age, sex, degree of education and intelligence, rank, social condition as well as the amount of pressure put on the person and the ability to resist such pressure were to be taken into account as part of a determination whether a person assisted enemy forces.\textsuperscript{158} These latter factors also played a role in the examination of the voluntariness of the assistance by indicating that members of armies of satellite states such as Hungary or Romania were generally not seen as having assisted voluntarily unless they were very high officers in decision making positions or unless they undertook special service indicating their pro-Nazi stance.\textsuperscript{159} Conscription is usually connoted with involuntary assistance with the exception of initial conscription in the general German army but then opting to serve in organizations specifically designed to uphold the Nazi regime, such as S.S. units, the Gestapo and especially dangerous military formations such as commandos or paratroopers.\textsuperscript{160}

The category of ordinary criminals extraditable by treaty was not often applied ‘since the majority of crimes are committed by refugees in the country of haven, the use of this clause is restricted’.\textsuperscript{161} The manual allows for personal circumstances to play a role in determining whether to provide IRO assistance in two aspects. First a distinction is made between habitual criminals who should not be within the mandate of the IRO as opposed to persons who committed one crime of little importance.\textsuperscript{162} Secondly it is emphasized that in the same manner a criminal court balances the nature of the crime against the punishment to be imposed, so should the Organization.\textsuperscript{163}

As to the seriousness of the crimes which should be included in this category, a lengthy list is given, varying from crimes against persons (murder, rape, arson, assault and causing grave injury), crimes against property (malicious destruction) and crimes against public morals (bigamy and perjury), to economic crimes such as

\textsuperscript{155} Ibidem at 33, paragraph 24.
\textsuperscript{156} Ibidem at 34, paragraph 30.
\textsuperscript{157} Ibidem at 34, paragraph 31.
\textsuperscript{158} Ibidem at 34, paragraph 32.
\textsuperscript{159} Ibidem at 33, paragraph 25.
\textsuperscript{160} Ibidem at 33-34, paragraphs 27-28. The Manual provides more detail about smaller units in the SS, the German Army and other nefarious organizations at 104-115.
\textsuperscript{161} International Refugee Organization, \textit{Manual for Eligibility Officers} at 35, paragraph 36.
\textsuperscript{162} Ibidem at 35, paragraph 37.
\textsuperscript{163} Ibidem at 35, paragraph 38.
forgery, issuing of counterfeit money, theft, bankruptcy, receiving stolen goods and embezzlement.\textsuperscript{164}

The last exclusion for criminal activities, subversion and terrorism, is not directed at people involved in the overthrow of government by legal or peaceful means but only those who want to accomplish this result by armed force.\textsuperscript{165} However, the manual interprets the term ‘participated’ as meaning ‘membership or participation’ in an organization while participation can include financial support.\textsuperscript{166}

2.5: The Universal Declaration of Human Rights

The first step towards the seminal Universal Declaration of Human Rights began with the establishment of the United Nations’ Commission on Human Rights on 16 February 1946 by the Economic and Social Council during its first session.\textsuperscript{167} This Commission on Human Rights established a Drafting Committee, which received its terms of reference on 24 March 1947.\textsuperscript{168} The function of the Drafting Committee was to prepare, on the basis of documentation supplied by the United Nations Secretariat, a preliminary draft of an International Bill of Human Rights.\textsuperscript{169} This Committee had its first meeting from June 9 to June 25, 1947.\textsuperscript{170}

Apart from the documentation prepared by the Secretariat, the Drafting Committee had also before it proposals by the United Kingdom and the United States, none of which contained a reference to asylum or refugees.\textsuperscript{171} The Committee formed a temporary working group, which had as its purpose to rearrange the draft articles suggested and also to redraft certain articles based on discussions in the Committee.\textsuperscript{172} This working group produced a draft, which included the following article 33: ‘Every State has the right to grant asylum to political refugees’.\textsuperscript{173} The Drafting Committee agreed that the right of asylum should be included in the draft Bill.\textsuperscript{174}

\textsuperscript{164} Ibidem at 34-35, paragraph 34.  
\textsuperscript{165} Ibidem at 39, paragraph 64.  
\textsuperscript{166} Ibidem at 39, paragraph 64. The Manual also included ineligibility for membership in certain groups outside Germany as well such as the Hlinka Guard in Slovakia (at 63), Hunyadi Division in Hungary (at 74), the Iron Guard in Romania (at 78), the State Security Police and the Military Police in Bulgaria (at 82) and the Ustas in Croatia (at 89).  
\textsuperscript{167} United Nations Yearbook on Human Rights for 1947 at 421; all the documents pertaining to the drafting of the Universal Declaration of Human Rights can also be found on the website of the United Nations under ‘The Universal Declaration of Human Rights, a Historical Record of the Drafting Process’.  
\textsuperscript{168} United Nations Yearbook on Human Rights for 1947 at 482.  
\textsuperscript{169} Ibidem at 482.  
\textsuperscript{170} Yearbook of the United Nations, 1946-47 at 525.  
\textsuperscript{171} United Nations Yearbook on Human Rights for 1947 at 484-486 for the draft prepared by the Secretariat, at 487-492 for the UK proposal and at 492-495 for the US proposal.  
\textsuperscript{172} United Nations Yearbook on Human Rights for 1947 at 485.  
\textsuperscript{173} Ibidem at 497.  
\textsuperscript{174} Ibidem at 483, also Yearbook of the United Nations, 1946-47 at 526. For more detail regarding the concept of refugee in the Declaration, see G.S. Goodwin-Gill and J. McAdam at 358-363; T. Einarsen at marginal notes 18-20; and S. Kapferer, ‘Article 14(2) of the Universal Declaration of Human Rights’ at 61-62.
During the debates of the Drafting Committee the French representative made the comment that common criminals should be excluded from the right to asylum. On 20 June 1947 the U.S.S.R. representative echoed statements by that country during the deliberations regarding the establishment of the International Refugee Organization on 4 February 1946 to the effect that quislings, traitors and war criminals should not be regarded as refugees, by observing that the Moscow Declaration was being neglected and asking if some sort of reservation to that effect would be made. The French representative answered by saying that he wanted to reserve the question of criminals in general and of the obligations of extradition incumbent on states, which might also apply to war criminals. No further steps were undertaken to follow up on these suggestions.

The Commission on Human Rights considered the preliminary draft of its Drafting Committee during its second session in Geneva from December 2 to 17, 1947. During this session the Commission decided on a terminology to be used in referring to the three documents, which together were to constitute the International Bill of Human Rights, namely: a Declaration of Human Rights, a Covenant on Human Rights, and Measures of Implementation.

The Commission was of the opinion that the Declaration would be a simple statement defining human rights and fundamental freedoms and its force, upon adoption by the General Assembly, would be more of a moral rather than a legal nature. The Declaration would establish and indicate goals rather than impose precise obligations upon states. The draft Covenant, on the other hand, was visualized as an instrument, which would legally bind the states acceding to it. Such states would undertake to make their national laws conform to its standards, and would agree to the imposition of sanctions in the case of violation of the rights enumerated therein. The Measures of Implementation were only related to the proposed Covenant, and possible future conventions.

With respect to asylum, some members of the newly established Working Group on a Declaration of Human Rights requested that ordinary criminals, who were generally the subject of extradition law and all those whose acts were contrary to the principles and purposes of the United Nations, be explicitly excluded from the right of asylum. The

175 UN Doc. E/CN.4/AC.1/SR.9 at 8.
176 The Moscow Declaration was signed during the Moscow Conference on 30 October 1943; the formal name of the declaration was ‘Declaration of the Four Nations on General Security’ and had, among other topics a ‘Statement of Declaration’, which led to the London Charter of the International Military Tribunal on 8 August 1945.
working group agreed on the following sentence: ‘this right will not be accorded to criminals nor to those whose acts are contrary to the principles and aims of the United Nations’.

The Commission decided during the first week of January 1948 that the above documents should be forwarded to governments for their comments and it requested the Secretary-General to fix 3 April 1948 for governments to send replies. As a result of comments received, the Drafting Committee of the Commission on Human Rights held its second session from 3-21 May 1948.

The first comment with respect to asylum during this session was made on 7 May 1948 when the French representative stated that France would reserve its right to expel foreigners who disturbed public order and morality. The Chilean representative, responding to a comment by the U.S.S.R. representative that the article on asylum should have a paragraph 2 excluding war criminals from the benefit of asylum, stated that it would be unwise to include such a paragraph, which attempted to cover cases of special criminals and which did not clearly state these cases as an exception, the result of which would be that persons would be condemned a posteriori. He felt that war criminals should be covered by other conventions.

On 12 May 1948, the Chilean representative made the same comment as 5 days earlier. As a result it was agreed that article 14 on asylum should be accepted as it stood with the deletion of paragraph 2 and that a new article should be drafted to deal with war criminals. The next day this issue was revisited when the British representative indicated that he wanted to retain paragraph 2 and the U.S.S.R. representative agreed. The Chilean representative then indicated that although he felt that war criminals should be dealt with separately, this would cause more problems than retaining this paragraph and therefore he would be in favour of the United Kingdom’s suggestion. The chair on behalf of the United States felt that retaining this paragraph on war criminals would usurp the work of another United Nations organ, namely the International Law Commission, which had recently been given a mandate to look at the issue of war criminals in the context of developing international law. The French representative, however, also agreed with the UK and as a result paragraph 2 dealing with the exemption of war criminals was accepted as part of the article on asylum.

On 18 May 1948, the Drafting Committee discussed a new text of paragraph 2 which was drawn up by its Drafting Sub-Committee, constituted of the representatives of China, France and the UK. The new text read: ‘prosecutions genuinely arising from non-

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185 Ibidem at 574.
187 Ibidem at 9.
188 UN Doc. E/CN.4/AC.1/SR.30 at 11.
189 UN Doc. E/CN.4/AC.1/SR.31 at 1-5.
political crimes or acts contrary to the purposes and principles of the United Nations do not constitute persecution.\textsuperscript{190}

The U.S.S.R. wanted to add to the text that asylum would not be granted to fascists and Nazis who had been prosecuted for their activities.\textsuperscript{191} The UK was of the opinion that these activities formed part of acts against the purposes and principles of the United Nations, in response to which the U.S.S.R. representative asked whether that would be the correct interpretation. Both the French and Chilean representatives agreed that that was indeed the case.\textsuperscript{192} Consequently, the committee as a whole accepted this wording.\textsuperscript{193}

The Drafting Committee presented the report of its second session to the Commission on Human Rights on 21 May 1948\textsuperscript{194}, attaching a redraft of the proposed International Declaration of Human Rights, which contained the following article 11:

1. Everyone has the right to seek and may be granted, in other countries, asylum from persecution;
2. Prosecutions genuinely arising from non-political crimes or acts contrary to the purposes and principles of the United Nations do not constitute persecution. [\textit{Note.} The representative of the Soviet Union proposed that the following text be submitted for the above text of article 11 (unofficial translation): ‘The right of asylum shall be granted to everyone persecuted because of his activity in defense of democratic interests, because of his activity in the field of science, or because of his participation in the struggle for national liberty.’]\textsuperscript{195}

During the third session of the Commission on Human Rights in May and June 1948, India and the United Kingdom proposed to delete the limitation in article 11 as part of a wider proposal to streamline the draft declaration to general statements of principle. This was supported by the United States and Belgium but opposed by communist countries.\textsuperscript{196} The Byelorussian representative was of the view that he was unable to accept this deletion, bearing in mind the suffering of the people in Byelorussia and of Byelorussian and Western European Jew in a ghetto in Minsk, while the Ukrainian delegate found it impossible to avoid reference to activities against the United Nations and against democracy. Lastly, the U.S.S.R. made it clear that without paragraph 2, even it was not entirely acceptable, this article would have no value whatsoever. The motion to delete the second paragraph was defeated.\textsuperscript{197}

The Commission on Human Rights examined the text of the draft declaration of the Drafting Committee and adopted a new text on 28 June 1948 while the article dealing

\textsuperscript{190} UN Doc. E/CN.4/AC.1/39; UN Doc. E/CN.4/AC.1/SR.37 at 8.
\textsuperscript{191} UN Doc. E/CN.4/AC.1/SR.37 at 11.
\textsuperscript{192} UN Doc. E/CN.4/AC.1/SR.37 at 12.
\textsuperscript{193} Ibidem at 14.
\textsuperscript{194} United Nations Yearbook on Human Rights for 1948 at 457.
\textsuperscript{195} United Nations Yearbook on Human Rights for 1948 at 459; this proposal was referred to the Third Committee meetings as UN Doc. E/800 at 33.
\textsuperscript{196} S. Kapferer, ‘Article 14(2) of the Universal Declaration of Human Rights’ at 63.
\textsuperscript{197} Idem.
with asylum (now article 12) remained virtually the same (only the word “may” in the first paragraph had been deleted) and transmitted the text to the Economic and Social Council.\textsuperscript{198} ECOSOC, in turn, on 26 August 1948, during its seventh session, transmitted the draft Declaration to the General Assembly without changes but with comments made by several representatives during its meetings.\textsuperscript{199}

On 24 September 1948, the General Assembly referred consideration of the draft Declaration to its Third Committee,\textsuperscript{200} where the article on asylum was debated on 3-4 November 1948.\textsuperscript{201} The only change to this article was made in paragraph 1 where the words ‘and be granted’ were changed to ‘, and to enjoy’ as a result of a British proposal.\textsuperscript{202} This proposal was accepted a day later.\textsuperscript{203}

During the deliberations a number of comments were made with respect to paragraph 2 of the article. The U.S.S.R. representative stated that the article should be framed in a way that war criminals, fascists and Nazis hiding abroad, particularly in occupied Germany, could not claim to be persecuted persons.\textsuperscript{204} The representative of the Philippines agreed with this statement.\textsuperscript{205} The representative of Yugoslavia also felt that the limitations in paragraph 2 were insufficient in that they ignored the new provisions established in post-war international documents, all of which related to the prosecution and punishment of war criminals. He was, therefore, unable to agree to a provision drafted in too general terms, which could result that the benefit of asylum would be extended to war criminals and traitors. He would therefore vote for the U.S.S.R. amendment.\textsuperscript{206}

The next day, the Polish representative expressed the same sentiments, as did the representative of the Ukraine,\textsuperscript{207} while the French representative warned of over-expansion and over-restriction of paragraph 2 and defended the wording as submitted.\textsuperscript{208} The French delegate opposed the Soviet proposal, saying that paragraph 2 contained all the necessary limitations and reservations while the United States indicated that it saw no reason to change what it considered to be very reasonable limitation in that article.\textsuperscript{209} The representative of Pakistan argued that by denying the right of asylum to all those guilty of acts contrary to the purposes and principles of the United Nations, the

\textsuperscript{198} United Nations Yearbook on Human Rights for 1948 at 462-463.
\textsuperscript{199} Ibidem at 464, also Yearbook of the United Nations, 1947-48 at 576-578.
\textsuperscript{200} United Nations Yearbook on Human Rights for 1948 at 465.
\textsuperscript{203} Ibidem at 344.
\textsuperscript{204} Ibidem at 327.
\textsuperscript{205} Ibidem at 335.
\textsuperscript{206} Ibidem at 339.
\textsuperscript{207} Ibidem at 341.
\textsuperscript{208} Ibidem at 342.
\textsuperscript{209} S. Kapferer, ‘Article 14(2) of the Universal Declaration of Human Rights’ at 64.
provisions of paragraph 2 denied asylum to the Nazis and fascists, which the U.S.S.R. wanted to exclude from the benefits of this article 12.\textsuperscript{210}

The U.S.S.R. representative was of the opinion that his amendment was not covered by paragraph 2 of the proposed article, as suggested by the United States and Chile, and would as a result provide a loophole for war criminals.\textsuperscript{211} The U.S.S.R. amendment was rejected after taking a roll call\textsuperscript{212}, while the whole article 12 was adopted the same day.\textsuperscript{213} In explanation, the U.S.S.R. representative stated that he had been able to vote in favour of paragraph 2 of article 12 on the understanding that no country would give shelter to war criminals on the grounds that their crimes has been committed before the United Nations had come into being, since the purposes and principles of the United Nations had at that time already been recognized by all democratic peoples and that no objection had been raised to that interpretation by any member of the Committee.\textsuperscript{214}

As a result of a considerable number of amendments adopted during the meetings of the Third Committee, a Sub-Committee was set up to consider the Declaration of Human Rights as a whole, from the point of view of arrangement, consistency, uniformity and style.\textsuperscript{215} As a result of the work of this Sub-Committee the comma’s disappeared in the first paragraph of the article dealing with asylum, while the first and the last four words of paragraph 2 ‘prosecutions ... do not constitute persecution’ were reworked to read ‘this right might not be invoked in the case of prosecutions’.

The representative of the U.S.S.R. said ‘that he was not opposed to paragraph 2 but noted that the Sub-Committee had not merely altered the wording of the original text but had rather had touched upon the substance of the question.’ No response to this comment was received\textsuperscript{216} and finally the article was renumbered as article 14 and now read: ‘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’. The report of the Sub-Committee was adopted by the Third Committee, resulting in the adoption of the draft Universal Declaration of Human Rights by the Third Committee and its submission to the General Assembly.\textsuperscript{217} The General Assembly adopted the report of the Third Committee on 10 December 1948 after voting on each article and the Declaration as a whole. Only one article was deleted, while virtually all the other articles, including article 14,\textsuperscript{218} were adopted unanimously.\textsuperscript{219}

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\textsuperscript{210} Idem.
\textsuperscript{212} Ibidem at 343.
\textsuperscript{213} Ibidem at 346.
\textsuperscript{214} Ibidem at 347.
\textsuperscript{215} United Nations Yearbook on Human Rights for 1948 at 465.
\textsuperscript{216} S. Kapferer, ‘Article 14(2) of the Universal Declaration of Human Rights’ at 65.
\textsuperscript{217} United Nations Yearbook on Human Rights for 1948 at 465.
\textsuperscript{218} Ibidem at 465.
\textsuperscript{219} Ibidem at 465-466.
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2.6: The 1951 Refugee Convention Relating to the Status of Refugees

2.6.1: Introduction

Less than a year after its adoption of the Universal Declaration on Human Rights, the General Assembly of the United Nations, on 3 December 1949, decided to establish a ‘High Commissioner’s Office for Refugees’ to be functional as of 1 January 1951, the date when the International Refugee Organization would cease to operate. At the same time it requested Economic and Social Council to prepare a resolution setting out the functions of this office while also providing recommendations with respect to the definition of refugee to be used by that same office.\(^{220}\)

ECOSOC established an *ad hoc* Committee of Statelessness and Related Problems, which examined draft resolutions from various countries as well as its Secretariat during its first meeting held 16 January - 16 February 1950 and which drew up a draft convention related to the status of refugees, which was submitted to ECOSOC. The Social Committee of the ECOSOC discussed the work in relation to the proposed convention between 31 July - 10 August 1950, after which it submitted its report which included a preamble and a definition of refugee as well as a recommendation for the *ad hoc* Committee to continue it work.\(^{221}\) ECOSOC examined the report of its Social Committee and accepted its recommendation on 16 August 1950. The *ad hoc* Committee under its new name, the Ad Hoc Committee of Refugees and Stateless Persons, resumed its work during its second session held 14-25 August 1950. Work during this session resulted in a revised draft convention with the exception of the definition of refugee. The Committee submitted the draft convention,\(^{222}\) as well as the draft statute of the United Nations High Commissioner for Refugees, to ECOSOC. With respect to the notion of exclusion in the draft statute ECOSOC came to the conclusion that the contents should be the same as was being proposed for the future refugee convention.\(^{223}\)

Both proposals were forwarded to the Third Committee, which discussed them during its 1950 November-December meeting.\(^{224}\) The exclusion clause in the Statute was adopted during this session but the definition of refugee, including its exclusion clause did not go any further than agreeing that the document would be considered a draft

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\(^{220}\) UN Doc. A/RES/319(IV)A. This resolution had been preceded by work in ECOSOC and the Third Committee earlier that year about issues such as the relation of the new agency to other organs of the United Nations, the selection of the High Commissioner, the life span of the agency and the persons who should receive assistance; the latter issue caused a disagreement between some European countries which expressed concern about great financial burden they would face as a result of the large number of refugee on their territories, on one hand, and countries such as Australia, the U.S. and the UK who wanted to have as many refugees settled as possible; for more detail see L.W. Holborn, *Refugees: A Problem of Our Times* at 65-75.

\(^{221}\) UN Doc. E/1814.


\(^{223}\) S. Kapferer, ‘Article 14(2) of the Universal Declaration of Human Rights’ at 66.

\(^{224}\) Ibidem at 66.
convention only. The Third Committee submitted both the Statute and the draft convention to the General Assembly, which accepted these documents on 14 December 1950. The draft convention became the basis of discussion during a Conference of Plenipotentiaries held in Geneva from 2-25 July 1951. This conference adopted the Convention relating to the Status of Refugees on 25 July 1951 while the Final Act was signed three days later. 225

2.6.2: The debates in the Social Committee of the Economic and Social Council and the Third Committee of the General Assembly226

The first reference to a possible exclusion of certain persons can be found in article 1(2) of the draft Refugee Convention text proposed by France on 17 January 1950. This stated in reference to the Universal Declaration on Human Rights that: ‘no person to whom Article 14, paragraph 2 of the aforesaid Declaration is applicable shall be recognised as a refugee’.227 During the deliberations in the ad hoc Committee on Statelessness and Related Problems the following definition of exclusion was produced in its report of 17 February 1950:

no contracting State shall apply the benefits of this Convention to any person who in its opinion has committed a crime specified in Article VI of the London Charter of the International Military Tribunal or any other act contrary to the purposes and principles of the Charter of the United Nations. 228

The Social Committee of the ECOSOC discussed the entire text of the proposed convention between 31 July - 10 August 1950, while the above provision (or actually an identical text based on a French proposal of 29 July 1950)229 was the subject of debate between 2 and 7 August 1950.

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225 P. Weis at 3-4.
227 UN Doc. E/AC.32/L3.
On 2 August the discussion was mostly devoted to voicing concerns over whether the wording was too vague so that it could be open to abuse230 and to giving examples of what acts could be covered by the provision. Collaborators, those responsible for genocide and persons practising racial discrimination were mentioned. The day ended by the Canadian representative suggesting (after reconsidering her original position that the provision was too vague and indicating that the French proposal had merit) that this provision be referred to a drafting committee to make it clearer. This suggestion was accepted.231

By the 7 August meeting, the French delegation had amended its original proposal by changing the words ‘or any other act contrary to the purposes and principles of the United Nations’ to a general reference to article 14(2) of the Universal Declaration of Human Rights. France’s delegate started the discussion that day by saying that:

his delegation held that the phrase in question applied to - and hence excluded - war criminals, ordinary criminals and certain individuals who, though not guilty of war crimes, might have committed acts of similar gravity against the principles of the United Nations, in other words, crimes against humanity.232

Later he elaborated on this statement in the following way:

put differently, the question was whether a ex-Hitler, who was not guilty of any war crimes, merely because there had been no war, would have the right to be classified as a refugee after torturing, persecuting and reducing a people to slavery. That was the extreme case of the great tyrant. There might, however, be a larger number of more petty tyrants likewise guilty of acts contrary to the purposes and principles of the Charter, who had by such acts helped create fear which the refugees had fled.’ … ‘the provision was not aimed at the man-in-the-street, but at persons occupying government posts, such as head of States, Ministers, and high officials.’233

Mr. Giraud of the United Nations Secretariat responded to the latter statement of France by saying that:

it was a fact that an individual could violate the provisions of the United Nations Charter. According to the terms of the Charter and the judgement of the Nuremberg Tribunal and by virtue of the provisions of the Genocide Convention an individual could nowadays be held liable under international law, and could be called upon to answer for crimes constituting a violation of such international law.

230 Countries who found the provision too vague were Canada (UN Doc. E/AC.7/SR. 160 at 15), Pakistan (at 16) and the United Kingdom (at 19); Mexico thought that the provision could lead to abuse (at 19) while Chile felt that it was difficult to see how an individual could commit acts contrary to the purposes and principles of the Charter; the example of collaborators was given by the U.S. (at 16) and the UK (at 19), the example of genocide originated from the French delegation (at 15) while the India mentioned the situation of discrimination (at 15).

231 UN Doc. E/AC.7/SR 160 at 19.


233 Ibidem at 6.
France was in entire agreement with this explanation.\textsuperscript{234} Mr. Giraud also suggested that ‘an individual who, without having committed a crime against humanity, had violated human rights, for instance by the exercise of discrimination, could be considered to have committed acts contrary to the purposes and principles of the United Nations.’\textsuperscript{235} Canada then stated that:

> the Canadian government would certainly not wish the persons envisaged in the amendment to benefit from the Convention. As has been said, they would be persons who had abused positions of authority by committing crimes against humanity, other than war crimes.\textsuperscript{236}

The delegate of Chile indicated that ‘he was glad to see his French colleague had modified his original wording. ... he was glad to see, too, that for the first time an article proclaiming human rights was to take a contractual form.’\textsuperscript{237} The chairman put the French amendment to a vote as a result of which (7-0, with 8 abstentions) the following text for the last portion of the exclusion ground was arrived at:

> No contracting State shall be obliged under the provisions of this Convention, to grant refugee status to any person whom it has serious reasons to consider, as falling under the provisions of article 14(2) of the Universal Declaration of Human Rights.\textsuperscript{238}

This proposal (together with the original text regarding crimes specified in the London Charter) was adopted by the ECOSOC and forwarded to the Third Committee of the General Assembly for its November-December 1950 session. In that forum, on 24 November, Yugoslavia submitted a proposal to change this definition but only for the Statute of the High Commissioner, which retained the ECOSOC definition but added the category of ‘persons who have committed non-political crimes’.\textsuperscript{239} An informal working party examined the various drafts and proposals and suggested that for purposes of the Statute the mandate of the High Commissioner should not extend to:

> a person in respect of whom there serious reasons for considering that he has committed a crime covered by the provisions 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.\textsuperscript{240}

\textsuperscript{234} Ibidem at 8.
\textsuperscript{235} Ibidem at 9.
\textsuperscript{236} Ibidem at 10.
\textsuperscript{237} Ibidem at 10.
\textsuperscript{238} Ibidem at 11; the same text is also contained in the Second Report of the Social Committee, UN Doc. E/1814, paragraph C of the definition of refugee.
\textsuperscript{239} S. Kapferer, ‘Article 14(2) of the Universal Declaration of Human Rights’ at 66.
\textsuperscript{240} Ibidem at 66.
The Australian representative, during the subsequent debate in the Third Committee, was concerned that the language of the Universal Declaration on Human Rights was too vague to be part of both instruments under consideration and proposed to delete all words after ‘extradition’. The French delegate pointed out that ‘the paragraph proposed by the informal working party applied to war criminals, common criminals and those responsible for crimes against the United Nations’ and was opposed to deleting the latter two categories. Yugoslavia also opposed the Australian proposal with as result that it was rejected. Consequently, the definition originally proposed by the informal working group became part of the Statute as it was also approved by the General Assembly.241

This same wording but with the deletion of the reference to common criminals appeared as article 1(E) in the text of the Draft Convention relating to the Status of Refugees, which was annexed to the Official Records of the United Nations General Assembly 325th Plenary Meeting of 14 December 1950. The entire text read:

the provisions of the present Convention shall not apply to any person with respect to whom there are serious reasons for considering that (a) he has committed a crime specified in article VI of the London Charter of the International Military Tribunal; or (b) he falls under the provisions of article 14, paragraph 2, of the Universal Declaration of Human Rights.

2.6.3: The debates during Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons

Since no agreement on a convention could be reached in the context of the Economic and Social Council, the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons was called at Geneva from 2-25 July 1951 in order to reach such an agreement. The draft text of article 1 with respect to exclusion was the same as the one in the above Draft Convention.242

Since the definition of refugees, in which this exclusion clause appeared, was of great importance to the Conference and since it was difficult to come to a consensus with respect to the exclusion grounds, it was decided to appoint a Working Group to study section E of Article I of the Draft Convention. This working group was able to achieve a consensus on the wording with respect to the war crimes exclusion but not on the other exclusion grounds, so that the discussion on what was to become sections (b) and (c) of Article F continued in plenary session.

The debate on the issue of exclusion for war crimes began with the following amendment to the definition in the draft convention on exclusion put forward by Germany:

242 UN Doc. A/Conf.2/4 at 6.
the provisions of the present Convention shall not apply to any person to whom there are serious reasons for considering that (a) he has committed a war crime or crime against humanity as specified in article 147 of the Geneva Convention of 12 August 1949 relative to the Protection of Civilian Persons in Time of war and in the corresponding articles of the three other Geneva Conventions of the same date and in article III of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; or (b) he has committed a crime against peace, namely planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in common plan or conspiracy for the accomplishment of any of the foregoing; or (c) he falls under the provisions of article 14, paragraph 2 of the Universal Declaration of Human Rights’. 243

The main reason for this amendment, as stated by the German representative, was to have a more appropriate reference to more recent developments in the area of international crimes than the London Charter as that document had only been approved by a limited number of states. 244

Mr. Meyrowitz of the Consultative Council of Jewish Organizations objected to the German proposal for two reasons, the first of which was that the principles of the London Charter had transcended the institution for which they were created and had already been the subject of the work of the International Law Commission. Secondly, the suggested definition would not apply to crimes against humanity. 245

In response to this comment, the representative of Germany stated that while not being opposed to using the London Charter he wanted to point out that the Charter did not cover crimes against humanity committed after the Second World War due to its restrictive wording. As well, he was also fully cognizant of the fact that war crimes, crimes against humanity and crimes against peace could very well fall within the other proposed exclusion clauses as such crimes were both common crimes and acts against the United Nations. 246 However, the delegate of Israel agreed with the comments of Mr. Meyrowitz that the Nuremberg Principles provided a more comprehensive body of international criminal law than the German proposal and urged its rejection. 247 Further discussion on this issue was referred to a Working Group. 248

The Working Group held two meetings between 17-19 July 1951 and proposed that a person be excluded where ‘(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

243 UN Doc. A/Conf. 2/76.
244 UN Doc. A/Conf.2/SR 19 at 26.
245 UN Doc. A/Conf. 2/SR 21 at 7-11.
246 UN Doc. A/Conf.2/SR 24 at 6-8.
247 Ibidem at 14-16.
248 Ibidem at 16.
make provision in respect of such crimes.\textsuperscript{249} This was accepted by the Conference although Israel was unable to vote for this definition.\textsuperscript{250}

Before setting out in some detail the debates with respect to the ground for exclusion dealing with other forms of criminality, it is useful to point out that this discussion can be traced back to the positions of the British and French delegations, which at the beginning were diametrically opposed. The French delegation was very concerned that France, which had been absorbing large numbers of refugees, would face severe problems with the entry of criminals among genuine refugees. Britain, on the other hand, had great difficulties with the notion that refugees who had been admitted to a country could afterwards be removed for having committed only relatively minor offenses in the country of refuge.

The debate began on 11 July 1951 in plenary when Mr. Hoare of the UK delegation stated that he presumed that article 14 of the Universal Declaration of Human Rights meant to exclude common criminals and if that was the intention of the Conference he had difficulty with such an approach.\textsuperscript{251} Two days later the same representative stated that ‘it was difficult to define what acts were contrary to the purposes and principles of the United Nations though he presumed that what was meant was such acts as war crimes, genocide and the subversion or overthrow of democratic regimes’.\textsuperscript{252} He also stated that he was concerned that people who committed minor crimes in the country of refuge should not be excluded from the benefits of the Convention.\textsuperscript{253} France’s representative responded that it was:

observed that the divergence between two standpoints arose from the fact that certain delegations wished their governments to be able to return and expel refugees who were common-law criminals, whereas the French government wanted to be able, under certain circumstances, to receive them, without, however, being compelled to apply to such individuals the benefits accorded by the Convention. For France, the definition was the criterion for the right of asylum, and that was why she attached fundamental importance to it.\textsuperscript{254}

The Belgian representative replied that in his view this exclusion ground should apply in both the country of origin and the country of refuge.\textsuperscript{255} The delegate of the

\textsuperscript{249} UN Doc. A/Conf.2/92; there are no summary records of the meeting of the Working Group, only a report, which indicated that during the drafting of this exclusion ground, the relationship between the work of the International Law Commission and the breadth of this ground was discussed although no conclusive agreement was reached (UN Doc. A/Conf.2/SR 21 at 7-10). Grahl Madsen states that this ground was couched (especially the term “international instruments”) in more general terms as a result of the fact that it was felt by the drafters that the work of the International Law Commission on its Code of Crimes against the Peace and Security of Mankind should be encompassed by the provision contained in F(a) (A. Grahl-Madsen, The Status of Refugee in International Law, Volume I at 276).

\textsuperscript{250} UN Doc. A/Conf. 2/SR 29 at 10.

\textsuperscript{251} UN Doc. A/Conf. 2/SR 3 at 15.

\textsuperscript{252} UN Doc. A/Conf.2/SR 24 at 5.

\textsuperscript{253} Ibidem at 8.

\textsuperscript{254} Ibidem at 12.

\textsuperscript{255} Ibidem at 9.
UNHCR noted that there was a discrepancy between the UNHCR Statute, which excluded persons who had committed crimes envisaged by extradition treaties while the draft convention did not.\textsuperscript{256} This sparked a general debate about this discrepancy and the relationship between extradition treaties and the proposed refugee convention\textsuperscript{257} resulting in this area of exclusion also being referred to the Working Group.\textsuperscript{258}

The same day a formal proposal was put forward which suggested deleting paragraph (b) entirely from article I(E) or, in the alternative, substituting the wording in (b) for the following: ‘that he has committed an act contrary to the purposes and principles of the United Nations’.\textsuperscript{259}

On 19 July 1951, after the Working Group and the Conference had not been able to reach a consensus on exclusion other than with respect to crimes against peace, war crimes and crimes against humanity, the discussion regarding this ground for exclusion resumed. The UK delegate was quick to reiterate his concern about the

\textsuperscript{256} Ibidem at 9-10.

\textsuperscript{257} The concern, as voiced by the Belgium representative was that a refugee under an international treaty who had committed a common-law crime could be handed under a bilateral treaty over to the country where he feared persecution (UN Doc. A/Conf.2/SR 24 at 9); the UK delegate recognized this concern but felt that extradition treaties should prevail and that the exclusion article should reflect this (UN Doc. A/Conf.2/SR 24 at 10-11). Both Israel and Belgium agreed with the UK (UN Doc. A/Conf.2/SR 24 at 11) while Denmark stated that ‘states who had received a request for extradition of a refugee who had committed a crime of no great consequence from the government that was likely to persecute him, would be faced with a very difficult decision. On the other hand, States could not be expected to grant asylum to persons committing capital crimes merely because they happened to be exposed at the same time to relatively minor dangers on account of some unimportant political activity. A proper balance must be struck between all the considerations involved.’ (UN Doc. A/Conf.2/SR 24 at 13). The Belgium and Dutch representatives suggested a couple of days later in order to resolve this issue to make a reservation regarding extradition in the provision dealing with refoulement (UN Doc. A/Conf. 2/SR 29 at 14). which was given reluctant support by the UK (UN Doc. A/Conf. 2/SR 29 at 15). However, the debate on the refoulement provision hardly touched upon extradition with the exception of a comment by the UK delegate to the effect that ‘extradition treaties between countries of refuge and countries of persecution were outside the purview of the Convention. Most treaties of that kind specified that not only the facts should be established \textit{prima facie} to the satisfaction of the country receiving the request for extradition but also that the crime for which the criminal was to be returned should not be of a political nature.’ This statement was echoed by France by saying that ‘article 33 was without prejudice to the rights of extradition.’(see P. Weis at 332 and 334). Weis, in his commentary, makes the obervation: ‘as to extradition it would also seem to be covered by the words “in any manner whatsoever”’ and goes on to say that with respect to the comment given by the UK that ‘these arguments are hardly convincing. The question arises in cases where extradition is requested for a non-political offence and the requested person is in fear of disproportionate punishment or of persecution apart from punishment for one of the reasons mentioned in Article 1 of the Convention. The Convention supersedes, in any case, extradition treaties concluded previously by the same parties. It appears that the question has been clarified by the European Convention on Extradition and by court decisions. Article 33 should be applied to extradition, at least by analogy.’ (see P. Weis at 342; for the same views, see UNHCR, \textit{Commentary of the Refugee Convention} at 135; see also J. Hathaway and C. Harvey, at 276-278).


\textsuperscript{259} UN Doc. A/Conf.2/74.
vagueness of the words ‘against the purposes and principles of the United Nations’ and its exact meaning since governments would use this wording to exclude people they should not.\textsuperscript{260} In response to the comment by the Dutch representative that some criminals should be excluded\textsuperscript{261}, Mr. Hoare of the UK stated that:

article 14(2) seems intended to apply to persons who were fugitives from prosecution in another country for non-political crimes. He could not imagine that those who had drafted it intended that article 14(2) should apply to a person who having been granted asylum subsequently committed a crime in the country of refuge.\textsuperscript{262}

The Swiss representative stated that article 14(2) simply referred to serious crimes as a reason for exclusion,\textsuperscript{263} while the Yugoslavian representative suggested inserting the words ‘in common law’ after the word ‘crime’ and adding a subparagraph (c) which would comprise the words of the original amendment suggested above.\textsuperscript{264} The French delegate still had concerns related to crimes committed before entering the country of refuge; in addition he assumed that ‘crimes’ meant ‘serious crimes’.\textsuperscript{265} The UK delegate had no objection to excluding persons who had committed crimes before entering the country of refuge.\textsuperscript{266} The French delegate then suggested adding the word ‘serious’ to the word ‘crime’.\textsuperscript{267}

At this point the president of the Conference adjourned the meeting in order to give delegations an opportunity to draft a text on which they could agree.\textsuperscript{268} As a result of this intervention the text read as follows:

\[
(b) \text{ he has committed a serious crime under common law outside the country of reception; (c) he has committed acts contrary to the purposes and principles of the United Nations.}\textsuperscript{269}
\]

The British delegate stated that this amendment removed his main objection to the text as originally drafted, which would have made it too easy for states to withdraw the status of refugee from many persons who had been granted asylum from persecution.\textsuperscript{270} At this point the president took the opportunity to say that:

when a person with a criminal record sought asylum as a refugee, it was for the country of refugee to strike a balance between the offences committed by that person and the extent to which his fear of persecution was well founded. He

\textsuperscript{260} UN Doc. A/Conf. 2/SR 29 at 12.
\textsuperscript{261} Ibidem at 12.
\textsuperscript{262} Ibidem at 14-15.
\textsuperscript{263} Ibidem at 17.
\textsuperscript{264} Ibidem at 17.
\textsuperscript{265} Ibidem at 18.
\textsuperscript{266} Ibidem at 19.
\textsuperscript{267} Ibidem at 20.
\textsuperscript{268} Ibidem at 20.
\textsuperscript{269} Ibidem at 21.
\textsuperscript{270} Ibidem at 21.
would simply ask the representatives to keep in mind the hypothetical case of some minor official of an outlawed political party who had a criminal record. The president was convinced that all countries, both in Europe and overseas, had, even under the earlier refugee conventions, always acted fairly in such cases.\textsuperscript{271}

The Belgian delegate suggested the following wording: 'that he has committed a serious crime under common law outside the receiving country before being admitted to it as a refugee.'\textsuperscript{272} The Dutch representative wanted to know whether the new definition applied to the following two situations: 1) a person guilty of crimes committed before the guilty person acquired the status of refugee and 2) a person who had committed crimes outside the receiving country.\textsuperscript{273} The Yugoslav delegate was of the opinion that both situations were covered by paragraph (b).\textsuperscript{274} The president put the Belgian proposal to a vote and the proposal was accepted,\textsuperscript{275} after which the remainder of the original amendment, namely subparagraph (c) was also accepted by vote\textsuperscript{276} and finally the complete text of paragraph E was adopted.\textsuperscript{277}

The text of subparagraph (b) was slightly altered by the Style Committee in order to make the text clearer\textsuperscript{278} and this was the wording which found its way into the Final Act of the Conference and into the Convention relating to the Status of Refugees, although paragraph E had been renumbered as paragraph F:

‘F. 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.’

\textbf{2.7: Conclusion}

The regulation of refugee and asylum at the international level did not begin until after the First World War with the first tentative attempt in 1922 and culminating with a number of conventions in the thirties. Three observations about the work in this time period can be made. To begin with, it was for the first time the issue of refugees had risen beyond the concern of individual states and had become the subject of international efforts and regulation. Secondly, after the \textit{ad hoc} arrangements of the

\textsuperscript{271} Ibidem at 23.
\textsuperscript{272} Ibidem at 25.
\textsuperscript{273} Ibidem at 26.
\textsuperscript{274} Ibidem at 26.
\textsuperscript{275} Ibidem at 26.
\textsuperscript{276} Ibidem at 27.
\textsuperscript{277} Ibidem at 27.
\textsuperscript{278} UN Doc. A/Conf.2/L.1/Add. 10.
1922-1928 period, which dealt with the aftermath of the chaos of the First World
War, the conventions of the 1933-1939 period dealt with new situations in Europe,
which had resulted in large new refugee flows. Possibly as a result, these new
arrangements attempted to create a more fulsome regime for the treatment of
refugees. Thirdly, while these new arrangements did not yet attempt to create a
definition of what constitutes an individual refugee but rather repeated the collective
objective definition from the earlier arrangements, they do already contain embryonic
rights, which should be granted to refugees. They also already contain limits on one
of these rights, namely the right of non-refoulement, which could be adjusted in
situations of national security or public order.

After the Second World War the International Refugee Organization became the
primary international vehicle to address the urgent issue of massive displacement of
persons in Europe. With respect to the drafting of its Constitution it is interesting
albeit not surprising, given the timing of the establishment of the organization, that
the exclusion from refugee status of war criminals was quickly and readily accepted
and that is was equally readily extended to collaborators high and low. This
acceptance was not only forthcoming from the two major powers involved in the
negotiations at the time, the U.S. and the U.S.S.R., but also from a number of
erstwhile occupied countries as well as South American countries, which were in
danger of becoming safe havens for Nazi perpetrators of such crimes. Another
comment regarding the Constitution is the fact that the drafters had serious concerns
about subversive and terrorist activities, although unlike in later eras these concerns
did not come from Western states but from Eastern Bloc countries which were afraid
that their relatively fragile governments could be easily overthrown by political
opponents who had fled their countries during the war.279

With regard to the practice of the International Refugee Organization as exemplified
by its Manual, it is remarkable how much detail is provided about what constitutes
crimes against peace, war crimes, crimes against humanity and common crimes, as
well as in the examples of extended liability. In this context, it is not clear in how far
the writers of the Manual relied on the developing jurisprudence in Europe with
respect to war crimes related concepts.280 The Manual was written in 1951 by which
time a great deal of cases had been heard and reported, although no case law is set out
in the Manual. It is also known that this was the third version of a field guide, a
rudimentary version of which was in place in January 1947, soon after the
International Refugee Organization started to operate.281 At that time there were very
few decisions in war crimes cases although the decision of the International Military
Tribunal at Nuremberg had already been handed down, which could explain why the
Manual excluded mere members of some notorious organizations, although with a

280 See for an overview of this jurisprudence, J. Rikhof, ‘War Crimes, Crimes against Humanity and
Immigration Law’, 19 Immigration Law Reporter (2d) (1993) at 23-36; see also United Nations War
Crimes Commission, Law Reports of Trials of War Criminals, Volume XV, Digest of Laws and Cases
281 See L.W. Holborn, The International Refugee Organization at 207.
different reasoning and a different number of organizations than the International Military Tribunal had decided upon in 1946.\textsuperscript{282}

The next historical event of importance in the development of the concept of asylum was the creation of the Universal Declaration of Human Rights about which some comments can be made. The first is that earlier work in defining which persons should not be given assistance by international aid organizations such as the United Nations Relief and Rehabilitation Agency and the International Refugee Organization was now carried through in general terms to an exclusion from entitlement to asylum. This can be seen in the development in the mandates of Relief and Rehabilitation Agency and the International Refugee Organization from denying collaborators any benefits and the reference to war criminals in the Constitution of the International Refugee Organization to the extensive discussion regarding article 14(2) of the Universal Declaration of Human Rights in respect to persons involved in war crimes. Along the same vein, the reference in United Nations Relief and Rehabilitation Agency documents to persons committing crimes against the interests and nationals of the United Nations is echoed in the phrase ‘purposes and principles of the United Nations’ in the Universal Declaration of Human Rights. As well, while the International Refugee Organization’s exclusion of ‘ordinary criminals who are extraditable by treaty’ has given way to more general language in the Universal Declaration of Human Rights, the phrase ‘prosecutions genuinely arising from non-political crimes’ has a direct lineage to the Constitution of the International Refugee Organization, especially when considering the interpretation in the Manual. Lastly, in respect to the words ‘acts contrary to the purposes and principles of the United Nations’, two other conclusions can be drawn as well. The first is that the implicit reference to war crimes would also include the commission of crimes against humanity and crimes against peace.\textsuperscript{283} In this context, it is also significant that in the same time period the United Nations appears to have equated the violation of human rights with crimes against humanity.\textsuperscript{284} The second conclusion is that, as a result of references to fascists, Nazis and traitors, these words appear to include more than just war criminals, even in its broadest sense.

The final stage in crystallizing the notion of exclusion in international refugee law came in 1950-1951 during the work done to draft a refugee convention. In general it has been said that the negotiations reflected a sense of international morality in which

\textsuperscript{282} The Manual mentions the SS and the Gestapo while the IMT designated the Leadership Corps of the Nazi Party, the Gestapo, the SD and the SS as criminal organizations (see S. Darcy, \textit{Collective Responsibility and Accountability Under International Law} (Leiden: Transnational Publishers, 2007) at 273-278 and J. Rikhof, ‘War Crimes, Crimes against Humanity and Immigration Law’ at 40-41).

\textsuperscript{283} UN Doc. United Nations Economic and Social Council, Commission on Human Rights, Drafting Committee, International Bill of Rights, First Session, Summary Record of Thirteenth Meeting (June 20, 1947), where a reference is made to the Moscow Declaration (which has the same contents as the London Agreement or London Charter).

the protection of perpetrators of atrocities was seen as repugnant while the humanitarian objective of protecting refugees should only be extended to those who deserve such protection.\textsuperscript{285}

Regarding article 1F(a), it was clear from the beginning that the drafters wanted this exclusion ground to be as framed as broadly as possible and that any formulation of the concepts included in this provision was to take into account both the jurisprudence developed after the Second World War as well as recent attempts to bring both international humanitarian law and criminal law up to date as a result of some of the shortcomings in this area previously. The debate in the various fora of the diplomatic conference focused primarily on how to achieve this result in the most meaningful manner, which was done eventually by using the term ‘international instruments’ to exclude persons involved in crimes against peace, war crimes and crimes against humanity as defined by both recent international treaties, such as the 1949 Geneva Conventions and the 1948 Genocide Convention (which was seen during the debates as an adjunct to crimes against humanity), as well as other, less binding, sources of international law such as the work of the International Law Commission. The even broader concept proposed by the Eastern Bloc countries, which also wanted to include traitors\textsuperscript{286} was rejected.

With respect to article 1F(b), a version of which was included in the Statute of the United Nations High Commission of Refugees but not in the 1950 draft Refugee Convention, the main disagreement had to do with the difference between delegations. Some States had no problem allowing persons in to their countries who had committed minor crimes, whereas other countries took a more absolute stance without exceptions. This was eventually resolved by including the notion of serious criminality. While extradition was mentioned on a number of occasions, it was mostly in the context of the relationship between the Refugee Convention and extradition treaties, for which most delegations favoured the latter in the case of conflict during a possible removal. This issue became later part of the discussions of article 33, the \textit{non-refoulement} provision. While there had been some mention of non-political crimes and while this wording found its way into the final text, the drafting history does not provide any guidance as to whether extradition concepts could be automatically transferred to the exclusion context.\textsuperscript{287}

Although the debates with respect to the meaning of the exclusion ground in article 1F(c)\textsuperscript{288} are not exactly paragons of clarity, it can be deduced that this exclusion ground was meant to be a residual one to the two preceding grounds and as such it should be interpreted restrictively.\textsuperscript{289} Also, the acts committed must be criminal in

\textsuperscript{285} See M. Zagor, ‘Persecutor or Persecuted: Exclusion under Article 1F(A) and (B) of the Refugees Convention’ 23(3) \textit{University of New South Wales Law Journal} (2000) at 167.

\textsuperscript{286} See also S. Kapferer, ‘Article 14(2) of the Universal Declaration of Human Rights’ at 71.

\textsuperscript{287} S. Kapferer, ‘Article 14(2) of the Universal Declaration of Human Rights’ at 74.

\textsuperscript{288} J. Hathaway, \textit{The Law of Refugee Status} at 227.

\textsuperscript{289} A. Grahl-Madsen, \textit{The Status of Refugee in International Law, Volume I} at 286.
nature and the exclusion ground appears to be capable of including acts committed both in the country of refuge and the country of origin. As well, from the statements and examples given by the various delegates of what would constitute acts contrary to the purposes and principles of the United Nations, it appears that both acts which can be committed by private individuals and acts which can only be committed by individuals in the exercise of government functions were contemplated.

In examining the historical background of refuge and asylum it has become clear that the concern with criminality has permeated virtually all discussions related to the rights of refugees. This started already with legal philosophers, such as Grotius and Vattel who advocated states’ obligations to protect persons fleeing persecution but who were not inclined to extend these rights to serious criminals. This trend has not abated in more recent times. Very soon after the issue of refugees became a concern of the international community and international agreements were drawn up to provide protection to displaced persons, in addition to the regulation of the use of identity cards, criminality in the form of a refoulement provision already found a place in the first comprehensive refugee arrangement, namely in the 1933 Refugee Convention. This Convention included exceptions for non-refoulement for situations of national security or public order.

The first instruments after the Second World War were less concerned with criminality as an exception to refoulement but more with ensuring that certain criminal elements would not be entitled to any benefit normally associated with refugees in the first place. The Statute of the United Nations Relief and Rehabilitation Agency and the Constitution of the International Refugee Organization, two organizations with a temporary mandate to deal with refugees both in terms of repatriation to their home countries and resettlement in third countries, specifically barred assistance to serious criminals. This exclusionary practice continued on a permanent basis with the Statute of the United Nations Commissioner for Refugees. In the meantime, in the human rights area, the very first instrument cataloguing basic

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290 The UK delegate during the Conference of Plenipotentiaries referred to acts such as war crimes, genocide and the subversion or overthrow of democratic regimes, while other indications were given earlier during the debate in the Social Committee, where the French delegate referred to both people who have committed crimes against humanity other than war crimes (UN Doc. E/AC.7/SR 166, page 4 which was mirrored by the Canadian delegation at 10) or who are guilty of genocide (UN Doc. E/AC.7/SR. 160 at 15).

291 Persons who occupy government posts, such as heads of state, Ministers and high officials (UN Doc. E/AC.7/SR. 166 at 6), the U.S. and UK delegates mentioned collaborators (UN Doc. E/AC/SR. 166 at 16 and 19) and the United Nations Secretariat submitted that those violating human rights without committing a crime against humanity, such as discrimination (a notion expressed also by India (UN Doc. E/AC.7/SR 160 at 17) should be included (UN Doc. E/AC.7/SR. 166 at 9), even when committed by individuals (UN Doc. E/AC.7/SR 166 at 8). Grahl-Madsen appears to be in favour of a combination of the above approaches by suggesting that F(c) should be limited to persons occupying government posts, such as Heads of State, cabinet members, officials and agents of a government, who are guilty of persecutory measures and atrocities in defiance of human rights, or who have instigated, committed, or abetted acts of State contrary to the maintenance of a just peace; with the possible addition of persons who, although, acting in an individual capacity, are guilty of especially flagrant violations of human rights, like those mentioned above (A. Grahl-Madsen, The Status of Refugee in International Law, Volume I at 286).
human rights, the Universal Declaration of Human Rights, contained an exception for criminality in its provision dealing with asylum, the only specific provision to do. The drafting of the Refugee Convention brought these two strands of criminality together for the first time by having both an exclusion ground and an exception to the non-refoulement provision.

In terms of the contents of what types of criminal activities should limit the benefits to asylum seekers, the basic parameters as sketched out by Grotius and Vattel do not differ all that much conceptually from what was considered to be nefarious in later centuries, taking into account the political and legal context of the times during which those instruments were conceived. After all, crimes injurious to mankind and destructive to society or a menace to public security everywhere and enemies of the whole human race, as stated by those two scholars are not all that far removed from concepts such as national security, public order, crimes against peace, war crimes, crimes against humanity or acts against the purposes and principles of the United Nations. Similarly, an elucidation of what constitutes a danger to security by a commentator on the 1933 Refugee Convention to the effect of activities which upset the very equilibrium of society resonates quite clearly with the comments made in relation the 1951 Refugee Convention that such a concept involves acts of a rather serious nature threatening directly or indirectly the government, the integrity, the independence or the external peace of the country.

What changed after the Second World War was firstly, the beginning of attempts to provide more detail for those universally known criminal concepts, especially as a result of the debates related to the 1951 Refugee Convention. Secondly, as a result of concerns about refoulement to unacceptable situations from a human rights perspective, the limitations on the benefits for refugees were restricted and further clarified. In examining the historical background of the institution of asylum it has become clear that the issue of possible criminals within refugee movements has been a concern for the drafters of international instruments dealing with asylum from the very beginning. These instruments set out concepts of exceptions to the right of asylum only in general terms and often as a result of political compromises arrived at during its negotiations and as such only provide a limited understanding of the various notions contained in them, even when such an instrument was operationalized as in the case of the International Refugee Organization. The following chapters will flesh out these general concepts as developed in subsequent domestic legislation and jurisprudence while also examining in how far the work of international institutions have influenced national decision makers in providing their interpretation of the elements of exclusion with an international component such as the international crimes in article 1F(a) and the parameters of the phenomenon of terrorism which has been used for exclusion purposes in both articles 1F(b) and 1F(c).

292 The Universal Declaration of Human Rights has 30 articles; articles 29 and 30 contain general limitations which apply to all previous articles, including article 29(3) which says: ‘These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations’, which mirrors part of the asylum exception.

293 UNHCR, Commentary of the Refugee Convention 1951 at 124.
Chapter 3

Exclusion 1F(a) - crimes against peace, war crimes and crimes against humanity as grounds for exclusion from refugee protection

3.1: Introduction

As seen in the previous chapter, the international community had grave concerns about the atrocities committed during the Second World War and was determined to address the issue of impunity of the persons who had perpetrated such acts. Most of the law of crimes against peace, war crimes and crimes against humanity was developed in the immediate aftermath of the Second World War and consisted of the instruments setting up the two international military tribunals in Nuremberg and Tokyo, the legislative authority enabling domestic courts to deal with war criminals in Europe and Asia, the case-law developed by these tribunals and courts,294 the adoption of the 1948 Genocide Convention and the passing of the Geneva Conventions, which regulated the conduct of war, including its violations.295

Another main issue facing the international community in addition to bringing war criminal to justice and the strengthening of human rights norms, both in times of peace and war through human rights instruments and improved rules of war was a new framework for dealing with the large number of refugees. While the main treaty in this area, the Refugee Convention, was primarily a vehicle for the protection for people seeking asylum status, it was felt that persons who had been involved in criminal activity should not benefit from such generosity. With the memory of the Second World War still fresh in the mind of the drafters of the Refugee Convention, a

294 The most important cases have been described in a variety of law reports; the proceedings and the verbatim judgments of the Military Tribunals in Nuremberg have been reported very extensively in the 15 volumes of the Trials of War Criminals before the Nuremberg Military Tribunals, the so-called Green Series. There has also been the Law Reports of Trials of War Criminals for all proceedings including the Nuremberg Tribunals, which is a 15-volume compilation of summaries and case comments of important decisions selected and prepared by the United Nations War Crimes Commission. The judgment of the Nuremberg International Military Tribunal is reported in Volume XXII of the Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 - 1 October 1946, which was published in Nuremberg in 1949 and is also known as the Blue Series. There has also some reporting of war crimes trials in Annual Digest and Reports of Public International Law Cases, which changed its name in 1950 to International Law Reports.

295 There are four Geneva Conventions, namely the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva I); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva II); Geneva Convention relative to the Treatment of Prisoners of War (Geneva III); and Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva IV), each of which has one article dealing with grave breaches or war crimes (articles 50, 51, 130 and 147 respectively. The 1977 Additional Protocol I has supplemented the war crimes provisions of the 1949 Geneva Conventions in articles 11 and 85. For a discussion of the post Second World War case-law see J. Rikhof, ‘War Crimes, Crimes against Humanity and Immigration Law’, 19 Immigration Law Reporter (2d) (1993), at 30-46.
clause denying asylum rights to criminals did not take long to become embedded in the text of this instrument resulting in the so-called in the exclusion clause, which reads:

F. 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.'

While there are legal differences between the three exclusion grounds, similarities do also exist between them, both from a legal perspective as well as arising from factual situations, which do not tend do divide themselves up along neat legal principles. For instance, a bombing attack with a large number of victims during an armed conflict and designed to terrorize people, which was committed before the perpetrator came to a country of refuge could fall within the parameters of all three exclusion grounds. This overlap in the use of the different aspects of article 1F is echoed in the jurisprudence of the countries under consideration. For instance, several decisions in New Zealand and the UK combined the use of articles 1F(b) and 1F(c) for the same underlying fact pattern, while in Australia article 1F(a) is regularly used in combination with article 1F(b), as is also the case at times in New Zealand. In Canada, the administrative tribunal dealing with refugee matters combines article 1F(a) almost always with article 1F(c) in Quebec, and in some cases has used all three exclusion grounds for one situation. In this context, France tends to use article 1F(c) almost exclusively for cases, which are for all intent and purposes amount to crimes against humanity. This chapter focuses on article 1F(a) and will discuss the relevant jurisprudence sequentially in relation to each of the categories of crimes in that provision while also examining the one international crime not mentioned in article 1F, genocide.

3.1.1: The standard of proof

Before beginning the discussion regarding substantive crime, it is useful to explain briefly the standard of proof required in exclusion proceedings and how that standard compares with international criminal procedure.

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296 It can also be more than one crime within the parameters of article 1F(a), see C. Damgaard, *Individual Criminal Responsibility for Core International Crimes, Selected Pertinent Issues* (Berlin-Heidelberg: Springer Verlag, 2008) at 375-379.

297 The burden of proof as in where the obligation lies to provide evidence of exclusion has generally been accepted as to be borne by the state as opposed the refugee claimant, see UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, September 4, 2003 at 38, paragraph 105.
The standard of proof in article 1F is ‘serious reasons for considering’. This is an unusual standard as it is not known in these terms in other areas of law.\textsuperscript{298} The \textit{travaux preparatoires} are silent on the reasons for including this phrase or the meaning to be attributed to it. In Canada it has been equated to the better-known concept of reasonable grounds to believe.\textsuperscript{299}

On the national level, there have been a number of formulations to express the evidence required for exclusion.\textsuperscript{300} In Canada this has been expressed in a number of ways at different court levels. The Supreme Court of Canada has indicated that this phrase ‘requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities. In essence, reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information’.\textsuperscript{301} The Federal Court of Appeal added to this understanding by saying that this ‘standard requires more than suspicions. It also requires more than a mere subjective belief on the part of the person relying on them. The existence of reasonable grounds must be established objectively, that is, that a reasonable person placed in similar circumstances would have believed that reasonable grounds existed.’\textsuperscript{302}

The Federal Court of Australia, Full Court, indicated that neither a charge nor conviction for an international crime is necessary but that the only requirement in this test is clear and convincing evidence that may fall below the civil standard of proof.\textsuperscript{303} In the UK, the Supreme Court had this to say about serious reasons for considering:

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 \textit{Gurung} … 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”. I am inclined to agree it sets a standard above mere suspicion. Beyond this, it is a mistake to try to

\textsuperscript{298} Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees at 38, paragraph 107.
\textsuperscript{299} This trend began with the seminal decision in Canadian jurisprudence regarding exclusion, \textit{Ramirez v. Canada (Minister of Employment and Immigration)}, [1992] 2 F.C. 306.
\textsuperscript{301} Mugesera v. Canada (Minister of Citizenship and Immigration), 2005 SCC 40 at paragraph 114.
\textsuperscript{302} Charkaoui v. Canada (Minister of Citizenship and Immigration), 2004 FCA 421 at paragraph 103; the court draws a comparison with the same concept used in Canadian criminal law where this standard is used for preventative police powers.
\textsuperscript{303} In SRYYY v MIMIA [2005] FCAFC 42 and VWYJ v MIMIA [2006] FCAFC 1.
paraphrase the straightforward language of the Convention: it has to be treated as meaning what it says.\footnote{R (on the application of JS) (Sri Lanka) (Respondent) v Secretary of State for the Home Department (Appellant), [2010] UKSC 15 at paragraph 39.}

The Supreme Court of New Zealand came to the same conclusion as its UK counterpart while referring to the passage above.\footnote{The Attorney-General (Minister of Immigration) v Tamil X and the RSAA, [2010] NZSC 107 at paragraph 39.}

While the United States does not have an exclusion clause in its legislation as it has not ratified the 1951 Refugee Convention, its courts, including at the highest level, has indicated that the standard of proof to deny persons asylum benefits if they have been involved in persecution type activities, for which the legislation sets no standard, is clear, unequivocal, and convincing evidence of assistance in persecution.\footnote{Federenko, v. United States, 499 U.S. 490 (United States Supreme Court, 1981); United States v. Szechinskyj, 277 F.3d 331 (3d Circuit, 2002).} However, where the legislation uses the terminology of ‘reasonable grounds to believe’,\footnote{As is the case for exclusions from asylum in section 208(b)(2)(A)(iii) of the Immigration and Nationality Act, when ‘there are serious reasons for believing that the alien has committed a serious non-political crime outside the United States prior to the arrival of the alien in the United States’ and section 208(b)(2)(A)(iv) when ‘there are reasonable grounds to believe that the alien is a danger to the security of the United States’.} then this should be equated with the probable cause standard,\footnote{Khouzam v. Ashcroft, 361 F. 3d 161(2d Circuit, 2004); Yusupov v. Attorney General of U.S., 518 F.3d 185 (3d Circuit, 2008).} which means ‘if there is information that would permit a reasonable person to believe’.\footnote{Yusupov v. Attorney General of U.S., 518 F.3d 185 (3d Circuit, 2008).}

In comparing the national common law jurisprudence, it would appear that the notion of serious grounds for considering is seen in Australia, Canada, New Zealand and the UK as a standard of proof which is lower than the civil standard of balance of probabilities although the contents of the standard still requires objective, compelling and credible evidence (Canada) or clear and convincing evidence (Australia); the standard in the U.S. appears to be higher in some instances, namely clear, unequivocal and convincing evidence but lower when the legislation has used language similar to what can be found in the 1951 Refugee Convention, namely if there is information that would permit a reasonable person to believe.

With respect to civil law countries, in the Netherlands, the standard of proof is explained in the Aliens Manual as a standard, which falls below the criminal standard of proof\footnote{Vreemdelingencirculaire 2000 (C), article C4/3.11.3.3. See also T.P. Spijkerboer & B.P. Vermeulen at 100-101.} while in Belgium\footnote{CE No. 94.321, 27 March 2001, paragraph 2.4.2 and CE No. 186.913, 8 October 2008, paragraph 2.4.} and France,\footnote{CE No. 94.321, 27 March 2001, paragraph 2.4.2 and CE No. 186.913, 8 October 2008, paragraph 2.4.} their Councils of State used the same
formulation. As well, in France, the Council of State overturned a decision of a lower tribunal, which had refused to take into consideration that a claimant from Rwanda had been mentioned in both an international commission of inquiry and a government of Rwanda list of genocide suspects in the application of article 1F(a) by saying that the tribunal had used not the serious considering test but the higher test of ‘démonstration de leur implication dans ces crimes’.

At the international level, the International Tribunal for the Former Yugoslavia (ICTY), the International Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC)\textsuperscript{315}, the ICTY and ICTR use the reasonable grounds approach when the Prosecutor wants to indict a suspect.\textsuperscript{316} The parameters of this concept were described in an early ICTR decision as follows:

The term “prima facie” as … is defined as sufficient information which justifies a reasonable suspicion that the suspect did in fact commit the crime or crimes for which he is charged and the term “sufficient evidence” in … is interpreted to mean essential facts, that when supported by evidence, could result in a conviction. This does not mean conclusive evidence or evidence beyond a reasonable doubt.\textsuperscript{317}

While the ICC Statute has provided more oversight of the work by the Prosecutor then in the ICTY/ICTR Statutes and it is the Pre-Trial Chamber of the court rather than the prosecutor who takes the first step in the trial process by issuing a warrant of arrest for a suspect after an investigation has commenced, the grounds for doing so are again based on reasonable grounds to believe that a person has committed a

\textsuperscript{313} As was the case in Switzerland, see UNHCR, The Interface Between Extradition and Asylum, by Sibylle Kapferer, PPLA/2003/05, November 2003 at 108, paragraph 329.
\textsuperscript{314} CE, 18 January 2006, 255091, Office français de protection des réfugiés et apatrides c/Tegera.
\textsuperscript{315} The ICTY and ICTR were established by the United Nations Security Council in 1993 and 1994 respectively while the ICC is based on a treaty, which has been ratified by well over one hundred countries making them truly international institutions. There have been and are other tribunals with international aspects involved in the investigation and prosecution of international crimes but they are either based on a treaty between the United Nations and the country where such crimes occurred, such as the Sierra Leone Special Court, the Extraordinary Chambers of the Cambodian Courts and the Special Tribunal for Lebanon, or they were established by agencies of the United Nations to complement national courts, as was the case in East Timor, Bosnia-Herzegovina and Kosovo.
\textsuperscript{316} The Statutes of both institutions use the language of \textit{prima facie} case (article 18.4 for the ICTY and article 17.4 for the ICTR) but the term ‘reasonable grounds’ can be found in the Rules of Evidence of Procedure of both tribunals, namely in article 47(B) of the ICTY, which begins with saying ‘the Prosecutor, if satisfied in the course of an investigation that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime …’ The ICTR’s Rules of Procedure and Evidence uses the exact same words in its article 47(B). Both Statutes required an indictment to be confirmed by a judge before a trial can commence on the same \textit{prima facie} test (article 19.1 in the ICTY Statute and article 18.1 in the ICTR Statute).
\textsuperscript{317} Decision on the Preliminary Motion by Defence Counsel on Defects in the Form of Indictment, Nyiramashuko and Ntahobali, (ICTR-96-17-T), Trial Chamber, 4 September 1998, § 3.
crime. Unlike in the ICTY and ICTR, however, the confirmation of the charges after the initial step of the warrant issuance, has to be done at a higher level of proof, namely ‘whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged.’

Both the Pre-Trial Chamber and the Appeals Chamber of the ICC have examined the reasonable grounds test. The majority of one of the Pre-Trial Chambers equated this standard with the reasonable suspicion test as set out in the European Convention of Human Rights for the arrest or detention of a person as well by reference to article 7 of the American Convention of Human Rights. The minority elaborated on the different levels of proof in various stages of ICC proceedings. The Appeal Chamber noted this approach of the Pre-Trial Chamber without criticism and then went on to provide the contours of this standard of proof by recalling the jurisprudence of the European Court of Human Rights on this point and saying:

> it is instructive to recall that the European Court of Human Rights has interpreted "reasonable suspicion" under article 5 (1) (c) of the European Convention on Human Rights as "presuppos[ing] the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence". Thus, at this preliminary stage, it does not have to be certain that that person committed the alleged offence.

Two conclusions can be drawn from this examination of international criminal law. The first one is that if international criminal law is to play a role in the interpretation of article 1F and if the term serious reasons for considering can be given the same meaning as reasonable grounds to believe (which national courts have no difficulty in

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318 ICC Statute, article 58.1(a).
319 ICC Statute, article 61.7. This distinction between reasonable ground to believe for one stage in the process before the court and the higher standard of substantial ground to believe is reminiscent of the difference in standards between articles 1F and 33.2 of the Refugee Convention.
320 Article 5(1)(c) which says: ‘the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.’
321 Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Al Bashir, (ICC-02/05-01/09), Pre-Trial Chamber I, 4 March 2009, § 160.
322 Separate and Partly Dissenting Opinion of Judge Anita Ušacka, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Al Bashir, (ICC-02/05-01/09), Pre-Trial Chamber I, 4 March 2009, §§ 8-10; in footnote 15 of this decision the judge makes it clear that there had been one earlier decision on this issue but that document is not publicly available.
323 Judgment on the appeal of the Prosecutor against the ‘Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Al Bashir (ICC-02/05-01/09-OA), 3 February 2010, §§ 30-31; Pre-Trial II Chamber followed the decision of the Appeals Chamber a month later although it was of the view that the reliance on the case-law in the context of arrest warrants might not be the most appropriate for the situation at hand, which was an article 15(3) commencement investigation proprio motu by the prosecutor and was of the view that the test of 'reasonable basis to proceed' in that article or that of 'reasonable grounds to believe' in article 53(1)(a) was lower than that for an arrest warrant, namely 'sensible or reasonable justification for a belief', see Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09, 31 March 2010, §§ 30-35.
accepting), then the equation of reasonable grounds with reasonable suspicion might foreshadow of a relaxation of this standard of proof and the evidence required to meet this test.

Both the ICTR and ICC cases make this comparison and when discussing the contents of this test, which is enunciated by the Appeals Chamber of the ICC by setting out two elements, namely an objective observer of the evidence and the conclusion by that observer that a person may have committed an offence. The objective standard has been used in national jurisprudence but that case-law uses terminology along the lines of ‘clear’ or ‘compelling’ and ‘unequivocal’, which is stricter than ‘may have’. National courts might find it necessary to bridge the different interpretations of this concept.

The second conclusion is that there is an argument at the national level in the event that a person under indictment or arrest warrant by an international institution flees to another country and claim refugee status that such an indictment or arrest warrant will be viewed as conclusive regarding the question of exclusion given the same standard of proof for an international document and a substantive decision on exclusion. This approach might very well be strengthened by the fact that an international indictment and arrest warrant in most cases contain more and stronger evidence than is typically necessary or used in refugee determination processes including exclusion.

This might not be a problem, when the international institution, which issued these documents, seeks to have this person transferred and a speedy resolution of the asylum claim can be obtained. However, it could (and has) become a serious issue if an international institution has acquitted a person. In that situation such a person will be released from detention but might not be able to return to his home country or go to a third country because an acquittal does not mean that his innocence has been proven. The third country can still be of the view that there has been sufficient evidence in the indictment to warrant exclusion and refuse to admit such a person. It is incumbent upon states which are placed in such a situation to examine both the indictment and the trial record to determine exactly on what basis an acquittal was entered by the institution and whether that record can overcome the initial allegation.\(^{324}\)

\(^{324}\) This scenario is not hypothetical as there are a number of persons who have been acquitted by the ICTR but which that institution has not able to resettle because of considerations mentioned above; see R. K. G. Amoussouga, ‘The ICTR’s Challenges in the Relocation of Acquitted Persons, Released Prisoners and Protected Witnesses’, Roundtable on Cooperation between the International Criminal Tribunals and National Prosecuting Authorities, Arusha, 26 to 28 November 2008 (online); and International Tribunal for Rwanda, Address by Judge Dennis Byron, President of the ICTR, to the United Nations Security Council - Six monthly Report on the Completion Strategy of the ICTR, 6 December 2010.
3.2: The crimes under international criminal law

3.2.1: The elements of aggression, war crimes, crimes against humanity and genocide

While aggression and genocide can be considered sui generis crimes in international criminal law, a large number of the activities considered to be objectionable from an international criminal perspective are also known as offences in domestic criminal statutes. In order to differentiate war crimes and crimes against humanity from national crimes and elevate them to the international plane, some overarching requirements have been introduced to distinguish them from domestic crimes. The requirement for war crimes is the existence of an armed conflict while for crimes against humanity it is primarily the fact the acts have to be committed in a systematic or widespread manner. This part of the chapter will examine the specific requirements for aggression and genocide (which has been considered a particular odious form of crimes against humanity) and the overarching elements of war crimes and crimes against humanity.

3.2.1.1: Aggression

The crime of aggression was previously known as crimes against peace in the trials after the Second World War and in the Refugee Convention itself. None of the statutes of the ad hoc international or internationalized tribunals created since the 1990s have this crime included within their mandate and while the ICC had a reference to aggression in its Statute since 1998, the parameters of this crime were only firmly established in June 2010 during the first Review Conference of the Rome Statute in Kampala, Uganda.

The crime of aggression is of a different character than the other three crimes in a number of aspects. First of all, aggression is part of ius ad bellum, the law governing recourse to conflict or going to war rather than ius in bello, the law that operates when war or armed conflict has begun and as such can be seen as the initial cause for the commission of other international crimes. As a result of this different perspective the crime of aggression contains some unique features not shared with war crimes, crimes against humanity or genocide. These features are: aggression can only be committed by or on behalf of a state and as part of state plan or policy while the other crimes, as will be seen can, be carried out by both state and non-state like entities alike; furthermore while the perpetrators of the other crimes can be found anywhere in a hierarchy, the crime of aggression is a leadership crime confined to the actions of persons in high policy decision-making positions in a state.

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325 Article 5.1(d) and 5.2).
326 The amendments have not come into force yet (this will only happen in 2017 provided that 30 states have ratified the amendments, see UN Doc. Resolution RC/Res.6, Annex I, ‘Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression’, article 15 bis) but as the contents of the crime reflects earlier United Nations’ General Assembly Resolutions they can be used as an interpretative guide outside the ICC context.
Because of the unusual character of this crime, so far it has only been prosecuted immediately after the Second World War and even then the inclusion of this crime into the constituting documents of the International Military Tribunals in Nuremberg and Tokyo had been controversial. This controversy continued from these trials until the conference to establish the International Criminal Court in 1998 in Rome. The only accomplishments in that time-period had been a definition of aggression in 1974 in a resolution of the United Nations’ General Assembly and the inclusion of the crime of aggression without an agreement as to the elements of this crime in the ICC Statute. This finally changed with the 2010 Kampala Review Conference.

This Review Conference established the contours of this crime by delineating two concepts, one with respect to the type of activities which can amount to aggression and one regarding the level of functionaries who have the ability to carry out such crimes.

The crime of aggression is defined as follows:

1. For the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

2. For the purpose of paragraph 1, “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:
   a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
   b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
   c) The blockade of the ports or coasts of a State by the armed forces of another State;
   d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

329 R. Cryer, H. Friman, D. Robinson and E. Wilmhurst at 314-316, which also indicates that during the travaux preparatoires of the ICC three interrelated issues were the cause of the controversy, namely the question whether this crime should be included at all in the Statute; if so, how it should be defined; and lastly whether the role of United Nations’ Security Council should be reflected in the Statute as the final arbiter of declaring that an act of aggression had occurred.
e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.\textsuperscript{331}

The level of functionaries is described in article 1 above and repeated in an amendment to the ICC Elements of Crime document saying: ‘the perpetrator was a person in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression.’\textsuperscript{332}

\textbf{3.2.1.2: War Crimes}

The notion of war crimes as a means to hold individuals liable for certain violations of the rules of war or international humanitarian law had its genesis already shortly after the First World War, namely in the Report of the 1919 Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties, followed by actual trials for such crimes after the Second World War, including for the persons most responsible in the proceedings of the International Military Tribunals in Nuremberg and Tokyo.\textsuperscript{333} War crimes have figured prominently in the statutes of the ICTY, ICTR and the ICC, as well as the internationalized tribunals, the Sierra Leone Special Court and the Extraordinary Chambers of the Courts of Cambodia.

From the inception of international criminal law, it was acknowledged that in order for a person to have committed a war crime, two requirements needed to be fulfilled: the conduct needed to have taken place during a war and the activity, in which the person had been engaged, was one specifically prohibited by international law. Both have been the subjects of a great deal of debate.

The requirement that there had to be a war has slowly expanded by dispensing with the notion that certain formalities, such as a declaration of war, had to be taken into account and by no longer insisting that war crimes could only be committed during an international armed conflict or war between states but not during a civil war. The Appeals Chamber of the ICTY laid to rest both questions in the \textit{Tadić} case, first by

\textsuperscript{331} UN Doc. Resolution RC/Res.6, Annex I, ‘Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression’, which has inserted this text as article 8 bis.

\textsuperscript{332} UN Doc. Resolution RC/Res.6, Annex II, ‘Amendments to the Elements of Crimes’.

applying a broad definition of the term armed conflict and secondly by specifically stating that war crimes could be committed in any type of armed conflict by indicating that under customary international law ‘an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State’. The Tadić decision described a situation in 1991 and given the fact that the 1977 Protocol II to the Geneva Conventions, which regulates non-international armed conflicts and which does not have a provision making individuals liable for violations of Protocol II (i.e. war crimes), it is unlikely that under international criminal law a person can commit war crimes in non-international armed conflicts much before 1990, unless such a conflict can be characterized as an internationalized non-international armed conflict. In such a situation, the conflict between two parties within one state is elevated legally to an international armed conflict and individual liability is derived from international criminal law regulating war crimes in international armed conflicts. This is derived from the acknowledgment that an international armed conflict can not only take place directly between two states but also within the confines of one state if one or more of the parties within that state stand in less than an arms length relationship with another state.

With respect to indicators of protracted armed violence, the ICTY was of the view that:

The two determinative elements of an armed conflict, intensity of the conflict and level of organisation of the parties, are used “solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.” Therefore, some degree of organisation by the parties will suffice to establish the existence of an armed conflict. … By way of example, in assessing the intensity of a conflict, other Chambers have considered factors such as the seriousness of attacks and whether there has been an increase in armed clashes the spread of clashes over territory and over a

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334 Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Tadić (IT-94-1), Appeals Chamber, 2 October 1995, §§ 128-134. See also Judgment, Mucić et al. (Čelebići Camp’) (IT-96-21), Appeals Chamber, 20 February 2001, §§ 168-174; see also the ICC Statute, article 8.2(f).

335 Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Tadić (IT-94-1), Appeals Chamber, 2 October 1995, § 70.


337 Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Tadić (IT-94-1), Appeals Chamber, 2 October 1995, § 156. See also Judgment, Aleksovski ( IT-95-14/1-A), Appeals Chamber, 24 March 2000, §§ 122-136; Judgment, Kordić and Ćerkez (IT-95-14/2-A), Appeals Chamber, 17 December 2004, §§ 229-313; Decision on the Confirmation of Charges, Lubanga (ICC-01/04-01/06), Pre-Trial Chamber I, 29 January 2007, §§ 209-211.
period of time, any increase in the number of government forces and mobilisation and the distribution of weapons among both parties to the conflict as well as whether the conflict has attracted the attention of the United Nations Security Council, and, whether any resolutions on the matter have been passed. With respect to the organisation of the parties to the conflict Chambers of the Tribunal have taken into account factors including the existence of headquarters, designated zones of operation, and the ability to procure, transport, and distribute arms.\footnote{Judgment, Limaj, Bala and Musliu (IT-03-66-T), Trial Chamber, 30 November 2005, §§ 89-90; see also Judgment, Haradinaj at al. (IT-04-84-T), Trial Chamber, 3 April 2008, §§ 89, 99 and 100; Judgment, Boškoski and Tarčulovski (IT-04-82-T), Trial Chamber, 10 July 2008, §§ 175-206 (including differences between armed conflict and terrorism); Judgment, Boškoski and Tarčulovski (IT-04-82-A), Appeals Chamber, 19 May 2010, §§ 20-24; Judgment, Brima, Kamara and Kanu (‘AFRC’) (SCSL-2004-16-T), Trial Chamber, 20 June 2007, §§ 243-244; Judgment, Fofana and Kondewa (‘CDF’) (SCSL-04-14-T), Trial Chamber, 2 August 2007, §§ 123-128; Decision on the Confirmation of Charges, Lubanga (ICC-01/04-01/06), Pre-Trial Chamber I, 29 January 2007, § 320; Decision of Confirmation of Charges, Bemba (ICC-01/05-01/08), Pre-Trial Chamber II, 15 June 2009, §§ 224-237.}

The rules of armed conflict apply throughout the territories of the parties to the conflict and not only where actual combat operations are been carried out.\footnote{Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Tadić (IT-94-1), Appeals Chamber, 2 October 1995, § 69; Judgment, Kordić and Ćerkez (IT-95-14/2-A), Appeals Chamber, 17 December 2004, §§ 314-321; Judgment, Kaing Guek Eav alias Duch (Case File 001/18-07-2007/ECCC/TC), Trial Chamber, 26 July 2010, § 415. The same was said for non-international armed conflicts in Judgment, Kunarac et al. (IT-96-23/IT-96-23/1), Appeals Chamber, 12 June 2002, § 57. For the related notion of ‘occupation, see Judgment, Naletilić & Martinović (IT-98-34-T), Trial Chamber, 31 March 2003, §§ 210-223, as well as footnote 34 of the ICC Elements of Crime, UN Doc. ICC-ASP/1/3 (part II-B) while for the concept of ‘statehood’ see Decision on Motion for Judgement of Acquittal, Milošević (IT-02-54-T), Trial Chamber, 16 June 2004, §§ 83-115.} A person would be responsible for war crimes if his acts were closely related to the armed conflict, which means whether the existence of such a conflict played a substantial part in the perpetrator’s ability to commit a crime, his decision to commit it, the manner in which it was committed or the purpose for which it was committed.\footnote{Judgment, Kunarac et al. (IT-96-23/IT-96-23/1), Appeals Chamber, 12 June 2002, §§ 58-59; Judgment, Rutaganda (ICTR-96-3-A), Appeals Chamber, 26 May 2003, §§ 569-575; Judgment, Brima, Kamara and Kanu (‘AFRC’) (SCSL-2004-16-T), Trial Chamber, 20 June 2007, §§ 246-247; Judgment, Fofana and Kondewa (‘CDF’) (SCSL-04-14-T), Trial Chamber, 2 August 2007, §§ 129-130; Judgment, Sesay, Kallon and Gbao (‘RUF’), (SCSL-04-15-T), Trial Chamber, 2 March 2009, §§ 100-101; Judgment, Kaing Guek Eav alias Duch (Case File 001/18-07-2007/ECCC/TC), Trial Chamber, 26 July 2010, § 416.}

The number of activities, which can amount to war crimes, has also steadily increased from the about a dozen specifically named in the Tokyo and Nuremberg Charters to fifty such crimes in the Rome Statute.\footnote{Article 8 of the ICC Statute.}

In addition to these two essential requirements it should also be noted that war crimes can only be committed against civilians who do not have the nationality of the party to the armed conflict in whose hands they find themselves. While the term national
seem to connote a restrictive interpretation along the lines of citizens of a country, the ICTY Appeals Chamber in Tadić loosened this notion by tying it to the allegiance of persons to a party to the conflict and the control of that party over such persons rather than a formal bond.\textsuperscript{342} As well, from the early cases on, anybody could be a perpetrator of war crimes, not only persons with a connection to a state or government.

In conclusion, the notion of war crimes has undergone a substantial expansion between the Second World War and the present in two principal areas, namely by extending the scope of application from international armed conflicts to include non-international armed conflicts and by the ability of holding persons responsible for a greater number activities considered undesirable by the international community.

3.2.1.3: Crimes against humanity

The term crimes against humanity was first used prominently in the context of the 1915 Armenian massacres and became part of the jurisdiction after the Second World War in the charters of the International Military Tribunals in Nuremberg and Tokyo in order to criminalize crimes against citizens of their own countries, specifically Jewish nationals in Germany. While the development of the parameters of this crime was still hesitant in the post Second World War tribunals and court, this crime became of the main vehicles to hold persons responsible in the jurisprudence of both the international and internationalized tribunals as well as the ICC.\textsuperscript{343}

Like war crimes, crimes against humanity have two basic requirements and a number of subsidiary elements. The main requirement to elevate a domestic crime to the international level is the fact that an act has to be committed in a systematic or widespread fashion. The case-law of the ICTY and the ICTR has expanded on the historical expression of crimes against humanity by requiring five elements, namely: (i) there must be an attack; (ii) the acts of the perpetrator must be part of the attack; (iii) the attack must be directed against any civilian population; (iv) the attack must be systematic or widespread; and (v) the perpetrator must know that his acts constitute part of a pattern of widespread or systematic crimes directed against a civilian population and know that his acts fit into such a pattern.\textsuperscript{344}


\textsuperscript{344} Judgment, Akayesu (ICTR-96-4-T), Trial Chamber, 2 September 1998, § 579; Judgment, Blaškić (IT-95-14-A), Appeals Chamber, 29 July 2004, §§ 96-102; Judgment, Nahimana, Barayagwiza and Ngeze (‘Media’) (ICTR-99-52-A), Appeals Chamber, 28 November 2007, §§ 915-924; Decision of the Confirmation of the Charges, Katanga and Chui (ICC No. ICC-01/04-01/07), Pre-Trial Chamber I, 30 September 2008, §§ 394-400; Decision of Confirmation of Charges, Bemba (ICC-01/05-01/08), Pre-Trial Chamber II, 15 June 2009, §§ 75-89; Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09, 31 March
The ICC Statute defines the requirement as ‘acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack,’ while further describing an attack against a civilian population as ‘a course of conduct involving the multiple commission of acts … against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.’ Activities committed in an isolated fashion do not fall within these parameters.

Widespread has been defined as ‘massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims’ while systematic as ‘thoroughly organised action, following a regular pattern on the basis of a common policy and involving substantial public or private resources’, ‘organised nature of the acts of violence and the improbability of their random occurrence’ or ‘patterns of crimes, in the sense of the non-accidental repetition of similar criminal conduct on a regular basis’.

With respect to the notion of civilian population, the term ‘population’ does not mean that the ‘entire population of the geographical entity in which the attack took place must be subjected to that attack.’ It is ‘sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to satisfy the Chamber that the attack was in fact directed against a civilian population’ as opposed to a limited and randomly-selected number of individuals.
The civilian population includes all persons who are not members of the armed forces or otherwise recognized as combatants. Even members of the armed forces who were not engaged in combat at the time of their capture are not considered civilians. As well, soldiers *hors de combat* do not qualify as civilians for this purposes but the armed law enforcement agencies of a State can be considered civilians. A civilian population does not have to be exclusively civilian as long as it is ‘predominantly civilian and ‘the primary object of the attack’. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the entire population of its civilian character. The civilian status of the victims, the number of civilians, and the proportion of civilians within a population are factors relevant to the determination of whether the requirement that an attack be directed against a civilian population is fulfilled.\footnote{Decision of Confirmation of Charges, Bemba (ICC-01/05-01/08), Pre-Trial Chamber II, 15 June 2009, § 77; Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09, 31 March 2010, § 81.}

The second essential part of the definition is that, as with war crimes, only certain enumerated activities will amount to crimes against humanity. These would include murder, torture, rape, deportation, imprisonment, inhumane acts and persecution. Unlike war crimes, however, there has been no increase or only a small increase since the Second World War in the number of acts, which have been and are considered to be crimes against humanity\footnote{There is virtually no difference between the crimes against humanity as defined by the post-Second World War instruments and the statutes of the ICTY and ICTR. The ICC Statute seems to expand the range of activities which are considered crimes against humanity by adding the crimes of apartheid and enforced disappearance of persons (articles 7.1(i) and (j)); this is not the case since the crime of apartheid had already been specified as a crime against humanity in article 1 of the 1973 *Convention on the Suppression and Punishment of the Crime of Apartheid* (1015 UNTS 243) while an equivalent of forced disappearance had already been condemned by the IMT when discussing the “Nacht und Nebel” Decree instituted by the Nazi regime in occupied Europe during the Second World War (Volume XXII of the *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 - 1 October 1946*, at 475-476).} and, also unlike war crimes, some crimes, even in the Rome Statute, are framed in a fairly wide manner. It can be said that conceptually crimes against humanity and violations of basic human rights are similar; in some
ways crimes against humanity are seen from the perspective from bringing the perpetrator to justice while violations of human rights are seen from a victim’s view.

As with war crimes, the term ‘perpetrators’ has become wider as well over time in the context of crimes against humanity, albeit more recently than was the case for perpetrators of war crimes, by including not only persons who committed crimes against humanity while in the employ of a government or on behalf of a state but also individuals who were acting in a private capacity but pursuant to an organizational plan or policy. 352 Lastly, the confusion surrounding the question whether crimes against humanity are a crime in their own right or need to be connected to an armed conflict has been resolved in favour of the former; crimes against humanity can be committed even in time of peace. 353

3.2.1.4: Genocide

Genocide was first defined by the 1948 Genocide Convention as follows:

Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, 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.

Unlike war crimes and crimes against humanity, this is a sui generis crime without a distinction between contextual elements and underlying crimes. This definition of the Genocide Convention was maintained in its exact form in the Statutes of the ICTY, ICTR and ICC. 354

The concept of killing members of the group does need not only mean physical killing. Other acts can also ‘constitute direct participation in the actus reus of the crime. The question is whether an accused’s conduct was as much an integral part of

352 Judgment, Kunarac et al. (IT-96-23/IT-96-23/1), Appeals Chamber, 12 June 2002, §§ 83 and 86.
353 Although article 5 of the ICTY Statute makes a connection between crimes against humanity and an armed conflict, the Appeals Chamber has made it clear that is a jurisdictional requirement for the ICTY only and is not to be considered a reflection of general international criminal law; see Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Tadić (IT-94-1), Appeals Chamber, 2 October § 141; Judgment, Kunarac et al. (IT-96-23/IT-96-23/1), Appeals Chamber, 12 June 2002, § 83. The Judgement, Kaing Guek Eav alias Duch (Case File 001/18-07-2007/ECCC/TC), Trial Chamber, 26 July 2010, §§ 291-292 makes it clear that such a connection was not part of international law in the seventies (although another organ of the same institution held the opposite, see Decision on Ieng Sary’s Appeal against the Closing Order, (Case file 002/19-09-2007-ECCC/OCIJ (PTC75), Pre-Trial Chamber, 13 January 2011, § 7.1) while the same is said for the fifties by a decision of the European Court of Human Rights in the case of Korbely v. Hungary, 19 September 2008, Application No. 9174/02, para. 82.
the genocide as were the killings which it enabled.’

The harm within the term ‘causing serious bodily or mental harm’ must go beyond temporary unhappiness, embarrassment or humiliation’ and inflict ‘grave and long-term disadvantage to a person’s ability to lead a normal and constructive life’. Examples of acts which meet this threshold are bodily or mental torture, inhumane or degrading treatment, rape, sexual violence, as are interrogations combined with beatings, threats of death, and harm that damages health or causes disfigurement or serious injury. In some circumstances forcible displacement can also amount to genocide.

Subjecting a group of people to a subsistence diet, systematic expulsion from their homes and deprivation of essential medical supplies below a minimum vital standard would fall within the parameters of ‘deliberately inflicting on the group conditions of life calculated to bring about its physical destruction’, as would ‘the creation of circumstances that would lead to a slow death, such as lack of proper housing, clothing and hygiene or excessive work or physical exertion’ and ‘acts of contamination of water pumps and forcible transfer coupled by resettlement’. Sexual mutilation, enforced sterilization, forced birth control, forced separation of males and females, and prohibition of marriages can be construed as ‘measures intended to prevent births within the group’.

The subcategory of ‘forcibly transferring children of the group to another group’ has received scant judicial attention but the ICC Elements of Crimes document clarifies

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355 Judgment, Kalimanzira (ICTR-05-88-A), Appeals Chamber, 20 October 2010, § 219; Judgment, Kanyarukiga (ICTR-02-78), Trial Chamber, 1 November 2010, § 622.
356 Judgment, Popović et al. (IT-05-88-T), Trial Chamber, 10 June 2010, § 811.
359 Judgment, Popović et al. (IT-05-88-T), Trial Chamber, 10 June 2010, § 812 and Second Decision on the Prosecution's Application for a Warrant of Arrest, Al Bashir (ICC-02/05-01/09), Pre-Trial Chamber I, 12 July 2010, § 30. The same was said about ethnic cleansing, which by itself is not mentioned as an international crime but can be seen as an accumulation of other activities which are prohibited by international criminal law, see Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), International Court of Justice, 26 February 2007, ICJ Reports (2007) ICJ General List No. 91, § 190.
360 Judgment, Akayesu (ICTR-96-4-T), Trial Chamber, 2 September 1998, §§ 500-509; see also the ICC Elements of Crime document, footnote 4.
361 Judgment, Popović et al. (IT-05-88-T), Trial Chamber, 10 June 2010, § 815.
362 Second Decision on the Prosecution's Application for a Warrant of Arrest, Al Bashir (ICC-02/05-01/09), Pre-Trial Chamber I, 12 July 2010, § 38.
363 Judgment, Akayesu (ICTR-96-4-T), Trial Chamber, 2 September 1998, §§ 500-509 and Judgment, Popović et al. (IT-05-88-T), Trial Chamber, 10 June 2010, § 818.
the notion of ‘forcibly’ by saying ‘the term ‘forcibly’ is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment.’\footnote{564}

The words ‘as such’ used in the preamble in relation to the protected groups have been interpreted to mean that the acts must be committed against an individual because the individual was a member of a specific group and ‘specifically because he belonged to this group, so that the victim is the group itself, not merely the individual.’\footnote{565} The term ‘in part’ in the preamble of the definition has been interpreted as requiring a ‘substantial number’ as well as a ‘significant section’ of the intended group. In assessing whether the targeted part of the group is substantial, the numeric size of the part of the group targeted, evaluated in absolute terms and relative to the overall group size, ‘is the necessary and important starting point.’\footnote{566} Other factors can include the prominence within the group of the targeted part, whether the targeted part of the group ‘is emblematic of the overall group, or is essential to its survival’ and the area of the perpetrators’ activity and control and limitations on the possible extent of their reach.\footnote{567}

Only a person belonging to the four types of groups mentioned in the preamble of the above definition would fall within the class of victims of genocide.\footnote{568} What amounts to a group has been resolved in the jurisprudence by not only relying on objective factors such as the permanency or stability of a group but also on subjective factors and should be assessed on a ‘case-by-case basis by reference to the objective particulars of a given social or historical context, and by the subjective perceptions of the perpetrators.’\footnote{569}

When comparing the definitions of genocide and crimes against humanity, it becomes clear that the crime of genocide is subsumed within the larger category of crime against humanity so that every act of genocide is also a crime against humanity but

\footnote{564}{Footnote 5.}
\footnote{565}{Judgment, Akayesu (ICTR-96-4-A), Appeals Chamber, 1 June 2001, § 521 and Judgment, Niyitegeka (ICTR-96-4-A), Appeals Chamber, 9 July 2004, §§ 47-55.}
\footnote{566}{Judgment, Krstić (IT-98-33-A), Appeals Chamber 19 April 2004, §§ 6-23 and Judgment, Popović et al. (IT-05-88-T), Trial Chamber, 10 June 2010, § 832.}
\footnote{567}{Judgment, Popović et al. (IT-05-88-T), Trial Chamber, 10 June 2010, § 832.}
\footnote{568}{Judgment, Krstić (IT-98-33), Trial Chamber, 2 August 2001, §§ 554-557 and 575-580 makes is clear that the destruction of groups with other characteristics than the ones mentioned in the definition does not amount to genocide; see also Judgment, Stakić (IT-97-24), Trial Chamber, 22 March 22, §§ 23-24 and Judgment, Nahimana, Barayagwiza and Ngeze (‘Media’) (ICTR-99-52-A), Appeals Chamber, 28 November 2007, §§ 496-497.}
\footnote{569}{Judgment, Semanza (ICTR-97-20-T), Trial Chamber, 15 May 2003, § 317; Judgment, Gacumbitsi, (ICTR-2001-64-T), Trial Chamber, 17 June 2004, § 254; Separate and Partly Dissenting Opinion of Judge Anita Ušacka, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Al Bashir (ICC-02/05-01/09), Pre-Trial Chamber 1, 4 March 2009 § 23. Negative criteria, such as ‘non-Serbs’, are not appropriate in this context, see Judgment, Stakic (IT-97-24), Trial Chamber, 22 March 2006, §§ 16-36) and Judgment, Popović et al. (IT-05-88-T), Trial Chamber, 10 June 2010, § 809.}
not vice versa. Only four situations have been judicially recognized at the international level since the Second World War as genocide, namely the events between 6 April and 17 July 1994 in Rwanda with the Tutsi ethnic group as the primary target, the killing of over 7000 Muslim men and boys at Srebenica in the former Yugoslavia around July 13, 1995, the situation in Darfur from March 2003 until at least 14 July 2008 against the Fur, Masalit and Zaghawa ethnic groups and the acts between 17 April 1975 and 6 January 1979 against the ethnic and religious Cham group and the Vietnamese, an ethnic, national and national group, living in Cambodia.

3.2.1.5: The mens rea of international crimes

Apart from the fact that a crime has to fall within the parameters of international law in order to consider such activity a war crime, crime against humanity, genocide or crime of aggression, a person who was involved in such crime is only liable if he or she.

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370 This is not surprising given the fact that the crime of genocide originated in the context of post-Second World War international criminal law. Genocide as a war crime or crime against humanity was recognized by various tribunals after the Second World War, such as the International Military Tribunal at Nuremberg where it was included the indictment as part of murder and ill-treatment of the civilian population. In the Justice Trial, Trial of Josef Altstötter and Others, United States Military Tribunal, Nuremberg, Law Reports of Trials of War Criminals Volume VI at 99 the accused Rothaug was actually convicted of this crime and also found guilty of the charges of crimes against humanity. Other examples where the crime of genocide was recognized can be found in Trial of Hauptsturmführer Amon Leopold Goeth, Supreme National Tribunal of Poland, Law Reports of Trials of War Criminals, Volume VII, at 7-9; Trial of Ulrich Greifelt and others, United States Military Tribunal, Nuremberg, Law Reports of Trials of War Criminals Volume XIII, at 37-42 and Trial of Obersturmbannführer Rudolf Fanz Ferdinand Hoess, Supreme National Tribunal of Poland, Law Reports of Trials of War Criminals, Volume VII, at 24-26. It appears that the tribunals treated genocide as the end result of a series of war crimes and crimes against humanity, rather than an independent crime. This was probably done in order to achieve a balance between recognizing genocide as a crime on one hand and fitting the crime within the confines of their constituting instruments on the other. See also Judgment Sikirica (IT-95-8-T), Trial Chamber, 3 September 2001, § 58. For the differences between genocide and crimes against humanity, see Judgment, Musema (ICTR-96-13-A), Appeals Chamber, 16 November 2001, § 366 and Judgment, Krstić (IT-98-33-A), Appeals Chamber, 19 April 2004, §§ 220-229 although the latter decision recognized that these differences have been all but eliminated in the ICC Elements of Crime document.

371 At the national level, a number of states have expanded on the number of groups, which can be victimized, when incorporating the ICC Statute into their national legislation while national judiciaries have done the same, see J. Rikhof, ‘Fewer Place to Hide? The Impact of Domestic War Crimes Prosecutions on International Impunity’, 20 Criminal Law Forum (2009) at 13-14 and 44-46.

372 This has been recognized in all the ICTR jurisprudence since 1998 with the clearest statement on this point by the Appeals Chamber by saying that judicial notice could be taken that genocide had taken place, see Decision on Prosecutor’s Interlocutory Appeal of Decision on Judicial Notice (ICTR-98-44-AR73(C)), Appeals Chamber, 16 June 2006, § 35.


374 Second Decision on the Prosecution’s Application for a Warrant of Arrest, Al Bashir (ICC-02/05-01/09), Pre-Trial Chamber I, 12 July 2010, §§ 9 and 30-31.

she had the required *mens rea* or mental element to commit such a crime. As a result of the case-law at the ICTY and ICTR,\(^{376}\) and the discussions surrounding the ICC, culminating in the ICC Elements of Crime document,\(^{377}\) it has been established that the *mens rea* extends to the contextual element of war crimes and crimes against humanity. This would mean for instance that in order for a prosecutor to prove the crime against humanity of murder, he or she would need to show that a person, as part of widespread or systematic activity, caused the death of certain persons and intended to do so\(^{378}\) and that the accused knew that the murder committed was part of the widespread or systematic activity\(^{379}\) or was wilfully blind in this respect. The latter type of *mens rea* has been expressed by the ICTY as follows:

In addition to the intent to commit the underlying offence, the accused must know that there is an attack directed against the civilian population and he must know that his acts are part of that attack, or at least take the risk that they are part thereof. This, however, does not entail knowledge of the details of the attack. It is sufficient that, through his acts or the function which he willingly accepted, he knowingly took the risk of participating in the implementation of that attack.\(^{380}\)


\(^{377}\) See 'Introduction' to the Crimes against Humanity portion, at 5, paragraph 2, which goes on to say: ‘However, the last element should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization. In the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack.’

\(^{378}\) See Judgment, *Lukić* (IT-98-32/1) Trial Chamber, 20 July 2009, § 900


\(^{380}\) Judgment, *Kunarac et al.*(IT-96-23/IT-96-23/1), Appeals Chamber, 12 June 2002, § 102 and Judgment, *Blaškić* (IT-95-14-A), Appeals Chamber, 29 July 2004, § 126. For a discussion of the various types of *mens rea* in international criminal law, see the Decision on the Confirmation of Charges, *Lubanga* (ICC-01/04-01/06), Pre-Trial Chamber I, 29 January 2007, §§ 349-360 and Decision of Confirmation of Charges, *Bemba* (ICC-01-05-01/08), Pre-Trial Chamber II, 15 June 2009, §§ 352-369. In the latter decision article 30 of the Rome Statute, setting out the general *mens rea* concept applicable to crimes, which do not include their own *mens rea*, is analyzed and the court makes the following distinctions between types of mental elements: a) intent if the consequences of action were meant (*dolus directus* of the first degree in civil law) or certain to follow (*dolus directus* of the second degree in civil law); b) *dolus eventualis* (in civil law) when a person is aware of the risk that the objective elements of the crime may result from his actions and accepts such an outcome by reconciling himself with it or consenting to it; this concept has two sub-levels, namely the risk is a substantial one or the risk is low but the person has clearly or expressly accepted the idea that such elements will follow from his actions; and c) recklessness if action followed by information acquired in the mind of the particular person (subjective) and the risk of the consequence are high and a decision was taken in spite of that consequence (in civil law a form of culpa or conscientious negligence); the court comes to the conclusion that only the first form of *mens rea* is part of article 30 which is a narrower interpretation than was reached by Pre-Trial Chamber I on this issue; for a commentary on these two decisions, see D. Stoitchkova, ‘International Criminal Court', 28
What has been said about war crimes\textsuperscript{381} and crimes against humanity is also the case for genocide, although it has been established that in general the \textit{mens rea} of the crime of genocide is of a higher level than knowledge and includes a special intent or \textit{dolus specialis} to destroy, in whole or in part, a national, ethничal, racial or religious group, which has been explained as follows:

‘the \textit{mens rea} requirement for persecution is higher than for ordinary crimes against humanity, although lower than for genocide. In this context the Trial Chamber wishes to stress that persecution as a crime against humanity is an offence belonging to the same \textit{genus} as genocide. Both persecution and genocide are crimes perpetrated against persons that belong to a particular group and who are targeted because of such belonging. In both categories what matters is the intent to discriminate: to attack persons on account of their ethnic, racial, or religious characteristics (as well as, in the case of persecution, on account of their political affiliation). While in the case of persecution the discriminatory intent can take multifarious inhumane forms and manifest itself in a plurality of actions including murder, in the case of genocide that intent must be accompanied by the intention to destroy, in whole or in part, the group to which the victims of the genocide belong. Thus, it can be said that, from the viewpoint of \textit{mens rea}, genocide is an extreme and most inhuman form of persecution. To put it differently, when persecution escalates to the extreme form of wilful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide’.\textsuperscript{382}

While the special intent is high for genocide, it does not go as far as to insist that the existence of a plan or policy is a legal ingredient\textsuperscript{383} nor are long meditation,\textsuperscript{384} a prior intent\textsuperscript{385} or personal motivation\textsuperscript{386} necessary to carry out a genocidal plan. The intent


\textsuperscript{381} Judgement, \textit{Kaing Guek Eav alias Duch} (Case File 001/18-07-2007/ECCC/TC), Trial Chamber, 26 July 2010, §§ 420-422.
\textsuperscript{384} Judgment, \textit{Krstić} (IT-98-33), Trial Chamber, 2 August 2001, § 572.
\textsuperscript{385} Judgment, \textit{Simba} (ICTR-01-76-A), Appeals Chamber, 27 November 2007, § 266) and Judgment, \textit{Karera} (ICTR-01-74-T), Trial Chamber, 7 December 2007, § 534.
to destroy a group only in part amounts to genocide even if the group whose destruction is desired consists only of a local segment of the larger group or as was said in the \textit{Krstić} case, 'the Chamber concludes that the intent to kill all the Bosnian Muslim men of military age in Srebrenica constitutes an intent to destroy in part the Bosnian Muslim group … and therefore must be qualified as a genocide.'\footnote{Judgment, \textit{Tadić} (IT-94-1-A), Appeals Chamber, 15 July 1999, § 269, Judgment, \textit{Jelisić} (IT-95-10), Appeals Chambers, 5 July 2001, § 49, Judgment, \textit{Popović et al.} (IT-05-88-T), Trial Chamber, 10 June 2010, § 825 and Judgment, \textit{Ntawukulilyayo} (ICTR-05-82-T), Trial Chamber, 3 August 2010, § 450.}

Some specific crimes against humanity also have a \textit{dolus specialis}, such as enforced disappearance,\footnote{Judgment, \textit{Krstić} (IT-98-33), Trial Chamber, 2 August 2001, § 598 while for the reasoning see §§ 581-597; see also Judgment, \textit{Jelisić} (IT-95-10), Appeals Chambers, 5 July 2001, § 83 and Judgment, \textit{Stakić} (IT-97-24), Trial Chamber, 22 March 22, §§ 521-526 and Judgment, \textit{Brđanin} (IT-99-36), Trial Chamber, 1 September 2004, §§ 700-703.} persecution\footnote{Special Tribunal for Lebanon, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative charging, STL-II-OI/IA/AC/RI76bis, Appeals Chamber, 16 February 2011, § 249.} and apartheid,\footnote{ICC Elements of Crime Document, Article 7(1)(j), Element 5.} as do war crimes such as attacking protected objects,\footnote{Ibidem, Article 8(2)(b)(ix), Element 3.} treacherously killing or wounding\footnote{Ibidem, Article 8(2)(b) (xi), Element 2.} and depriving the nationals of the hostile power of rights or actions.\footnote{Ibidem, Article 8(2)(b) (xiv), Element 3.}

\subsection*{3.2.2: Examples of specific war crimes and crimes against humanity}

\subsubsection*{3.2.2.1: Introduction}

The Rome Statute, which could be considered the most comprehensive instrument in describing war crimes and crimes against humanity at the time of its adoption, July 1998, makes mention of 11 crimes against humanity and 50 war crimes, both in international and non-international armed conflict, of which 34 are applicable in international armed conflicts with the remainder (almost all with the same characteristics\footnote{Article 8.2(e)(iii), dealing with attacks against people and material involved in a humanitarian or peacekeeping mission, is an exception.}) in non-international armed conflicts. This number is not static as international criminal law continues to develop, which is apparent, as the number of especially war crimes mentioned in post-Second World War instruments was substantially smaller than in the Rome Statute. The number of war crimes in the ICC Statute will see even more of an increase as a result of a decision at the Kampala Review Conference to add three more crimes to the non-international armed conflict regime. These crimes are already known for international armed conflicts. They are:

\begin{itemize}
  \item[(xiii)] Employing poison or poisoned weapons;
  \item[(xiv)] Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
\end{itemize}
(xv) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions.\textsuperscript{395}

The ICTY and ICTR also recognized early on that the number and type of war crimes in their statutes, which were based on the 1949 Geneva Conventions and their Additional Protocols, might not reflect the realities of modern warfare. Therefore, a method was developed to ensure that nefarious activities could become war crimes if a number of requirements were met. These conditions are:

(i) the violation must constitute an infringement of a rule of international humanitarian law;
(ii) the rule must be customary in nature, or, if it belongs to treaty law, the required conditions must be met;
(iii) the violation must be serious, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim;
and (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.\textsuperscript{396}

Based on this approach, the ICTY added the war crimes of causing terror\textsuperscript{397} and sniping and shelling\textsuperscript{398} to its arsenal of prosecutable acts

At this juncture only the specific crimes which have been the subject of considerable debate or which have been of particular interest in the jurisprudence relating to exclusion from refugee protection will be discussed in this study, namely the crimes (both war crimes and crimes against humanity) of torture, rape and other forms of sexual violence, and inhuman acts/cruel treatment as well as the crime against humanity of persecution.\textsuperscript{399}

\textsuperscript{395} UN Doc. Resolution RC/Res.5, Annex I, ‘Amendments to article 8 of the Rome Statute’. It appears from the Rome Statute that new types of war crimes can also be found outside the Assembly of States decision making process as a result of the wording in the preamble of both the enumeration of war crimes in international armed conflicts (article 8.2(b)) and non-international armed conflicts (article 8.2(e)) which reads: ‘within the established framework of international law’.

\textsuperscript{396} Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Tadić (IT-94-1), Appeals Chamber, 2 October 1995, § 94; Judgment, Kunarac et al. (IT-96-23/IT-96-23/1), Appeals Chamber, 12 June 2002, § 66; Judgment, Aleksovski (IT-95-14/1-A), Appeals Chamber, 24 March 2000, § 20.

\textsuperscript{397} Judgment, Galić (IT-98-29-A), Appeals Chamber, 30 November 2006, §§ 99-104; Judgment, Milošević (IT-98-29/1-A), Appeals Chamber, 12 November 2009, §§ 30-38; see also Judgment, Fofana and Kondewa (‘CDF’) (SCSL-04-14-A), Appeals Chamber, 28 May 2008, §§ 350-358.

\textsuperscript{398} Judgment, Galić (IT-98-29-A), Appeals Chamber, 30 November 2006, § 106.

\textsuperscript{399} The ICC Elements of Crime document sets out some more details of the crimes contained in the Statute including in its 68 footnotes, which on a number of occasions reflects the jurisprudence of the ICTY/ICTR regarding these crimes. For an overview of the jurisprudence in relation to the underlying crimes of war crimes and crimes against humanity, see R. Cryer, H. Friman, D. Robinson and E. Wilmhurst, An Introduction to International Criminal Law and Procedure, Second Edition (Cambridge: Cambridge University Press, 2010) at 246-265 and 290-309.
3.2.2.2: Torture

With respect to torture, it is important to point out that the definition of torture, as set out in the Convention against Torture is not identical to the international crime of torture as understood in customary international law. The definition of the international crime of torture, according to the ICTY case-law, is:

(i) torture consists of the infliction, by act or omission, of severe pain or suffering, whether physical or mental;
(ii) the act or omission must be intentional; and
(iii) the act or omission must be for a prohibited purpose, such as obtaining information or a confession, punishing, intimidating, humiliating, or coercing the victim or a third person, or discriminating, on any ground, against the victim or a third person.\(^{400}\)

The differences between international human rights law and international criminal law, as expressed by the ICTY jurisprudence, are twofold, namely that for an international crime no involvement of a state official or any other authority wielding person is required\(^{401}\) and that the prohibited purposes for which the crime torture is carried out are not limited to the ones set out in international human rights law.\(^{402}\) The ICC Statute has taken an even wider approach by not requiring an official capacity and by eliminating any of the purposes set out in the Torture Convention and as developed by the ICTY and ICTR case-law.\(^{403}\)

An early ICTY case relied on human rights examples to provide a picture what constitutes the element of severe physical and mental pain by indicating that the

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\(^{400}\) Judgment, *Kunarac et al.* (IT-96-23/IT-96-23/1), Appeals Chamber, 12 June 2002, § 142. The first two parts of this definition are similar to the description of torture in the ICC Statute, article 7.2(e) which says ‘torture’ means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions. The Appeals Chamber confirmed in 2007 that the level of pain is indeed ‘severe’ and not ‘extreme’, Judgment, *Brđunin* (IT-99-36-A), Appeals Chamber, 3 April 2007, §§ 244-252.

\(^{401}\) Judgment, *Kunarac et al.* (IT-96-23/IT-96-23/1), Appeals Chamber, 12 June 2002, § 148. In judgement, *Kaing Guek Eav alias Duch* (Case File 001/18-07-2007/ECCC/TC), Trial Chamber, 26 July 2010 at 357, the Trial Chamber is of the view that this was still a requirement in 1975.

\(^{402}\) Judgment, *Kvočka* (IT-98-30/1), Trial Chamber, 2 November 2001, § 140 indicates that humiliation is a prohibited purpose, which is not included in the Convention against Torture.

\(^{403}\) Footnote 14 in the ICC Elements of Crime document specifically states that ‘it is understood that no specific purpose need be proved for this crime’; the crime in this context is crimes against humanity as the war crime of torture in the ICC Statute still maintains the purpose requirement while the war crime of inhumane treatment has abandoned this element so that in the ICC context the actus reus of the crime against humanity of torture is the same as the war crime of inhumane treatment, both of which are broader than the equivalent crimes under ICTY/ICTR jurisprudence; on the other hand the war crime of torture in the ICC Statute has the same actus reus as both types of torture under the ICTY/ICTR case-law (see ICC Elements of Crime document under articles 7(1)(f), 8(2)(a)(ii)-1 and 8(2)(a)(ii)-2). The interpretation of this crime by the ICC Pre-Trial Chamber has primarily relied on the Elements of Crime Document with some reference to the Convention against Torture and the jurisprudence of the European Court of Human Rights, see Decision of Confirmation of Charges, *Bemba* (ICC-01/05-01/08), Pre-Trial Chamber II, 15 June 2009, §§ 191-193 and 292.
following acts had been considered to amount to torture: beating; electric shocks and mock executions; being held incommunicado for more than three months whilst being kept blindfolded with hands tied together, resulting in limb paralysis, leg injuries, substantial weight loss and eye infection; the practice of administering severe beatings to all parts of the body, known as falanga; being stripped naked and suspended by his arms which had been tied together behind his back; being detained over a period of three days and in a constant state of physical pain and mental anguish brought on by the beatings administered during questioning while also being paraded naked in humiliating circumstances and on one occasion being pummelled with high-pressure water while being spun around in a tyre; extraction of nails, teeth; burns; electric shocks; suspension; suffocation; exposure to excessive light or noise; sexual aggression; administration of drugs in detention or psychiatric institutions; prolonged denial of rest or sleep; prolonged denial of food; prolonged denial of sufficient hygiene; prolonged denial of medical assistance; total isolation and sensory deprivation; being kept in constant uncertainty in terms of space and time; threats to torture or kill relatives; total abandonment.404

The same case also discusses a number of particular interrogation techniques and its treatment by international human rights bodies by saying:

‘Whereas the European Commission of Human Rights considered that the combined use of wall-standing, hooding, subjection to noise, sleep deprivation and food and drink deprivation constituted a violation of article 3 amounting to torture, in this case, the European Court concluded that such acts did not amount to torture as they "did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood". The Trial Chamber notes that the European Court expressly acknowledged that the use of the five techniques of interrogation in question had caused "intense physical and mental suffering" but then, nonetheless, concluded that the intensity of the suffering inflicted was insufficient to warrant a finding of torture, without further explanation. Indeed, this aspect of the decision has been the subject of criticism in human rights literature. Furthermore, in later cases, forms of ill-treatment analogous to those considered by the European Court in the /Northern Ireland Case/ have been found by other human rights bodies to constitute torture.’405

In general the ICTY and ICTR case-law has indicated that the seriousness of the pain or suffering sets torture apart from other forms of mistreatment but has not specifically set the threshold level of suffering or pain required. The facts will be assessed depending on the individual circumstances of each case in which the seriousness of any mistreatment, the objective severity of the harm inflicted, including the nature, purpose and consistency of the acts committed, will be considered. Subjective criteria, such as the physical or mental condition of the victim, the effect of the treatment and, in some cases, factors such as the victim’s age, sex, state of health and position of inferiority will also be relevant in assessing the gravity

404 Judgment, Mucić et al. (Čelebići Camp) (IT-96-21), Trial Chamber, 16 November 1998), §§ 461-462 and 465-467.
405 Judgment, Mucić et al. (Čelebići Camp) (IT-96-21), Trial Chamber, 16 November 1998), §§ 464.
of the harm. Permanent injury is not a requirement for torture; evidence of the suffering need not even be visible after the commission of the crime. Both mutilation of body parts and rape have been considered torture since these crimes by definition implies severe pain and suffering.

3.2.2.3: Rape

With respect to crime of rape the ICTY and ICTR jurisprudence has adopted two definitions, which are not necessarily incompatible but emphasize different aspects of this crime. In the ICTR, rape was described as ‘a physical invasion of a sexual nature, committed on a person under circumstances which are coercive’. However, the ICTY Trial Chamber decided that a more precise definition would better accord with the criminal law principle of specificity and so adopted the more technical definition of ‘rape is the sexual penetration, however slight of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or the mouth of the victim by the penis of the perpetrator, where such sexual penetration occurs without the consent of the victim.’ The Appeals Chamber in the case of Kunarac agreed with the latter definition, which has also been incorporated in the ICC Elements of Crime Document while the latter adds the refinement that can be committed against both women and men.

Another debate with respect to the crime of rape dealt with the surrounding situation of this form of sexual violence where some decisions focused on coercive circumstances during the commission of the crime while others instead found that the essential feature was the lack of consent of the victim. Again, the Kunarac decision provided some clarification on this issue by saying that the lack of consent is the crucial element for rape, which is usually absent during coercive situations. The ICC Elements of Crime document has a similar approach to the one used by the ICTY Appeals Chamber and states:

[406] Judgment, Brđanin (IT-99-36), Trial Chamber, 1 September 2004, §§ 483-484
[412] The ICC “Elements of Crimes” describes the actus reus of rape as follows at page 8: ‘the perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.’ Footnote 15 in this description says: ‘the concept of invasion is intended to be broad enough to be gender-neutral.’ When interpreting this offence, the ICC Pre-Trial Chambers have relied solely on the Elements of Crime Document, see Decision of the Confirmation of the Charges, Katanga and Chui (ICC No. ICC-01/04-01/07), Pre-Trial Chamber I, 30 September 2008, § 342; Decision of Confirmation of Charges, Bemba (ICC-01/05-01/08), Pre-Trial Chamber II, 15 June 2009, §§ 161-162, 283.
The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.

The ICC Statute has the following sexual crimes in addition to rape as crimes against humanity: ‘sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.’

3.2.2.4: Inhumane acts/treatment

The crime against humanity of inhumane acts and the war crime of inhumane treatment are seen as residual crimes of the same seriousness as the other crimes against humanity and war crimes and both envisage physical or mental suffering or serious attack on human dignity at a lower level than the crime of torture, namely serious or great suffering rather than severe pain or suffering.

The seriousness of the harm or injury must be assessed on a case by case basis, taking into consideration various factors ‘including the nature of the act or omission, the context in which it occurs, its duration and/or repetition, its physical and mental effects on the victim and, in some instances, the personal circumstances of the victim, including age, gender and health. The harm inflicted does not need to be permanent.

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414 Article 7.1(g). The same crimes, as well as rape, are repeated as war crimes in article 8.2(b)(xxii) for international armed conflicts and article 8.2 (e)(vi) for non-international armed conflicts. Some explanations as to the nature and difference between these crimes are given in the Statute itself, which states for forced pregnancy in article 7.2(f) that it ‘means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy.’ The ICC Elements of Crime document at pages 9-10 (for crimes against humanity) elaborates on some essential elements of the other sexual crimes such as sexual enslavement (‘exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty’), enforced prostitution (‘the perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature’), and enforced sterilization (‘the perpetrator deprived one or more persons of biological reproductive capacity and the conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent’ while adding footnote 19 saying ‘the deprivation is not intended to include birth-control measures which have a non-permanent effect in practice’). For the elements of the crime of sexual assault other than rape in the ICTY jurisprudence, see Judgment, Đorđević (IT-05-87/1), Trial Chamber, 23 February 2011, §§ 1766-1769.

415 The war crime for inhumane treatment is related to international armed conflicts; the equivalent for non-international armed conflicts is called cruel treatment; both are considered similar in gravity as another war crime called wilfully causing great suffering or serious injury to body or health, see Judgment, Jelisić (IT-95-10-T), Trial Chamber, 14 December 1999, § 52; Judgment, Naletilić & Martinović (IT-98-34-T), Trial Chamber, 31 March 2003, § 246; Judgment, Đorđević (IT-05-87/1), Trial Chamber, 23 February 2011, § 1610; and the ICC Elements of Crimes Document (which has been relied upon by the ICC Pre-Trial Chamber to interpret this crime in Decision of the Confirmation of the Charges, Katanga and Chui (ICC No. ICC-01/04-01/07), Pre-Trial Chamber I, 30 September 2008, § 356).
and irremediable; it must, however, have more than a short-term or temporary effect on the victim.  

A number of cases have examined these crimes in the context of detention camps and looked at a number of acts often in combination to come to the conclusion that they reached the level of suffering required. In one case being used as human shields, beaten, being subjected to physical or psychological abuse and intimidation and deprived of adequate food and water was sufficient, while in another conditions in which detainees were forced to live, such as overcrowded conditions, deprivation of food, water and sufficient air, exposure to extreme heat or cold, random beatings of detainees as a general measure to instil terror amongst them reached the required level of suffering as well.

The latter case describes in more detail conditions of detention amounting to inhumane acts by saying:

‘The conditions in which people were transported to and from camps bear a resemblance to the transportation of livestock. In the camps and other places of detention, it was commonplace that detainees had no choice but to relieve themselves in the room in which they were detained. During interrogations, detainees were made to adopt uncomfortable postures while being held at gunpoint. Once, a Bosnian Muslim was forced to drink whisky. A Bosnian Croat was made to eat the piece of paper on which he had written a statement because he had used Latin, not Cyrillic script. As part of the ill-treatment by camp guards, Bosnian Muslims and Bosnian Croats were also forced to beat and perform sexual acts on each other. It was announced that their mothers and sisters would be raped in front of them. Bosnian Muslims and Bosnian Croats were forced to watch other members of their group being killed, raped, and beaten. Detainees were provided with totally inadequate food over long periods. On one occasion, when some bread was thrown into their room, they started to fight over it like animals. People licked walls in order to get water from condensation. Some detainees started to hallucinate or became mentally disturbed as a result of the conditions.’

Yet another case described

‘the conditions of detention prevailing in the camp such as the gross overcrowding in small rooms without ventilation, requiring the detainees to beg for water, and forcing them to relieve bodily functions in their clothes a form of abuse intended to harass, humiliate, and inflict mental harm on the detainees. The constant berating, demoralizing, and threatening of detainees, including the guards’ coercive demands for money from detainees, and the housing of

416 Judgment, Blagojević & Jokić (IT-02-60), Trial Chamber, 17 January 2005, § 586; Judgment, Đorđević (IT-05-87/1), Trial Chamber, 23 February 2011, § 1611.
418 Judgment, Brđanin (IT-99-36), Trial Chamber, 1 September 2004, § 1005.
419 Ibidem §§ 1015-1020.
detainees in lice-infected and cramped facilities were calculated by participants in the operation of the camp to inflict psychological harm upon detainees.\(^{420}\)

Forcible transfer of persons has been found to fall within the parameters of inhumane acts.\(^{421}\) It was also found to exist in a situation involving the forced undressing of a woman outside a communal building, after making her sit in the mud and the forced undressing of three women and the forcing of the women to perform exercises naked in public,\(^{422}\) while third parties could suffer serious mental harm by witnessing very serious criminal acts committed against others, particularly against family or friends.\(^{423}\) As well, sexual and physical violence perpetrated upon dead human bodies has been included in this crime.\(^{424}\) The Special Court for Sierra Leone has also recognized the phenomenon of forced marriage as the crime against humanity of inhumane acts.\(^{425}\)

However, bodily assaults amounting to beatings does not by itself establish that inhumane treatment has occurred unless such beatings reach the same level of gravity as other crimes against humanity or war crimes.\(^{426}\) Similarly, interrogations alone have not been considered in the jurisprudence to be of sufficient gravity to constitute such crimes.\(^{427}\)

3.2.2.5: Persecution

The crime of persecution is defined by the jurisprudence of the ICTY and ICTR as ‘an act or omission that discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law and was carried out deliberately with the intention to discriminate’ on one of the grounds listed in their statutes, specifically political, racial and religious grounds.\(^{428}\) An act or omission is considered discriminatory ‘when a victim is targeted because of his or her membership in a group defined by the perpetrator on a political, racial or religious basis’.\(^{429}\) Not every denial of a human right is serious enough to constitute a crime.

\(^{420}\) Judgment, Kvočka (IT-98-30/1-A), Appeals Chamber, 28 February 2005, §§ 324-325.
\(^{421}\) Judgment, Đorđević (IT-05-87/1), Trial Chamber, 23 February 2011, § 1614.
\(^{422}\) Judgment, Akayesu (ICTR-96-4-T), Trial Chamber, 2 September 1998, §§ 688, 697.
\(^{423}\) Judgment, Kayishema and Racindana, (ICTR-95-1-T), Trial Chamber, 21 May 1999, § 153.
\(^{424}\) Judgment, Kajelijeli (ICTR-98-44A-T), Trial Chamber, 1 December 2003, § 936 and Judgment, Niyitegeka (ICTR-96-14-T), Trial Chamber, 16 May 2003, § 465.
\(^{426}\) Judgment, Simić (IT-95-9-T), Trial Chamber, 17 October 2003, §§ 77-78, 83; for an example of beatings which reached this threshold, see Judgment, Boškoski and Tarčulovski (IT-04-82), Trial Chamber, 10 July 2008, §§ 383-390.
\(^{427}\) Judgment, Simić (IT-95-9-T), Trial Chamber, 17 October 2003, § 67 and 69.
\(^{429}\) Judgment, Popović et al. (IT-05-88-T), Trial Chamber, 10 June 2010, § 967; Judgment, Đorđević (IT-05-87/1), Trial Chamber, 23 February 2011, § 1758.
against humanity but it must be a gross or blatant denial of a fundamental right reaching the same level of gravity as the other crimes against humanity prohibited by the statutes of the ICTY and ICTR. The *mens rea* for this crime has been described as higher than the other crimes against humanity but lower than the intent required for genocide.

Persecution can include murder, extermination and torture; violations of political, social and economic rights; physical or mental harm or infringements on individual freedom; deportation or forcible transfer of civilians, depending upon the circumstances; sexual assault; destruction of religious and cultural sites; a combination of harassment, humiliation and psychological abuse; imprisonment, unlawful detention of civilians or infringement upon individual freedom, seizure, collection, segregation and forced transfer of civilians to camps, trench-digging and the use of hostages and human shields, and sexual violence; unlawful detention of civilians; violations of the right to life, liberty and the security of the person; the right not to be held in slavery or servitude; the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment; and the right not to be subjected to arbitrary arrest, detention or exile.

Since the severity of the persecution has to be similar to the other types of crimes against humanity, certain activities have been found not to reach that level of seriousness in terms of the violation of human rights, such as restrictions placed on a particular group in particular aspects of social life or dismissing and removing persons from government. Certain activities, such as denial of freedom of movement, the denial of employment, the denial to judicial process and the denial of equal to public services do not amount to persecution either unless committed in a cumulative fashion.

The crime against humanity of persecution has also extended to two areas which are expansions of the original notion of this crime that such a crime had to be related to violations of the integrity or well being of a person, by also including certain crimes against property and certain hate crimes within its parameters.

There is an apparent discrepancy between the ICTY and ICTR case-law regarding the application of the crime of persecution to hate crimes in that the ICTY trial judges

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430 Judgment, Popović et al. (IT-05-88-T), Trial Chamber, 10 June 2010, § 966; Judgement, Kaing Guek Eav alias Duch (Case File 001/18-07-2007/ECCC/TC), Trial Chamber, 26 July 2010, § 378.
431 Judgment, Kupreškić et al. (IT-95-16), Trial Chamber, 14 January 2000, § 636.
432 Judgment, Kupreškić et al. (IT-95-16), Trial Chamber, 14 January 2000, §§ 600, 615.
434 Judgment, Đorđević (IT-05-87/1), Trial Chamber, 23 February 2011, § 1763-1773.
435 Judgment, Kvočka (IT-98-30/1), Trial Chamber, 2 November 2001, § 190 and 324.
436 Judgment, Kvočka (IT-98-30/1), Trial Chamber, 2 November 2001, § 186.
437 Judgment, Blaškić (IT-95-14), Trial Chamber, 3 March 2000, § 220, 234.
438 Judgment, Kupreškić et al. (IT-95-16), Trial Chamber, 14 January 2000, § 615.
440 Judgment, Brdanin (IT-99-36), Trial Chamber, 1 September 2004, § 1049.
have rejected this notion\textsuperscript{441} while it has been accepted by the ICTR.\textsuperscript{442} The difference lies in the fact that the ICTR does not consider all hate speech to fall within the crime of persecution but only speech inciting to violence while it also stipulates that violence has to result from the speech.\textsuperscript{443}

The ICTY case-law has included as part of persecution a number of property offences such as certain types of attacks on property if they have the effect of the destruction of the livelihood of a certain population,\textsuperscript{444} which includes comprehensive destruction of homes and property, the destruction of towns, villages and other public or private property, the plunder of property and the destruction and damage to religious or educational institutions.\textsuperscript{445}

The ICC Statute has both narrowed and broadened the crime of persecution. It has been broadened by extending the groups, which can be victimized while narrowing it by insisting that this crime is only justiciable if it has been committed in connection to another crime in its statute by stating:

\begin{quote}
Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.\textsuperscript{446}
\end{quote}

While the national refugee jurisprudence have for the most part examined specific crimes, which are known already in domestic criminal law, such as murder and torture, it is likely that in the future there will be need to examine international criminal law for crimes, which do not have such an equivalent for which reliance can be placed on the international jurisprudence.

\textsuperscript{441} Judgment, \textit{Kordi\'c and Cerkez}, (IT-95-14/2), Trial Chamber, 26 February 2001, § 209. This aspect of the case was not appealed.


\textsuperscript{443} The original disagreement was between the trial chambers of the ICTY and ICTR where the ICTR had applied a broader notion of hate speech than eventually accepted by the Appeals Chamber; the trial chamber did not require a causal connection between the speech and subsequent violence while the level of hate speech was ‘a discriminatory form of aggression that destroys the dignity of those in the group under attack. It creates a lesser status not only in the eyes of the group members themselves but also in the eyes of others who perceive them as less than human’; see Judgment, \textit{Nahimana, Barayagwiza and Ngeze (‘Media’) (ICTR-99-52-T)}, Trial Chamber, 3 December 2003, § 1072.

\textsuperscript{444} Judgment, \textit{Bla\'skic} (IT-95-14), Trial Chamber, 3 March 2000, §§ 227, 233, 234.

\textsuperscript{445} Judgment, \textit{Kordi\'c and Cerkez}, (IT-95-14/2), Trial Chamber, 26 February 2001, § 202-207.

\textsuperscript{446} Article 7.1(h) while article 7.2(g) says ‘“persecution” means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity’. 
3.3: National Refugee Jurisprudence

3.3.1: Australia

Australia has no specific statutory provision re exclusion but has incorporated in general the 1951 Refugee Convention.\textsuperscript{447} In terms of procedure with respect to exclusion the Federal Court of Australia (FCA) sits in judicial review of two administrative tribunals. These tribunals are the Administrative Appeal Tribunal (AAT) in operation since 1998 and the Refugee Review Tribunal (RRT), which was active between 1994 and 1997. Decisions of the Federal Court of Australia can be appealed to the Federal Court of Australia, Full Court (FCAFC).\textsuperscript{448}

The sources of war crimes and crimes against humanity have evolved depending on the timing of the decisions and the legal developments in the international sphere. The earliest decisions at the Refugee Review Tribunal and the Administrative Appeal Tribunal referred mostly to the statute of the International Military Tribunal while later decisions examined the statutes of the ICTY and ICTR while most recently the statute of the ICC has been found the most useful in this regard.\textsuperscript{449} At the federal court level, the ICC Statute has been held to be the most authoritative in the context

\textsuperscript{447} Section 36 of the Migration Act 1958.

\textsuperscript{448} See for references to the International Military Tribunal in the cases of N96/1441 and Minister for Immigration and Multicultural Affairs [1998] AATA 619 (which also refers to the ICTY Tadić decision); N1998/532 and Minister for Immigration and Multicultural Affairs [1999] AATA (which also refers to the Draft Code); W97/164 and Minister for Immigration and Multicultural Affairs [1998] AATA 618; W98/45 and Minister for Immigration and Multicultural Affairs [1998] AATA 948; SRL and Minister for Immigration and Multicultural Affairs [2000] AATA 128; SRLLL and Minister for Immigration Multicultural and Indigenous Affairs [2002] AATA 795; VAG and Minister for Immigration and Multicultural and Indigenous Affairs [2002] AATA 1332 (although the latter also refers to the ICC); SRHHH and Minister for Immigration and Multicultural and Indigenous Affairs [2005] AATA 1020 (together with a reference to the ICC); SRO0OO and Minister for Immigration and Multicultural and Indigenous Affairs [2006] AATA 91 (together with a reference to the ICTY); WBV and Minister for Immigration and Citizenship [2007] AATA 2046 (together with the ICC Statute). The AAT has referred to all four international institutions in the following cases: WBR and Minister for Immigration and Multicultural Affairs [2006] AATA 75; (together with a reference to the ICC Statute). The AAT has referred to all four international institutions in the following cases: WBR and Minister for Immigration and Multicultural Affairs [2006] AATA 75; SAH and Minister for Immigration and Multicultural Affairs [2002] AATA 263 and SAL and Minister for Immigration and Multicultural Affairs [2002] AATA 1164 while referring only to the ICC Statute in the SRDDDD and Minister for Immigration and Multicultural Affairs [2004] AATA 150 and SRYYYY and Minister for Immigration and Multicultural Affairs [2006] AATA 320 cases.
of international crimes although a reference to the International Military Tribunal by the Administrative Appeal Tribunal was not found to have been in error.

The Federal Court of Australia, Full Court in the SRYYY decision provided context for the concepts of war crimes and crimes against humanity. While examining the historical development of these two crimes, the Court found that the definitions of the crimes in article 1F(a) were different in the various international instruments and that as a result it was difficult to apply article 1F(a). The Court gave the example that in early international instruments there was a requirement that a crime against humanity be committed in the context of an armed conflict, a requirement that was no longer followed in the ICTY case law, citing the Tadić case. A further example was that war crimes were considered more recently to include acts committed during both international and internal armed conflicts, again by referring to Tadić.

In an application of the parameters of crimes against humanity, the Administrative Appeal Tribunal examined the situation of a claimant who had been a prison officer at the Pul-e-Charkhi Prison in Kabul, Afghanistan between 1981 and 1988. The main part of Pul-e-Charkhi Prison was run as an ordinary prison by officers who were employed as police officers by the Ministry of the Interior. The inmates of this section of Pul-e-Charkhi Prison were sentenced prisoners who comprised both ordinary criminals and those convicted of terrorism, sabotage and other crimes against the Government. KhAD, the State Intelligence Service, ran a separate area of the prison but the claimant had no contact with that part. The Administrative Appeal Tribunal was of the view that no crimes against humanity were committed in this prison as 'the appalling conditions at the prison were not so much part of a systematic process of degradation of prisoners involving the applicant and others, but were more probably the product of the generally primitive conditions one might expect in an impoverished country after years of war and internecine bloodshed'.

The Federal Court of Australia, Full Court, had been called in the SZCWP case to determine whether police officers could be considered to be a civilian population in the context of crimes against humanity. The majority of the court found that the finding of the AAT that the attacks had been against civilians was correct because the police as non-military actors were considered civilian and as such the group had engaged in both war crimes and crimes against humanity and the applicant had been properly been excluded.

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452 WAV and Minister for Immigration and Multicultural Affairs [2002] AATA 463 at paragraph 42.
453 Ibidem.
With respect to the underlying crimes, most decisions have dealt with the crimes of murder of torture without making any further comments.\textsuperscript{455} However, in 2006, the Federal Court of Australia in the case of \textit{SZITR} examined the elements of the crime of torture as a crime against humanity in the context of Sri Lanka.\textsuperscript{456} The Administrative Appeal Tribunal had assessed the conduct of the accused using the five elements of torture (severe pain, the custody or control of the victim, unlawful sanction, part of a widespread attack against the civilian population and knowledge on the part of the accused of the conduct forming part of the attack) as defined in the ICC Elements of Crime. The tribunal had said that legal control over the detainee was not necessary but that the test for control required that in practical terms the victim was at the mercy of the accused. The court agreed.

At the Administrative Appeal Tribunal level, the actions by the Saddam Hussein regime against the Kurds during the Anfal Campaign in Northern Iraq between 1986 and 1989, resulting in massive killing of the population, the repression of the uprising by Shi’a Moslems after the 1991 Gulf War, and the draining of the marshes and the driving out of the Marsh Arabs in Southern Iraq between 1991 and 1993 were considered crimes against humanity. In respect to the latter event, it was said that the Iraqi Army was engaged in the drainage of the marshes and, in doing so, forced the inhabitants out of the marshes resulting in the loss of their homeland.\textsuperscript{457}

On the other hand, the same tribunal was of the view that crowd-dispersing techniques involving batons as used in Zimbabwe in 2002 did not amount to an underlying act for crimes against humanity. Nor did the 2005 Operation Murambatsvina, a campaign to demolish illegal dwellings and removing their inhabitants to various parts of the country. With respect to the latter activity, the tribunal was of the view (without giving an explanation) that none of the crimes against humanity of deportation, forcible transfer or inhumane acts were engaged.\textsuperscript{458}

An earlier decision by the predecessor tribunal, the Refugee Review Tribunal, had come to the conclusion that a street gang in Turkey, which frequently engaged in premeditated and savage assaults of Kurds, members of a particular racial group, had committed crimes against humanity.\textsuperscript{459}

The Australian courts and tribunals have been fairly successful in applying international criminal law to the situations before them, especially in using the international elements of crimes against humanity, the crime most often considered. While the federal court has lamented the fact that the requirements of the international aspects of the international crimes have changed over time this has not

\textsuperscript{455} There is some discussion of a number of underlying crimes amounting to war crimes in the minority judgment of the SZCWP v Minister for Immigration & Multicultural & Indigenous Affairs [2006] FCAFC 9 case.

\textsuperscript{456} The RRT had also examined the crime of torture in 1995 in the case of V94/01334 [1995] RRTA 1626.

\textsuperscript{457} SAH and Minister for Immigration and Multicultural and Indigenous Affairs [2002] AATA 263.

\textsuperscript{458} WBV and Minister for Immigration and Citizenship [2007] AATA 2046.

\textsuperscript{459} V96/04174 [1997] RRTA 2507.
affected the use of international criminal law in a consistent manner. Still with respect to the international elements of crimes against humanity, when the court had been called upon to go to determine to parameters of civilian population it showed no hesitation to include police officers within that category during peace time. It anticipated international criminal law where the the solution was found by the Sierra Leone Special Court in 2009, thereby showing that the judges in Australia had the same innate sense of the concept of civilian population.

This positive assessment of the Australian jurisprudence with respect to the overarching elements of crimes against humanity cannot be extended to the specific crimes, which are part of crimes against humanity. While the federal court was of the view that a narrow approach for the element of control for the ICC crime of torture, namely legal control, was not desirable, this forward thinking has not been followed consistently at the tribunal level. The fact that removing people from places of inhabitation amounted to the crime against humanity of forcible transfer in the situation of Iraq but not in Zimbabwe appears to be inconsistent at the surface. The latter case could have benefited from a more in depth analysis, especially since that case was decided in 2007, at a time that international jurisprudence was available on that point. However, it is clear that for tribunals and courts, which only examine international crimes on an infrequent basis, it is difficult to go beyond the most basic international criminal law documentation and jurisprudence.

3.3.2: Belgium

The Office of the Commissioner General for Refugees and Stateless Persons (CGRS) or Commissariat général aux réfugiés et aux apatrides (CGRA) has been the central body responsible for the adjudication for asylum claims since 1988. Appeals can be taken to the Aliens Litigation Council (Conseil du Contentieux des Etrangers or CCE) with a final appeal to the Council of State (Conseil d’État or CE).

The issue of internal armed conflict was discussed in one case in the context of the Qualification Directive, an instrument, which sets out a uniform approach for members of the European Union in providing persons with subsidiary protection when they do not qualify for refugee protection. While article 12.2(a) of the Directive excludes people who have committed crimes against peace, war crimes or crimes against humanity, the discussion of what amounts to an internal armed conflict has taken place in regards to article 15(c), which provides subsidiary protection as a result of indiscriminate violence in situations of international or internal armed conflict.

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460 Section 55/4 of the Aliens Act sets out the exclusion provisions.
461 In Dutch it is called Commissariaat-generaal voor de Vluchtelingen en de Staatlozen (CGVS).
462 In Dutch it is called the Raad voor Vreemdelingenbetwistingen or RvV. This is as of 1 June 2007. Before that date the appeal body was known as the Permanent Refugee Appeals Commission (Commission permanente de recours des réfugiés or CPRR/Vaste Beroepscommissie or VBC).
The Aliens Litigation Council defined internal armed conflict by reference to article 1 of the 1977 Protocol II to the 1949 Geneva Conventions. The Protocol defines non-international armed conflicts as those taking place on the territory of a State party ‘between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations’. This ‘shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.’\(^{464}\) The tribunal came to the conclusion that this threshold had not been met in Ivory Coast in the fall of 2006\(^{465}\) or in Lebanon in the 1980s.\(^{466}\)

In general, the concept of crimes against humanity has been applied in Belgium to situations where crimes were committed in the context of a policy aiming at terrorizing a population and obstructing the process of democratization and the free expression of opinions by systematic use of violence, torture and executions.\(^{467}\) In older cases, crimes against humanity were usually identified by reference to the Charter of the International Military Tribunal,\(^{468}\) but more recently the ICC Statute has become the preferred source.\(^{469}\) In older cases the following acts had been determined to be underlying crimes for crimes against humanity: fundamental inhumane conduct, such as slavery, torture, assassination or persecution of population groups targeted for religious, racial or political motives, the execution of prisoners and hostages, both civilian and military, activities within secret services including the kidnapping, torture and execution of opponents.\(^{470}\)

Belgium is one of the few countries where the concept of crimes against peace has been applied. This occurred in a case involving a person who was one of five members of the Politburo of the ruling party in Somalia during the Barre government between 1969 and 1991. As such, he was involved in all important policy decisions of this regime. One of these decisions was the aggression against Ethiopia over the control of the Ogaden region in 1982, in which this person was involved while also being responsible specifically for the purchase of military material in preparation of this armed conflict. The tribunal relied on the Charter of the International Military

\(^{464}\) CCE Case No. 3380, 31 October 2007 at paragraph 4.8. The Swedish Migration Court of Appeal in 2007 used the same source to come to the conclusion that there was no internal armed conflict in Iraq, see UNHCR, *Asylum in the European Union. A Study of the Implementation of the Qualification Directive*, November 2007 at 77-78 (for a background regarding the Swedish refugee system, see *Asylum Procedures* at 321, 323 and R. Stern, ‘Foreign law in Swedish judicial decision-making: playing a limited role in refugee law cases’, in G.G. Goodwin-Gill and H. Lambert at 189-191.

\(^{465}\) CCE No. 3380, 31 October 2007 at paragraph 4.9.

\(^{466}\) CCE No. 37011, 14 January 2010 at paragraph 2.17.


\(^{468}\) S. Kapferer, ‘Exclusion Clauses in Europe’ at 198.

\(^{469}\) CE No. 184.647, 24 June 2008, CE No. 186.913, 8 October 2008; CCE No. 49.298, 10 October 2010.

\(^{470}\) S. Kapferer, ‘Exclusion Clauses in Europe’ at 198.
Tribunal and its judgment in deciding that the prohibition against aggression had entered the realm of customary international law. As to the factual underpinnings of the decision, the tribunal referred to the international condemnation of Somalia for initiating the war against Ethiopia.\textsuperscript{471}

In the same case, the concept of war crimes was introduced to the context of an internal armed conflict, in this case one between the government of Somalia and rebel groups in northern Somalia from 1988 to 1990. The tribunal makes it clear that while the reasons and justification for the armed conflict are obscure and while international humanitarian law allows certain types of violence, the bombardment of refugees trying to flee the conflict zones, the killing of non-combatants, such as women, children and old men and the destruction of water reservoirs all amount to war crimes.\textsuperscript{472}

3.3.3: Canada\textsuperscript{473}

Refugee determinations, including assessments regarding exclusion are made by an administrative tribunal called the Refugee Protection Division (RPD)\textsuperscript{474} of the Immigration and Refugee Board. Judicial review can be sought to the Federal Court,\textsuperscript{475} with an appeal to the Federal Court of Appeal.\textsuperscript{476}

With respect to the parameters of international crimes, the Supreme Court of Canada issued a significant decision in 2005 in the context of the case of a person who had made an inflammatory speech in 1992 in Rwanda exhorting Tutsis to kill Tutsis.\textsuperscript{477} The court followed closely the international jurisprudence of the ICTY and ICTR by indicating that crimes against humanity consist of four essential elements: the commission of one of the enumerated proscribed acts; the act is committed as part of a widespread or systematic attack; the attack is directed against any civilian population or any identifiable group; and the accused must have knowledge of the attack and must know that his or her acts comprise part of it, or take the risk that his or her acts will comprise part of it.\textsuperscript{478} The civilian population must be the primary object of the attack, and not merely a collateral victim of it, and the attack must be

\textsuperscript{471} CPRR No. 99-1280/W7769, 6 August 2002 at paragraph 4.2.4.
\textsuperscript{472} CPRR No. 99-1280/W7769, 6 August 2002, at paragraph 4.2.3.
\textsuperscript{473} Section 98 of the Immigration and Refugee Protection makes reference to article 1F of the 1951 Refugee Convention.
\textsuperscript{474} The Convention Refugee Determination Division or CRDD before 2002.
\textsuperscript{475} Federal Court, Trial Division, before 2003.
\textsuperscript{476} See Asylum Procedures at 80, 84. Before 1995, the Federal Court of Appeal sat also in appeal of decisions of the Immigration and Refugee Board.
\textsuperscript{477} Mugesera v. Canada (Minister of Citizenship and Immigration), 2005 SCC 40.
\textsuperscript{478} Paragraphs 128 and 173; it provides more details of these elements in paragraphs 153-158. There have been cases where an exclusion finding by the tribunal was overruled by the court because of a lack of analysis with respect to crimes against humanity, such as in Tilus v. Canada (Minister of Citizenship and Immigration) 2005 FC 1738 and Ruiz Blanco v. Canada (Minister of Citizenship and Immigration) 2006 FC 623.
directed against a relatively large group of people who share distinctive features, which identify them as targets of the attack.\footnote{479} On two occasions since this decision the Federal Court has made it clear that prisoners convicted of regular crimes are included in the notion of civilian population.\footnote{480} As well, the Federal Court of Appeal has rejected the argument that proof is required of specific instances of the victimization of persons belonging to the civilian population but instead indicated that documentary information as to what generally happens to such persons is sufficient.\footnote{481} In the Canadian context, war crimes have been addressed only sporadically and then only with the observation that war crimes in internal armed conflicts were not part of international criminal law before 1990.\footnote{482}

Crimes against peace or aggression was addressed by the Federal Court, not in the context of exclusion, but rather in a decision dealing with an American soldier who had deserted the U.S. army because he did not want to fight in Iraq on the basis that the invasion in Iraq in 2003 was an act of aggression. The court came to conclusion in the \textit{Hinzman} case,\footnote{483} relying on UK jurisprudence, that the notion of acts which have received the condemnation by the international community as contrary to basic rules of human conduct (which is the threshold for conscientious objectors to meet), is equivalent to the conduct prescribed in article 1F(a). The court was of the view that crimes against peace, as established by the Charter of the International Military Tribunal were considered as leadership crimes\footnote{484} and since Hinzman was a foot soldier he could not have committed such a crime.

\footnote{479} Paragraphs 161-162. The court clarified some confusion in earlier jurisprudence, namely with respect to the general notion of crimes against humanity where it corrected its earlier decision in \textit{R. v. Finta}, [1994] 1 S.C.R. 701, a criminal case (which had said that the main element of the crime against humanity was the additional component of barbaric cruelty) while it did the same indirectly with the Federal Court of Appeal case of \textit{Equizabal v. Canada} (Minister of Employment and Immigration) (C.A.) [1994] 3 F.C. 514, which had relied had on the Finta case.

\footnote{480} Carrasco v. Canada (Minister of Citizenship and Immigration), 2008 FC 436 and Liqokeli v. Canada (Citizenship and Immigration) 2009 FC 530.


\footnote{482} By the Federal Court in the cases of Bermudez v. Canada (Minister of Citizenship and Immigration) 2005 FC 286 for the situation in Honduras in 1989 and Ventocilla v. Canada (Citizenship and Immigration) 2007 FC 575 for a situation in Peru between 1985 and 1992 while in passing in \textit{Howbott v. Canada} (Citizenship and Immigration) 2007 FC 911 for Liberia between 1995 and 2003 and \textit{Bonilla v. Canada} (Citizenship and Immigration) 2009 FC 881 for Colombia between 1984 and 1993. An earlier Federal Court of Appeal decision, Gonzalez v. Canada (Minister of Employment and Immigration) (C.A.), [1994] 3 F.C. 646 had said in the context of war crimes where an asylum seeker as a member of the Nicaraguan army had been involved in a battle with a Contra unit, as a result of which three peasant women and six children were killed along with about ten Contras that this action was not culpable as ‘tragic and appalling as its inevitable result, what the applicant admitted to was participation in a military action that does not reach the concepts of war crime or crime against humanity. It was war, not war crime.’

\footnote{483} Hinzman v. Canada (Minister of Citizenship and Immigration) 2006 FC 420.

\footnote{484} Paragraphs 141-142 and 155-160.
3.3.4: France

Asylum decisions are made by the French Office for the Protection of Refugees and Stateless Persons (Office Français de Protection des Réfugiés et Apatrides, OFPRA) with an appeal to the National Court of Asylum (Cour Nationale du Droit d’Asile, CNDA) from which a final appeal lies to the Council of State (Conseil d’Etat).

There have only been few decisions in France addressing the characteristics of war crimes or crimes against humanity. With respect to war crimes, a 2006 case at the Commission level relied on the definitions of war crimes in the statutes of both the International Military Tribunal and the ICTY to provide context for this notion as it pertained to the 1999 conflict in Kosovo.

The same authority, in the context of article 15(c) of the Qualification Directive, equated the parameters of non-international armed conflict with the description for such a conflict set out in Common Article 3 of the Geneva Conventions and found that the situation in Darfur corresponded to a non-international armed conflict. This approach of referring to international humanitarian law has not been followed since 2005.

With respect to crimes against humanity, the characteristics of this crime were described by the Council of State in 1996 as acts which were part of a coherent whole and a series of repeated acts, inspired by a political, racial or cultural motive.

3.3.5 Germany

The office in charge of making refugee decisions is the Federal Office for Migration and Refugees (Bundesamt für Migration und Flüchtlinge, BAMF). There are three avenues for appeal: to the state Administrative Court (Verwaltungsgerichtshof), the state Higher Administrative Court (Oberverwaltungsgerichtshof) and finally the Federal Administrative Court (Bundesverwaltungsgericht).

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485 Section L711-1 of the Code on Entry and Stay of Foreign Nationals and the Right to Asylum (CESEDA) refers to the 1951 Refugee Convention while section L712-2 incorporates the exceptions to subsidiary protection from the Qualification Directive.


488 CRR, 22 November 2005, 538807, A.


490 S. Kapferer, ‘Exclusion Clauses in Europe’ at 198.

491 Re exclusion see section 3(2) of the Asylum Procedure Act.

492 See Asylum Procedures at 169, 172 and P. Tiedemann, ‘The use of foreign asylum procedure in the German administrative court’, in G.G. Goodwin-Gill and H. Lambert (eds), The Limits of
With respect to the issue of war crimes, the Federal Administrative Court, like the courts in Belgium, France and the UK\(^{493}\) had to decide whether article 15(c) of the Qualification Directive, which refers to international or internal armed conflicts, should be construed with a reference to international humanitarian law. In a decision rendered in 2008 it was of the view that this should be the correct manner of interpreting this article and in doing so it relied on the Geneva Conventions and their Protocols, ICTY jurisprudence and UK tribunal decisions.\(^{494}\) It also indicated, relying on these authorities, that an internal armed conflict can occur in a part of a country as opposed to a nationwide situation of conflict and as a result came to the conclusion that there was such a conflict in Iraq.\(^{495}\) The same conclusion was reached for the situation in Afghanistan.\(^{496}\) The Federal Administrative Court followed the same interpretative approach relying on the same international materials as well as the ICC Statute a year later when giving a general meaning to the terms war crimes\(^{497}\) and crimes against humanity pursuant to article 1F(a).\(^{498}\)

The same court addressed the issue of internal armed conflict in the context of Afghanistan again in 2010,\(^{499}\) where it was faced with an argument that its earlier decision should be adjusted in view of the developing UK trend in jurisprudence to seek the meaning of what constitutes such a conflict outside international humanitarian and criminal law. The judges were of the view that there is no principal reason for them to digress from their original point of view in spite of a change of heart in the UK,\(^{500}\) but do acknowledge that, since the purpose of article 15(c) is different than the underlying reasons for international humanitarian law, there can be situations in 15(c) which are not covered by humanitarian law. This can be especially the case in situations where the requirements of intensity of the conflict or the organization of the parties to the conflict, both of which are hallmarks of protracted violence required to meet the international humanitarian or criminal law threshold of internal conflict, are not met.\(^{501}\)

\(^{493}\) See below at 3.3.8.

\(^{494}\) Bundesverwaltungsgericht (Federal Administrative Court), BverwG 10 C 43.07, 24 June 2008 at paragraphs 19-24.

\(^{495}\) Ibidem at paragraph 26; the same conclusion was reached in Bundesverwaltungsgericht (Federal Administrative Court), BverwG 10 C 4.09, 27 April 2010 at paragraph 25; it rejected the proposition that such a conflict existed in the whole of Iraq in the cases of Bundesverwaltungsgericht (Federal Administrative Court), BverwG 10 C 42.07, 24 June 2008 at paragraph 4; Bundesverwaltungsgericht (Federal Administrative Court), BverwG 10 C 44.07, 24 June 2008 at paragraph 4 and Bundesverwaltungsgericht (Federal Administrative Court), BverwG 10 C 45.07, 24 June 2008.

\(^{496}\) Bundesverwaltungsgericht (Federal Administrative Court), BverwG 10 C 9.08, 14 July 2009 at paragraph 17.

\(^{497}\) Bundesverwaltungsgericht (Federal Administrative Court, Germany), 10 C 24.08, 24 November 2009 at paragraphs 32-34.

\(^{498}\) Ibidem at paragraph 39.

\(^{499}\) Bundesverwaltungsgericht (Federal Administrative Court), BVerwG 10 C 4.09, 27 April 2010.

\(^{500}\) Ibidem at paragraph 22.

\(^{501}\) Ibidem at paragraph 23.
This same court has made some findings on the nature of war crimes in general and with respect to one specific war crime, treacherous killing, in particular in the context of exclusion. The situation involved a person who ‘had shot to death two people in Chechnya and taken a Russian officer prisoner to obtain through an exchange the release of his brother, who had been taken captive in a “cleanup” operation.’ After a finding that the situation in Chechnya amounted to an internal armed conflict along the lines of the ICC Statute, the court then relied on ICTY and ICTR jurisprudence to opine that both civilians and combatants can commit war crimes.

In order to hold a person liable for war crimes a nexus need to be shown between the acts and the armed conflict, or, according to the court, ‘the existence of an armed conflict must be of material significance to the actor’s ability to commit the crime, his decision to commit the act, the manner in which it was committed, or the purpose of the act’. This was found to exist in the present case.

The court proceeded with a detailed examination of the contours of the war crime of killing or wounding treacherously, which is contained in the ICC Statute but has not received judicial consideration by the ICC as of yet, and indicated that in general ‘not every misleading of an adversary is prohibited, but rather only the exploitation of a confidence obtained under false pretences through specific acts contrary to international law’. Even in an internal armed conflict, where there is no obligation to wear a uniform, ‘combatants do not violate the prohibition on perfidy if they carry their arms openly during each military engagement, including during the preparation of attacks. This assessment must also be taken into account in the application of the prohibition of perfidy in an internal armed conflict’.

It comes to the conclusion that this crime might have been committed since:

- carrying a concealed weapon might have deceived the Russian soldiers that they need expect no attack from the resistance fighter and the Complainant working with him, and that therefore they were not allowed to attack the two of them.

- The fact that the soldiers extended confidence to the Complainant and his companion could possibly be deduced from the fact that according to the Complainant, the soldiers had turned their backs as they were struck by the shots.

As this finding and its underlying reasoning represents a good understanding of international humanitarian and criminal law, other decision makers, both at the national and international level when dealing with this specific crime might

502 Ibidem at paragraph 2.
503 Bundesverwaltungsgericht (Federal Administrative Court), BverwG 10 C 7.09, 10 February 2010 at paragraph 26-31.
504 Ibidem at paragraph 32-33.
505 Ibidem at paragraph 37-41.
506 Ibidem at paragraph 39.
507 Ibidem at paragraph 40.
508 Ibidem at paragraph 41.
very well benefit from using this judgment in developing their own understanding of this war crime.

3.3.6: The Netherlands

The Immigration and Naturalisation Service (Immigratie en Naturalisatiedienst, IND) is the decision maker for refugee claims in the Netherlands. Appeals can be made to a District Court (Rechtbank, Rb) with a further appeal to the Administrative Jurisdiction Division of the Council of State (Afdeling Bestuursrechtspraak, Raad van State, AbRS).

According to the Council of State, in order to establish that a non-international armed conflict exists, the factors set out in article 1 of Protocol II regarding the organization of the parties to the conflict and the ability to control territory must be present. As well, in its view, it is possible, pursuant to Common Article 3 of the Geneva Conventions, in conjunction with article 4 of Geneva Convention IV, which deals with the protection of civilians during occupation, that occupation can occur in a non-international armed conflict setting. However, in the case before it, the Council of State held that the requirements for occupation were not fulfilled in the situation of armed clashes between the Kurdistan Workers’ Party (PKK) and the Turkish government in South East Turkey between 1995 and 1998 but they should be characterized as acts of war. Activities set out in article 13(2) of Protocol II, which states ‘acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited’ are to be considered war crimes.

Following this reasoning, the Anfal campaign by the Iraqi government of Saddam Hussein against the Kurdish population in northern Iraq between 1986 and 1989 was considered to be an internal armed conflict during which war crimes were committed. Similarly, the conflict between Maoist groups and the government of Nepal in 1998 was considered to be an internal armed conflict, in which the illtreatment of a village head by members of the Maoist groups was a war crime given that he was a civilian. The fact that, according to the claimant, this village head was a representative of an exploitative government against which armed attacks were directed was not relevant to the status as non-combatant of the victim nor was the argument that village heads were not unarmed as they could invoke the assistance of the Nepalese army.

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509 Section 29(1)(a) of the Aliens Act 2000 refer to the 1951 Refugee Convention.
511 AbRS 23 July 2004, nr. 200402639/1 and 200402651/1.
512 AbRS 9 July 2004, nr. 200401181/1; AbRS 7 October 2010, nr. 201006259/1/V1; AbRS 14 December 2010, nr. 200909884/1/V3. Dutch courts, including the Supreme Court of the Netherlands are of the view that under Dutch law crimes committed during non-international armed conflicts between 1979 and 1989 are punishable as war crimes, see J. Rikhof, ‘Fewer Place to Hide?’ at 47-49.
According to the Council of State, it is clear with respect to crimes against humanity that based on the ICC Statute and the ICTR case of *Akeyesu*, that such crimes must have been committed in a systematic or widespread fashion. There is no need for a great number of acts to consider the systematic nature of a crime against humanity as long as these acts have been repetitive.\(^{514}\) Crimes against humanity can also be committed by non-governmental entities, which operate in an organized fashion as set out by the ICC Statute, article 7.2(d).\(^{515}\)

Following the seminal decisions of the ICTR in *Akeyesu* and the ICTY in *Tadić*, the Council of State was also of the view that the notion of civilian population as victims of crimes against humanity stands in contrast to military personnel and the term population is used to indicate the collective nature of the attack. There is no requirement that the attack is carried out against the entire population.\(^{516}\) While genocide can be considered part of crimes against humanity according to a Dutch commentator,\(^ {517}\) it is also a crime in its own right.\(^ {518}\) With respect to the underlying crimes, almost all cases have dealt with crimes such as murder, torture and inhumane acts.

The Dutch courts have sought from early on a connection between exclusion and international humanitarian and criminal law in which the reliance on international criminal law in setting out the overarching elements of war crimes and crimes against humanity has been more successful than the use of international humanitarian law. The earlier decisions of the Council of State in the area of war crimes where non-international armed conflicts were based on the definition in Protocol II might have not yielded a different result but it would have been more persuasive if instead the jurisprudence of the ICTY had been utilized instead as the Protocol II does not refer to war crimes; as well, the manner in which international criminal law has specified the requirements of an non-international armed conflict is broader than in international humanitarian law in that the control of a territory is not an essential elements in the former area of law resulting in the possibility of more situations being characterized as non-international armed conflict in exclusion situations.

On the other hand, the same judicial institution was prescient in finding that the causing terror could amount to a war crime even without the benefit of the ICTY jurisprudence\(^{519}\) although its reasoning could have been improved upon by explaining why an international humanitarian law norm could be transformed into a crime with individual responsibility.

\(^{514}\) AbRS 31 Augustus 2005, nr. 200502650/1; Rb, The Hague, Awb 09/40819, 9 April 2010.
\(^{515}\) Rb, The Hague, Awb 00/7608, 1 March 2004.
\(^{516}\) AbRS 31 Augustus 2005, nr. 200502650/1.
\(^{517}\) T.P. Spijkerboer & B.P. Vermeulen at 99.
\(^{519}\) The case of Judgment, *Galić* (IT-98-29-T), Trial Chamber, 5 December 2003, §§ 133-138 had set out the basis of this crime in customary international law and its elements almost eight months before the decision of the Council of State.
3.3.7: New Zealand

The Refugee Status Appeals Authority (RSAA) is the authority entrusted with making exclusion decisions. Judicial review is possible to the High Court of New Zealand with appeals coming before the Court of Appeal. There has been one Supreme Court and one Court of Appeal decision of relevance, as well as two judgments from the High Court of New Zealand.

At the court level, the first decision was the *Sequeiros Garate* case decided in 1997, which involved a policeman from Peru who was a member of an anti-terrorist squad in 1991 and 1992. He was responsible for the capture and interrogation of members of the Shining Path, a terrorist organization and in that capacity he arrested between 30 and 40 suspected members and had personally carried out acts of torture on a number of occasions. The court indicated that, based on the International Military Tribunal and the Canadian case of *Sivakumar*, crimes against humanity are inhumane acts against a civilian population carried out in a systematic or widespread manner.

The second High Court decision, *X & Y v. Refugee Status Appeals Authority*, involved the exclusion of a person who was the chief engineer of a ship, which had been owned by the Liberation Tigers of Tamil Eelam (LTTE) and was sunk during a confrontation with the Indian Navy in January 1993. At the time, it was carrying several LTTE members and substantial quantities of arms and explosives. It had also been found by the Refugee Status Appeals Authority that the LTTE had committed crimes against humanity. The court examined several issues related to exclusion and upheld the RSAA decision.

The Court of Appeal overturned the above decision for a number of reasons on October 20, 2009. While most of the judgment deals with the issue of complicity, one of the judges addressed the issue of whether war crimes could be committed in non-international armed conflicts. He came to the conclusion that this is possible, having traced the historical developments in this area, including those at the ICTY, while also setting out the requirements for a situation reaching the threshold of a non-international conflict based on the intensity of the conflicts and the organization of the parties involved, again relying on ICTY jurisprudence.

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520 Section 137(2) of the Immigration Act 2009 sets out the exclusion provisions.
521 See Asylum Procedures at 257, 260.
522 Sequeiros Garate v. Refugee Status Appeals Authority, M826/97, High Court, 9 October 1997.
523 X & Y v. Refugee Status Appeals Authority, CIV-2006-404-4213, High Court, 17 December 2007. This was the judicial review of the RSAA Appeal No. 74796 & 74797.
524 Paragraph 110.
526 Paragraph 278 (Judge Baragwanath).
527 Paragraphs 210-223 and 228-234.
On appeal, the Supreme Court of New Zealand issued a decision on August 27, 2010\(^{528}\) in which it limited itself to an examination of crimes against humanity, in which respect it was of the view that the definition of crimes against humanity must be derived from international instruments of which the ICC Statute was the most important.\(^{529}\)

Most cases of relevance in New Zealand have dealt with crimes against humanity,\(^{530}\) which have been uniformly described as requiring a systematic or widespread attack.\(^{531}\) More recently this has been expanded by including the four elements of this crime as described by the Canadian Mugesera case.\(^{532}\) The underlying crimes discussed in the jurisprudence have been murder,\(^{533}\) torture\(^{534}\) and persecution.\(^{535}\) None of these crimes were further defined with the exception of the crime of torture where an early RSAA decision relied on the Convention against Torture to set out the parameters of this crime.\(^{536}\)

3.3.8: The United Kingdom\(^{537}\)

Refugee decisions made by government agencies in the United Kingdom can be appealed to the First-tier Tribunal (Immigration and Asylum Chamber) with a further appeal to the Upper Tribunal (Immigration and Asylum Chamber).\(^{538}\) The decisions

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\(^{528}\) The Attorney-General (Minister of Immigration) v Tamil X and the RSAA, [2010] NZSC 107.

\(^{529}\) Paragraphs 47-48.

\(^{530}\) RSAA Appeal No. 1248/93, 31 Jul 1995 and RSAA Appeal No. 74796 & 74797, 19 April 2006 refer in passing to violations of common article 3 of the 1949 Geneva Conventions and the 1977 Additional Protocol II. The latter case is currently considered to be the leading case for exclusion 1F(a) issues.

\(^{531}\) RSAA Appeal No. 1655/93, 23 November 1995, RSAA Appeal No. 73823, 11 August 2003, RSAA Appeal No. 74129, 29 July 2005, RSAA Appeal No. 75896, 10 November 2006, RSAA Appeal No. 74302, 26 June 2006, RSAA Appeal No. 75634, 24 May 2006 and RSAA Appeal No. 74796 & 74797, 19 April 2006; the one exception has been the case of RSAA Appeal No. 72635, 6 September 2002 where the Canadian case of Equizabal v. Canada (Minister of Employment and Immigration) (C.A.) 1994] 3 F.C. 514 was cited to say that the main element of the crime against humanity of torture is the additional component of barbaric cruelty; the Equizabal case had been following the 1994 Supreme Court of Canada decision of R. v. Finta, [1994] 1 S.C.R. 701 on this point, which was overruled by Mugesera v. Canada (Minister of Citizenship and Immigration), 2005 SCC 40.

\(^{532}\) RSAA Appeal No. 74273, 10 May 2006 and RSAA Appeal No. 74796 & 74797, 19 April 2006.

\(^{533}\) RSAA Appeal No. 74302, 26 June 2006, RSAA Appeal No. 75896, 10 November 2006 RSAA Appeal No. 75896, 10 November 2006 and RSAA Appeal No. 74273, 10 May 2006.


\(^{535}\) RSAA Appeal No. 74302, 26 June 2006 and RSAA Appeal No. 75896, 10 November 2006.

\(^{536}\) RSAA Appeal No. 1655/93, 23 November 1995.

\(^{537}\) Sections 1 and 2 of the Asylum and Immigration Appeals Act of 1993, which makes reference to the 1951 Refugee Convention. Section 55(1)(a) of the Immigration, Asylum and Nationality Act 2006 also allows the Secretary of State to issue a certificate during an appeal procedure to the effect that a person is not entitled to protection because exclusion ground 1F applies to this person.

\(^{538}\) This is as of February 15, 2010; between 2004 and 2010 there was the Asylum and Immigration Tribunal (AIT) for the same purpose while before 2004 there was an appeal tribunal called the Immigration Appeal Tribunal (IAT). See in general Asylum at 369-370 and M. O’Sullivan, ‘The Intersection between the International, the Regional and the Domestic: Seeking Asylum in the UK’, in
of the latter can be taken to the Court of Appeal. There has been one decision involving international crimes as part of the refugee or immigration process at two court levels\textsuperscript{539} and several at the tribunal level,\textsuperscript{540} of which the Gurung case\textsuperscript{541} is considered the most important.

The Gurung case, which involved a person who was a member of the Nepalese Communist Party between 1996 and 2000 and attended meetings and on occasion participated in protests against government land policies, addressed several issues regarding exclusion under article 1F(a). The tribunal noted first of all that the interpretation of article 1F(a) should have regard to the statutes of the ICTY, ICTR and the ICC as sources and to the jurisprudence decided pursuant to these instruments.\textsuperscript{542} It also stated that ‘a crime against peace has been defined as including planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances’.\textsuperscript{543} With respect to the latter concept, the Immigration Appeal Tribunal has made it clear that leaders of non-state organizations cannot commit crimes against peace.\textsuperscript{544} These findings are consistent with international criminal law as it stood at the time of the decisions although international criminal law has now broadened and clarified the definition used by the tribunals after the Second World War, which was the one applied in Gurung.

The concept of crimes against humanity was applied by the Upper Tribunal (Immigration and Asylum Chamber) to a situation in Zimbabwe where a person had been involved in violent invasions of land owned by two white farmers and in the violent expulsion of their black farm workers from their houses and jobs on those farms.\textsuperscript{545} The tribunal came to the conclusion that crimes against humanity applied because the attacks were ‘part of widespread systematic attacks against the civilian population of farmers and farm workers, carried out not just with the full knowledge of the regime but as a deliberate act of policy by it, with the intention of advancing its grip on power, suppressing opposition, and helping its supporters’.\textsuperscript{546} With respect to

\begin{footnotesize}
\begin{itemize}
\item JS (Sri Lanka) and Secretary of State for the Home Department, [2009] EWCA Civ 364 and R (on the application of JS) (Sri Lanka) (Respondent) v Secretary of State for the Home Department (Appellant), [2010] UKSC 15.
\item In 2004 the AIT mentioned in passing that a person who kills soldiers in battle (in the Sri Lankan context) exclusion ground 1F(a) is not engaged as no war crimes were committed in such a situation, see PK v Secretary for State for the Home Department, [2004] UKIAT 00089.
\item Gurung and the Secretary of State for the Home Department, [2002] UKIAT 04860. Gurung was approved in obiter by the Court of Appeal in the case of MH (Syria) v Secretary of State for the Home Department, [2009] EWCA Civ 226.
\item Paragraph 34.
\item Paragraph 2.2.1.
\item SK (Article 1F(a) – exclusion) Zimbabwe [2010] UKUT 327 (IAC)
\item Paragraph 36.
\end{itemize}
\end{footnotesize}
the underlying crimes, these invasions caused great physical and mental suffering as a result of the accompanying mob violence with beatings administered to men and women, burnings and lootings in a deliberately brutal and terrifying manner, as a result of which the crime against humanity of inhumane acts was engaged. Even though the tribunal did not rely upon the ICTY/ICTR jurisprudence regarding the crime against humanity of inhumane acts and even though the international jurisprudence has not examined this particular situation in that context, the level of violence described in this case is consistent with the analysis and the elements described in the international jurisprudence and as such is a good example of applying existing international norms to a new fact pattern.

As well, some other areas of refugee law have providing indirect guidance to the meaning of the crimes contained in article 1F(a). The notion of internal armed conflict in article 15(c) of the Qualification Directive has been given attention in three decisions by the Immigration Appeal Tribunal in 2008 and 2009, namely HH & others (Mogadishu: armed conflict: risk) Somalia v Secretary of State for the Home Department, KH (Article 15(c) Qualification Directive) Iraq v Secretary of State for the Home Department, and AM & AM (Armed Conflict: Risk Categories) Somalia v Secretary of State for the Home Department.

The first decision set out in great detail the history of the provisions in international law dealing with both international and internal armed conflicts, while it also canvassed academic literature and the jurisprudence of the International Court of Justice and the ICTY, especially the Tadić case. In applying the jurisprudence of the ICTY, the Tribunal distilled two main propositions with respect to the notion of internal armed conflict, namely that it must amount to a protracted armed violence between two parties, governmental or non-governmental, and that the conflict is limited both in duration and location to only when and where two parties are engaged in such violence. Based on these two premises it came to the conclusion that there was such a conflict in Somalia in the early nineties but only around Mogadishu.

The second case built on the two general premises of the first and after an in-depth examination of the ICTY case-law and some jurisprudence of the Sierra Leone Sepcial Court and the ICC, the Tribunal came to the conclusion that the essential elements for a determination of an internal armed conflict are twofold, namely some degree in the organisation of the parties to the conflict and an intensity of the conflict which goes beyond situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, or other acts of a similar nature. The second

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547 While in a fourth decision it was conceded by the government that the whole of Afghanistan amounted to such a conflict in the case of GS (Existence of Internal Armed Conflict) Afghanistan v. Secretary of State for the Home Department, [2009] UKAIT 00010.
549 [2008] AIT 00023.
551 Paragraphs 255-270.
552 Paragraphs 318-331.
553 Paragraphs 71-80.
element of intensity can be further analysed under four sub-headings, namely the length or protracted nature of the conflict; the seriousness and increase in armed clashes; the spread of clashes over the territory; and the increase in number of forces. Based on these parameters it came to the conclusion that there was an internal armed conflict in the whole of Iraq. The third case examined again the situation in Somalia and applied the same jurisprudence in the previous case. It took the view that given the lack of information available about the country conditions in all of Somalia, it came to the conclusion that there was an internal armed conflict in central and southern Somalia and not just Mogadishu.

The reliance on international humanitarian law by the Immigration Appeal Tribunal in the above decisions has been put in doubt by QD & AH (Iraq) (Appellants) v Secretary of State for the Home Department (Respondent), which states the following:

International humanitarian law (IHL) is the name given to the body of law which seeks to protect both combatants and non-combatants from collateral harm in the course of armed conflicts. It thus has a specific area of operation. It also, however, has defined and limited purposes which do not include the grant of refuge to people who flee armed conflict.

It added that "the phrase "situations of international or internal armed conflict" in article 15(c) has an autonomous meaning broad enough to capture any situation of indiscriminate violence, whether caused by one or more armed factions or by a state." Unfortunately there is no further reasoning to explain this departure from earlier consistent and persuasive reasoning, which is most likely the reasoning why a German court decided not to follow this UK decision when called upon to interpret article 15(c) a year later.

3.3.9: The United States

The United States has not ratified the Refugee Convention or the ICC Statute. As a result, a number of relevant terms have been decided in a more autonomous fashion than elsewhere, either legislatively or jurisprudentially. While the terms genocide,

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554 Paragraph 2 81-82.
555 Paragraphs 147-157.
556 Paragraphs 128-149.
558 Paragraph 16.
559 Paragraph 35; see also HM and Others (Article 15(c)) Iraq CG [2010] UKUT 331 (IAC) at paragraph 77; HK and others (minors – indiscriminate violence – forced recruitment by Taliban – contact with family members) Afghanistan CG [2010] UKUT 378 (IAC) at paragraph 15; and Asylum Policy Instructions on Humanitarian Protection, paragraph D.5.
560 Section 212(a)(3)(E)(ii) of the Immigration and Nationality Act; this section refers for the definition of “genocide” to section 1091(a) of Chapter 50A of title 18 of the U.S. Code where a description very similar to the one in articles I and II of the Genocide Convention can be found.
extrajudicial killing, torture and child recruitment have been given meaning in the Immigration and Nationality Act (INA) the concept of persecution in the context of human rights violations has been the subject of judicial interpretation. The United States regulates the granting of asylum in section 208 of the INA, which contains a number of exceptions (called mandatory bars to asylum). None of them uses the words genocide, war crime or crimes against humanity, or is based on the exclusion provision in the Refugee Convention dealing with such crimes. However, the exceptions used are of a type to ensure that claimants would not be granted asylum if involved in activities of that nature. The one used most frequently in dealing with human rights violators is the provision which disallows refugee protection for persons ‘ordering, inciting, assisting or otherwise participating in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion’.

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561 Section 212(a)(3)(E)(iii)(II) of the INA; for the definition of extrajudicial killing reference is made to section 3(a) of the Torture Victim Protection Act of 1991 (section 1350(3)(a) of Chapter 85 of Title 28 of the U.S. Code) which says it this a ‘deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation’.

562 Section 212(a)(3)(E)(iii)(I) of the INA; this section refers for the definition of torture to section 2340(1) of Chapter 113C of title 18 of the U.S. Code, which is almost identical to the description of torture in article 7.2(e) of the ICC Statute rather than the more limited definition in article 1.1 of the Torture Convention (which has been replicated in section 1350(3)(b) of Chapter 85 of Title 28 of the U.S. Code) while the U.S. definition has added its own definition in subsection 2340(2) for severe mental pain or suffering.

563 Section 212(a)(3)(G) of the INA. This was added on October 3, 2008 by virtue of the Child Soldiers Accountability Act of 2008; the definition of child recruitment, which can be found in the amended section 2442 of Chapter 118 of Title 18 of the U.S. Code is virtually identical to article 8.2(e)(vii) of the ICC Statute.

564 The concept of crimes against humanity has been described in the jurisprudence (without any reference to international criminal law) as ‘crimes against humanity include murder, enslavement, deportation or forcible transfer, torture, rape or other inhumane acts, committed as part of a widespread [or] systematic attack directed against a civilian population.” in the civil case of The Presbyterian Church of Sudan v. Talisman Energy, Inc., No. 07-0016-cv (US 2d Cir 2009).

565 Section 208(b)(2)(A) of the INA.

566 Although this term is used in a public U.S. immigration government document, namely the Affirmative Asylum Procedures Manual of the U.S. Citizenship and Immigration Services, Refugee, Asylum, and International Operations Directorate, Asylum Division, November 2007, which uses on page 61 the following sentence: ‘human rights abusers and modern-day war criminal cases, inquiries, or allegations, to include activity involving an individual suspected of having ordered or engaged in persecution of others, war crimes, genocide or torture’, the notion of war crime is known in U.S. law in general namely in section 2441of Title 18 of the U.S. Code and which provides a definition which consistent with contemporary international criminal law such as the statutes of the ICTY and the ICTR.

567 There have been calls to include this concept into U.S. law, see for instance the testimony of Pamela Merchant, Executive Director, the Center for Justice & Accountability before the Subcommittee on Human Rights and the Law, U.S. Senate Committee on the Judiciary “From Nuremberg to Darfur: Accountability for Crimes against Humanity”, 24 June 2008.

568 Section 208(b)(2)(A)(i) of the INA.
Refugee matters are decided by immigration judges and other decision makers under the Immigration and Nationality Act. Appeals can be launched with an administrative tribunal called the Board of Immigration Appeals (BIA), the decisions of which are subject to judicial review by the United States Courts of Appeals.  

There is no difference in the U.S. jurisprudence between the notions of persecution, as faced by victims when applying for asylum or when used to connote the harm inflicted by perpetrators of human rights violations. Sometimes the Court of Appeals clarified the meaning of aspects of this definition in cases dealing with perpetrators, while in other cases they have relied on victim oriented cases to use the same parameters of persecution. According to general persecution case-law, the term persecution contemplates the infliction of suffering or harm, under government sanction, upon persons who differ from others in specified ways, namely race, religion, national origin, or political opinion. Persecution comes in many forms, mental as well as physical, and causing mental anguish, fear and humiliation are all indicia of persecution. The harm or suffering need not be physical, but may take other forms, such as the deliberate imposition of severe economic disadvantage, or the deprivation of liberty, food, housing, employment, or other essentials of life. It also includes detention, arrest, interrogation, prosecution, imprisonment, illegal searches, confiscation of property, surveillance, beatings, or torture, as well as arrest and detention for selling books containing disfavored views. However, not every harmful act is persecutory; acts do not rise to the level of persecution when they consist of only a few isolated incidents of verbal harassment or intimidation.

The Board of Immigration Appeals in the Rodriguez-Majano case has indicated that engaging in acts of warfare in open combat taken in furtherance of political goals are not necessarily persecutory acts by saying that:

harm which may result incidentally from behavior directed at another goal, the overthrow of a government or, alternatively, the defense of that government against an opponent, is not persecution. In analyzing a claim of persecution in

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570 The U.S. uses a similar definition for persecution as contained in the Refugee Convention in section 101(a)(42) of the INA but specifically adds: ‘for purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.’

571 For a recent example of the latter, see Gao v. U.S. Attorney General, 500 F.3d 93 (2d Circuit 2007).


573 Abdel-Masieh v. INS, 73 F.3d 579 (5th Circuit, 1996).


the context of a civil war, one must examine the motivation of the group threatening harm.

In this context the Board was of the view that reference to international laws governing warfare may be useful in determining whether actions taken in the context of warfare constitute persecution or are legitimate acts of war. However, if an act is done on one of the five protected grounds it is persecution even in wartime. It specified several aspects that it found not to be persecution but rather acts related to civil war, such as drafting of youths as soldiers, unofficial recruitment by force, disciplining members of a rebel groups, prosecuting draft dodgers, engaging in military actions, attacking garrisons, and destruction of property.

This one case, which discussed the notion of war, was decided before the establishment of the ICTY and ICTR, so it is understandable that the definition and reasoning of the tribunal in that case did not make any connection to international criminal law. However, it is hoped that with newer cases this reliance on international law will become a more natural approach to take for tribunals and court. Similarly, while the larger notion of crimes against humanity is not known in the U.S. refugee legislation, the concept of persecution has largely taken its place and while in international criminal law persecution is only type of crimes against humanity, the U.S. case-law has been intuitively quite consistent in setting out the parameters of persecution in a matter consistent with the international jurisprudence regarding crimes against humanity in terms of the types of behaviour included in persecution.

3.4: Conclusion

In order to determine whether exclusion law has been following international criminal law concepts in terms of the parameters of the chapeau elements of the international crime as well as the specific crimes it is necessary to assess first whether international criminal law itself has been able to provide a consistent approach in defining war crimes and crimes against humanity. The crimes of aggression and genocide are less relevant in this context in that there has been no international guidance from international institutions for the crime of aggression while genocide is not mentioned in article 1F(a). Given the direct reference in article 1F(a) to international instruments, which would include the statutes of the international tribunals and the ICC one would expect that the national jurisprudence would have made reference to those documents and its related jurisprudence.

The development of international criminal law as it pertains to war crimes and crimes against humanity, as well as to the elements of the underlying crimes, has been very consistent at the international level. This is not surprising given the fact that any differences of opinion between the trial chambers of the ICTY and ICTR could be easily resolved by their joint Appeals Chamber. This was the case when the two theories surrounding the crime of rape were reconciled in the Kunarac judgment, in effect saying that the notions of coercive circumstances and consent are not alternatives but complementary. This approach can also be found in the ICC Statute. Similarly, in the context of the hate crime component of the crime against humanity
of persecution, the ICTY was of the view that it did not constitute such a crime and the ICTR reached the opposite view. The Appeals Chamber ruled that a hate crime could fall within the parameters of persecution but on a narrower plane than had been advocated by the ICTR Trial Chamber, namely by requiring a link between a hate speech and subsequent crimes as well as requiring that the hate speech had to be violent.

As well, given the fact that the two internationalized tribunals, which were the result of agreements between the United Nations and national governents, in Sierra Leone and Cambodia, had their statutes based primarily on the ICTY and ICTR statutes, it is not surprising that the jurisprudence of the Sierra Leone Special Court and the Extraordinary Chambers of the Courts of Cambodia has relied heavily on the ICTY and ICTR case-law. On the other hand, the Sierra Leone Special Court has not hesitated to break new ground when called upon, as was the case when no other jurisprudence was available with regard to the war crime of child recruitment or forced marriage as a crime against humanity.

However, possibilities of divergence between the established jurisprudence of the ICTY and ICTR and the ICC Statute as negotiated in Rome in 1998 certainly existed. This would have an effect on the national level as domestic authorities, both in the criminal context and civil cases, including exclusion, would have to apply different standards depending on when and where a particular crime had been defined. There are already some temporal elements to be considered even after the establishment of the first international institutions dispensing international criminal law, such as the fact that war crimes in non-international armed conflicts probably did not existed before 1990.

For the most part such discrepancies have not materialized. As the ICC Statute is generally seen as the most comprehensive reflection of international criminal law in 1998, it has for the most part incorporated the ICTY and ICTR case-law as it stood during the time of negotiations with some notable exceptions (apart from providing more clarification for particular crimes, such as was done for the sexual violence crimes, which could have been brought under more general headings under the ICTY and ICTR statutes in any event). One such variation pertains to the elements of the crime of torture, which has undergone a slight expansion when compared to the ICTY and ICTR case-law. Of the three requirements of the Torture Convention, severe pain or suffering, for a particular purpose, by a state official, the ICTY/ICTR judges had already eliminated the latter while adding several other prohibited purposes. The ICC Statute has also deleted the purpose requirement, which is more a difference in style rather than substance, as the purpose element in the ICTY and ICTR case-law had already become so broad as being always present when this crime was committed.

Another example of divergence is the fact that the crime against humanity of persecution has undergone an expansion from only three victim groups (political, religious and racial) to seven specifically named (political, racial, national, ethnic, cultural, religious and gender). Furthermore, a formula has been adopted to include
other grounds if ‘universally recognized as impermissible under international law’.
Again, this does not represent a major difference with ICTY and ICTR case-law as
the crime of persecution as charged under the ICTY and ICTR jurisdictions never
hinged on the victim group but rather on the activities carried out against such
groups. The fact that the ICC Statute has added the requirement that this crime has to
be connected to another crime is most likely a jurisdictional requirement and not part
of substantive law.

The ICC Statute, while being the embodiment of international criminal law in 1998,
is not as comprehensive as it may once have been in setting all the underlying crimes
known in this area of international law. The ICTY has added the war crimes of
causing terror, sniping and shelling to the number of violations of international
humanitarian law for which individual responsibility can be imposed.

At the national level, the discussion in refugee determination decisions with respect
to war crimes has taken place primarily in the context of non-international conflicts.
This happened at two levels, namely in interpreting the exclusion ground in article
1F(a) itself or, in Europe, indirectly by an examination of article 15(c) of the
Qualification Directive. In the direct approach, ICTY jurisprudence was used to
decide that war crimes could not be committed in such conflicts before 1990 (Canada
and New Zealand) although in Belgium and the Netherlands it was found to apply to
situations in the late eighties. Although the Tadić decision by the ICTY Appeals
Chamber was factually related to a armed conflict situation in 1991, its more general
reasoning and its reliance on customary international law, where some reference was
made to national criminal decisions with findings of war crimes in non-international
armed conflicts before that time, makes it difficult to point to a precise date for the
expansion for individual criminal liability from international armed conflicts to its
non-international counterparts. As such, the Belgian and Dutch decisions cannot be
said in error when putting them in the international criminal law context.

The examination of the Qualification Directive was based initially on international
treaties regulating non-international armed conflicts such as Common Article 3 of the
Geneva Conventions and Protocol II to determine whether an article 15(c) situation
amounted to an internal armed conflict in countries such as Afghanistan (Germany),
Iraq (France, Germany, Sweden and the UK), Ivory Coast (Belgium), Somalia (UK)
and Sudan (France), while a number of UK cases also incorporated the more detailed
elaborations on this concept as developed in the ICTY jurisprudence. This reliance on
international humanitarian law was put in doubt by a decision in the UK in 2009,
which was of the view that the words ‘situations of international or internal armed
conflict’ in article 15(c) were broader than the threshold for non-international armed
conflicts. The German Federal Administrative Court in 2010 adopted a different
approach by saying that internal armed conflicts can occur outside the realm of
international humanitarian law and then have an autonomous meaning but there is no
reason not to utilize the body of law from the ICTY jurisprudence if a situation is
similar to a non-international conflict defined in the instruments above.
As the German decision is better reasoned than the latest British one and because there is no convincing reason given in the latter judgment, apart from a general statement regarding the different purposes of international humanitarian law compared to refugee law, the German approach is the preferable one. However, in order to serve this humanitarian purpose of the Qualification Directive as best as possible it would be desirable in the future to have more regard for the concept of non-international armed conflict as developed in international criminal law rather international humanitarian law, as it has a wider application. It is wider in two aspects compared to international humanitarian law in that control of a territory is not a requirement while as well such a conflict can also take place between non-state entities and not just between a state and a non-state entity as is the case in international humanitarian law.

Crimes against humanity have received a great deal of treatment in all common law countries, except the U.S., as well as in the Netherlands. The courts in these countries agree with the main international elements of this concept, namely a systematic or widespread attack against a civilian population with knowledge of the attack. These general aspects of crimes against humanity are consistent with international criminal law, primarily because the national court in setting out these requirements relied directly on international jurisprudence. In Australia, the Federal Court of Australia, Full Court, has provided more detail about one aspect of the definition by saying that police officers who are victimized are part of a civilian population, while in Canada the same was said about people incarcerated in civilian prisons. The Netherlands came to the same conclusion for government officials such as village heads in Nepal. Again, these applications of the concept of crimes against humanity are consistent with international criminal law. This is the case directly with respect to police officers as the Australian situation pertained to a situation of peace and as such came to the same conclusion as the Special Court of Sierra Leone.578

With respect to the last international crime, aggression or crimes against peace, this is mentioned in general in both a UK and Dutch manual (the latter with a prescient reference to United Nations General Assembly Resolution 3314, which has now become part of the crime of aggression in the ICC Statute). In Canada this crime was analyzed outside the confines of exclusion law, namely as part of the issue of conscientious objectors, leading to the conclusion, that it did not apply to regular soldiers while in the UK it was said it could not be used in a situation involving non-government actors. Belgium applied this concept directly to a situation in Somalia in 1982 with respect to a high-level government official involved in the planning of an invasion into another country. While none of these national decision makers made reference to the ICC Statute as their decisions preceded the Kampala Review Conference, it is remarkable that all the parameters for this crime were not only in accordance with international law at the time of the decisions but also with later understandings of the contours of this crime in international criminal law.

As regards to specific or underlying crimes, which are part of war crimes and crimes against humanity, in most cases such crimes were not discussed as it was clear that the organization under discussion has been involved in at least murder or torture (plus persecution in one early New Zealand tribunal decision which also defined torture with reference to the Convention against Torture) both of which are mentioned as such crimes. However, the Federal Court of Australia, Full Court, discussed what type of control is required for the underlying crime of torture as defined by the ICC Statute and came to the conclusion that it has only to be factual, as opposed to legal, control and such represents a useful contribution to international criminal law which has not made any finding on this specific point.

In the UK, the crime against humanity of inhumane acts was applied to a situation of violent invasions of land in Zimbabwe, as was the crime of forcible transfer by an Australian tribunal to a situation in Iraq where the southern marshes had been drained resulting in people leaving that territory. In Belgium, a tribunal indicated that bombardment of civilians and the destruction of water wells amounted to war crimes. While there was no international jurisprudence with respect to the specific situations under consideration the extrapolation from international jurisprudence and from the reasoning used at the international level was not at all at odds with the conclusion that the above atrocities amounted to war crimes or crimes against humanity. This is most likely the result of intuitively applying the same thinking at the national level to the very serious nature of the violations against civilians, although in the future a more direct examination of the international jurisprudence and a justification why the fact situation before the national decision-maker would fit within the parameters of the international framework would be useful. Similarly, in the Netherlands, the Council of State used the war crime of causing terror based on the prohibition in Protocol II to decide that this international humanitarian law prohibition also had an individual responsibility application without making use of the ICTY jurisprudence, which had considered the same crime eight months earlier and had used the provisions of both Protocol I and II.  

On the other hand, in Germany the war crime of treacherous killing or wounding was addressed in detail without any benefit of recent international jurisprudence, as there was none. The Federal Administrative Court was of the view that this crime, when carried out during an internal armed conflict, includes the elements of concealing a weapon and creating a false confidence in the opposite side of the conflict. This reasoning and conclusion by a national court could very well be of benefit for especially the ICC when called upon to interpret this crime.

It can be concluded from the observations made above in regards to the relationship between international and national jurisprudence with respect to international crimes that the exclusion jurisprudence has not strayed very much at all from the international jurisprudence and as such has taken the reference to international

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579 Judgment, Galić (IT-98-29-T), Trial Chamber, 5 December 2003, §§ 86-138 for the discussion of this crimes, with §§ 94-95 regarding Protocol II.
instrument in exclusion 1F(a) seriously and accurately. An exception to this general pattern is the U.S.

With respect to U.S. law and jurisprudence, the crime of persecution may result in deprivation of refugee status. The jurisprudence of the U.S. Courts of Appeals does not distinguish between the notion of persecution from the perspective of the victims or as committed by the perpetrator. While international institutions have frowned on reliance on human rights instruments to define crimes against humanity because of the different purposes to be achieved in the two spheres of international law, namely protection against a state for one and determining individual criminal responsibility for the other, the difference of its application to the facts in specific cases seems to be more one of perception than reality.

Similarly, while there is no direct cross-reference in the U.S. legislation or jurisprudence to international criminal law, the definitions of genocide and torture in the Immigration and Nationality Act are remarkably similar to the definitions of the same crimes in the ICC Statute. Lastly, while persecution is only one crime out of eleven possible crimes against humanity, the U.S. jurisprudence does not appear to be out of step in applying what would be in theory the narrower concept of persecution rather than using a larger number of crimes committed against a civilian population in a systematic or widespread fashion, the hallmarks of crimes against humanity. The situations in which persecution in the U.S. were held to be applicable were very similar to the facts, against which the other countries under consideration have used the concept of crimes against humanity in general as used in their legislation or jurisprudence. The one exception in the U.S. is declaring legislatively that the one child policy in China, which includes abortion, amounts to persecution.

As a final observation it can be said that in the area of defining international crimes there is a high degree of agreement at the international level while at the domestic level the use of international instruments is widespread with some attention also being given to the most important jurisprudence coming out of the ICTY and ICTR. Where there has not been such jurisprudence, the domestic courts have applied their own reasoning to the characterization of underlying crimes in a manner that cannot be faulted. However, since a trend can be detected in the national jurisprudence where attention is being given to the less obvious specific crimes than murder, torture or rape, it will become necessary to go beyond the intuitive reasoning employed so far and utilize the international case-law, which have defined and circumscribed these crimes in great detail. Not only would the reasoning of the exclusion decision-makers

580 See Judgment, Kupreškić et al. (IT-95-16), Trial Chamber, 14 January 2000, §§ 586–598.

581 In both U.S. law and international criminal law the persecution has to be committed on discriminatory grounds which in U.S. law is based on race, religion, nationality, membership in a social group or political opinion, while the ICTY and ICTR Statutes are narrower by only allowing this crime based on political, racial and religious grounds although the ICC Statute has actually expanded the groups, which can be subject to persecution to any identifiable group as recognized in international law and as such is broader than U.S. law. On the other hand, the ICTY/ICTR case-law and the ICC Statute limit the parameters of these groups by saying that persecution has of the same level of severity as the other crimes against humanity.
become more persuasive it would also allow for a more consistent development of the over-all national jurisprudence.
Chapter 4

Exclusion and the modes of participation in international crimes: extended liability in article 1F(a)

4.1: International criminal law

4.1.1: Introduction

Like domestic criminal law, international criminal law employs a number of concepts aimed at holding persons liable for the commission of international crimes in addition to having personally committed such crimes. As a matter of fact, the majority of cases decided by international criminal institutions involved persons who had not personally committed these crimes. The reason for that choice lies in the nature of the international crimes, which because of their scale and collective nature call for an approach where the persons who are most culpable because of their leadership positions or directing minds usually do not interact directly with the victims of the crimes. A good example of this difference between national domestic law and international law is the attention given at the international level to legal concepts such as the liability of military commanders or senior persons within a civilian hierarchy who direct crimes from a distance or the concept of joint criminal enterprise where the criminal liability of a particular person within a larger group is difficult to pinpoint but where there is no doubt that the group as a whole was responsible for the commission of these crimes.

However, while the jurisprudence with respect to the parameters of the international crimes of genocide, war crimes and crimes against humanity has been quite consistent, the same cannot be said for extended liability. This is especially poignant when comparing the jurisprudence of the ICTY and the ICTR with that of the ICC. The ICTY and ICTR was instrumental in the development of the law in the area of joint criminal enterprise which over the years extended its application from smaller groups involved in crimes to people administering entities such as camps where detainees where abused to more recently to groups of people organizing and carrying out crimes over large territories. The ICC, on the other hand, has so far preferred a legal construct where the control over the international crimes by persons occupying high positions in governments or non-governmental organizations was criminalized by utilizing the notion of co-perpetration. Neither approach is incompatible with the other but there has been disagreement between the international criminal institutions as to the proper basis of these legal concepts, which will be further explored later in this chapter.

This chapter will begin by addressing those criminal liability concepts in international criminal law, the equivalent of which have frequently been used in national refugee determination jurisprudence, namely aiding and betting, complicity, joint criminal
enterprise, membership in a criminal organization, and command or superior responsibility while the relatively new form of extended liability, co-perpetration, will also be given attention as this might become of interest to refugee decision makers in the near future.

4.1.2: Aiding and abetting

While the terms aiding and abetting are usually used conjunctively, the two notions within this concept are slightly different in that aiding refers to some form of physical assistance in the commission of a crime while abetting connotes encouragement or another form of moral suasion. The actus reus of adding and abetting consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of an international crime. Either aiding or abetting alone is sufficient to render a person criminally liable for the crime committed by the actual perpetrator. Aiding and abetting can be committed at a time and place removed from the actual crime.

The actus reus of aiding and abetting may be perpetrated through an omission, provided that this failure to act had a decisive effect on the commission of the crime. The actus reus and mens rea requirements for aiding and abetting by omission are the same for aiding and abetting by a positive act. The critical issue to be determined is whether, on the particular facts of a given case, it is established that the failure to discharge a legal duty assisted, encouraged, or lent moral support to the perpetration of the crime, and had a substantial effect on it. The mere presence at the scene of a

583 Judgment, Nahimana, Barayagwiza and Ngeze (‘Media’) (ICTR-99-52-A), Appeals Chamber, 28 November 2007, § 482; Judgment, Rakundo, (ICTR-2001-70-A), Appeals Chamber, 20 October 2010, § 52; and Judgment, Kanyarukiga (ICTR-02-78), Trial Chamber, 1 November 2010, § 621; Judgment, Đorđević (IT-05-87/1), Trial Chamber, 23 February 2011, § 1873; Special Tribunal for Lebanon, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative charging, STL-II-OI/II/AC/RJ76bis, Appeals Chamber, 16 February 2011, §§ 226. There had been disagreement at the Trial Chamber level whether the contribution had to be ‘direct and substantial’ (on one hand, the cases of Judgment, Tadić (IT-94-1), 7 May 1997, §§ 730, 738 and Judgment, Mucić et al. (Čelebići Camp’) (IT-96-21), Trial Chamber, 16 November 1998, §§ 325–327 the requirement of ‘direct’ had been added while in Judgment, Furundžija (IT-95-17/1-T), Trial Chamber, 10 December 1998, §§ 225, 234; Judgment, Aleksovski (IT-95-14/1), Trial Chamber, 25 June 1999, § 61; Judgment, Rutaganda (ICTR-96-3-T), 6 December 1999, § 42; Judgment, Musema (ICTR-96-13-T), Trial Chamber, 27 January 2000, § 126; and Blaškić (IT-95-14), Trial Chamber, 3 March 2000, §§ 283–288 it had not) but the directness requirement was eliminated in Judgment, Tadić (IT-94-1-A), Appeals Chamber, 15 July 1999, § 229; see also Judgment, Kayishema and Razindana (ICTR-95-1-A), Appeals Chamber, 1 June 2001, §§ 191-194.
587 Judgment, Orić (IT-03-68-A), Appeals Chamber, 3 July 2008, §§ 42-46; Judgment, Mrkić et al. (IT-95-13/1-A), Appeals Chamber, 5 May 2009, §§ 145-159; Judgment, Popović et al. (IT-05-88-T),
crime can be an example of an omission. While such presence of an individual in a position of superior authority does not suffice to conclude that he encouraged or supported the crime, the presence of a person with superior authority, such as a military commander, can be ‘a probative indication for determining whether that person encouraged or supported the perpetrators of the crime’. Where the presence of a person bestows legitimacy on, or provides encouragement to, the actual perpetrator, it may be sufficient to constitute aiding and abetting. Moreover, responsibility for having aided and abetted a crime by omission may arise, regardless of whether the person’s presence at the crime scene provided encouragement to the perpetrators, if the person was under a duty to prevent the commission of the crime but failed to act, provided his failure to act had a substantial effect on the commission of the crime. Aiding and abetting is also possible where a commander allows the use of resources under his or her control, including personnel, to facilitate the perpetration of a crime.

The mens rea required for adding and abetting is the knowledge that the practical assistance, encouragement, or moral support assists or facilitates the commission of the offence though the accused does not need to have the intent to commit the crime. It is not necessary that the aider and abettor knows the precise crime that was intended and that was committed but he must be aware of the essential elements of the crime committed by the principal offender, including the principal offender’s state of mind. However, the aider and abettor does not need to share the intent of the principal offender, nor does he need to know who is committing the crime.

With respect to aiding and abetting genocide, the ICTR in Akayesu found that this form of commission is present if a person knowingly aided or abetted one or more persons in the commission of genocide, while knowing that such a person or persons

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590 Judgment, Mrkšić et al. (IT-95-13-1-A), Appeals Chamber, 5 May 2009, § 49; Judgment, Kanyarukiga (ICTR-02-78), Trial Chamber, 1 November 2010, § 621; Judgment, Đorđević (IT-05-87/1), Trial Chamber, 23 February 2011, § 1875.
592 Judgment, Brđanin (IT-99-36-A), Appeals Chamber, 3 April 2007, § 484; Judgment, Đorđević (IT-05-87/1), Trial Chamber, 23 February 2011, § 1876. It would appear that article 25(3)(c) of the ICC State imposes a higher level of mens rea by adding the words ‘for the purpose of facilitating the commission’.
were committing genocide, even though the aider and abettor himself did not have the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group.\footnote{596}

4.1.3: Complicity

While the terms complicity and aiding and abetting appear to be similar,\footnote{597} they have been the subject of debate in the ICTY and ICTR jurisprudence. The ICTY and ICTR statutes contain a specific provision with respect to complicity in genocide,\footnote{598} while at the same time having a general provision of extended liability for all crimes, which includes aiding and abetting.\footnote{599} The question has arisen as to whether these two notions overlap. The answer given was that aiding and abetting is only one aspect of the larger notion of complicity and that for genocide, the \textit{mens rea} for complicity, which goes beyond aiding and abetting, could possibly be the narrower, specific intent of genocide.\footnote{600} It has also been said that complicity in genocide requires a positive act, while with aiding and abetting the same crime can be accomplished by failing to act or refraining from taking action.\footnote{601} The question remains unresolved at the ICTY and ICTR,\footnote{602} but has been dealt with in the ICC Statute by separating the crime of genocide and the means of committing such a crime and by deleting the specific word complicity.


\footnote{597}{Judgment, \textit{Blagojević} (IT-02-60), Trial Chamber, 27 January 2005, § 777.}

\footnote{598}{Articles 4(3)(e) and 2(3)(e), respectively.}

\footnote{599}{Articles 7.1 and 6.1, respectively.}


\footnote{601}{Judgment, \textit{Akayesu} (ICTR-96-4-T), Trial Chamber, 2 September 1998, (hereinafter ‘\textit{Akayesu Trial Judgment}’), §547–548; Judgment, \textit{Musema} (ICTR-96-13-T), Trial Chamber, 27 January 2000, (hereinafter ‘\textit{Musema Trial Judgment}’), §83.}

It would appear that from the *travaux preparatoires* of the Genocide Convention\textsuperscript{603} and from the fact that one of the early transnational treaties using universal jurisdiction as a ground for criminalization, the Torture Convention, uses the words ‘an act by any person which constitutes complicity or participation’\textsuperscript{604} to denote forms of extended liability (as opposed to any of the other similar treaties, the counter-terrorism treaties, which use the notion of accomplice or abetting,\textsuperscript{605} as well as the International Convention for the Protection of All Persons from Enforced Disappearance, which also refers to accomplice)\textsuperscript{606} a persuasive argument can be made that the concept of complicity was an early iteration of aiding and abetting.

4.1.4: Joint criminal enterprise

Before examining the legal parameters of joint criminal enterprise (JCE) an example given by a Trial Chamber as to the factual aspects of this notion might help elucidating when this notion is engaged. In the *Kvočka* case this was said:

For instance, an accountant hired to work for a film company that produces child pornography may initially manage accounts without awareness of the criminal nature of the company. Eventually, however, he comes to know that the company produces child pornography, which he knows to be illegal. If the accountant continues to work for the company despite this knowledge, he could be said to aid or abet the criminal enterprise. Even if it was also shown that the accountant detested child pornography, criminal liability would still attach. At some point, moreover, if the accountant continues to work at the company long enough and performs his job in a competent and efficient manner with only an occasional protest regarding the despicable goals of the company, it would be reasonable to infer that he shares the criminal intent of the enterprise and thus becomes a co-perpetrator. The man who merely cleans the office afterhours, however, and who sees the child photos and knows that the company is participating in criminal activity and who continues to clean the office, would


\textsuperscript{606} Article 6.1(a).
not be considered a participant in the enterprise because his role is not deemed to be sufficiently significant in the enterprise.\textsuperscript{607}

This same judgment also provided some insight into the factors, which would be of significance in determining whether a person was part of a joint criminal enterprise, such as:

The level of participation attributed to the accused and whether that participation is deemed significant will depend on a variety of factors, including the size of the criminal enterprise, the functions performed, the position of the accused, the amount of time spent participating after acquiring knowledge of the criminality of the system, efforts made to prevent criminal activity or to impede the efficient functioning of the system, the seriousness and scope of the crimes committed and the efficiency, zealfulness or gratuitous cruelty exhibited in performing the actor’s function. It would also be important to examine any direct evidence of a shared intent or agreement with the criminal endeavor, such as repeated, continuous, or extensive participation in the system, verbal expressions, or physical perpetration of a crime.\textsuperscript{608}

With respect to the legal aspects of this concept, in general the ICTY Appeals Chamber jurisprudence has distinguished three types of joint criminal enterprise.\textsuperscript{609}

In the first form of joint criminal enterprise, all of the co-perpetrators possess the same intent to carry out the common purpose, namely the crime. The second form of joint criminal enterprise, the ‘systemic’ form, is a variant of the first form characterized by the existence of an organized criminal system, in particular in the case of concentration or detention camps. This form of joint criminal enterprise requires personal knowledge of the organized system and intent to further the criminal purpose of that system.

The third, ‘extended’ form of joint criminal enterprise entails responsibility for crimes committed beyond the common purpose, but which are nevertheless a natural and foreseeable consequence of the common purpose. The requisite \textit{mens rea} for the extended form is twofold. First, the accused must have the intention to participate in and contribute to the common criminal purpose. Second, in order to be held responsible for crimes which were not part of the common criminal purpose, but which were nevertheless a natural and foreseeable consequence of it, the accused must also know that such a crime might be

\textsuperscript{607} Judgment, \textit{Kvočka (IT-98-30/1)}, Trial Chamber, 2 November 2001, §§ 285-286.
\textsuperscript{609} Judgment, \textit{Tadić (IT-94-1-A)}, Appeals Chamber, 15 July 1999, § 227; Judgment, \textit{Vasiljević (IT-98-32-A)}, Appeals Chamber, 25 February 2004, § 100; Judgment, \textit{Stakić (IT-97-24-A)}, Appeals Chamber, 22 March 2006, § 64. It is worth noting that in one of the first cases in which JCE was used, namely the \textit{Tadić} case, the accused had been acquitted by the Trial Chamber since it could not be proven that he, as part of a larger group of five men, had played any part in the commission of murder. The Appeals Chamber found that there was criminal liability based on JCE even if there was no proof of the personal commission of any of the members in the JCE; see for more details, S. Darcy at 227-228.
perpetrated by a member of the group, and willingly take the risk that the crime might occur by joining or continuing to participate in the enterprise.\textsuperscript{610}

The general requirements for this type of responsibility are as follows:

a plurality of persons, who do not need to be organized in a military, political or administrative structure;
the existence of a common plan, design or purpose which amounts to or involves the commission of a crime. There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise;
participation of the accused in the common design involving the perpetration of one of the international crimes. This participation need not involve commission of a specific crime under one of those provisions but may take the form of assistance in, or contribution to, the execution of the common plan or purpose;
the participation in the enterprise must be significant, meaning an act or omission that makes an enterprise efficient or effective; e.g. a participation that enables the system to run more smoothly or without disruption.\textsuperscript{611}

More recently, some refinements and clarifications have been made to these general principles.\textsuperscript{612} In general, the doctrine of joint criminal enterprise can apply to high

\textsuperscript{610} Idem.


\textsuperscript{612} This might have been the result of criticism raised in the academic literature where this form of liability, especially the extended variety, has been controversial; see for instance W.A. Schabas, ‘Mens Rea and the International Tribunal for the Former Yugoslavia’, \textit{37 New England Law Review} (2003) at 1030–1036; E. van Sliedregt at 108–109; S. Powles, ‘Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?’ in \textit{2 Journal of International Criminal Justice} (2004) at 606–616; A. Marston Danner and J.S. Martinez, ‘Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law’, in \textit{93 California Law Review} (2005) at 133-137; G.P. Fletcher and J.D. Ohlin, ‘Relearning Fundamental Principles of Criminal Law in the Darfur Case’, \textit{3 Journal of International Criminal Justice} (2005) at 548–550; J. Ramer, ‘Joint Criminal Enterprise Liability and Persecution’, \textit{7 Chicago-Kent Journal of International and Comparative Law} (2007) at 58-61; S. Darcy, \textit{Collective Responsibility and Accountability Under International Law} (Leiden: Transnational Publishers, 2007) at 245-253; D. Robinson, ‘The Identity Crisis of International Criminal Law’, \textit{21 Leiden Journal of International Law}, (2008) at 938-943; C. Damgaard at 207-211and 236-261; R. Cryer, H. Friman, D. Robinson and E. Wilmhurst at 373. The criticism has been raised on a number of levels, from saying that the term ‘committing’ would not allow for all forms of joint criminal enterprise (Damgaard, Powles), that the jurisprudence on which the ICTY has relied to infuse its statute with joint criminal enterprise does not stand up to scrutiny for that proposition (Danner and Martinez, Damgaard and Powles), that the level of contribution required is not clear (Danner and Martinez, Damgaard, Fletcher and Ohlin and Robinson) and, especially for JCE III, that the mens rea is too low (all). With respect to the latter criticism, the analysis would have been more compelling if a more in depth study had been made of national jurisprudence in common law countries other than the U.S. (Danner and Ramirez mention the UK in passing in footnote 139), which make use of the concept of common intention (on which JCE III is based, although there are now some differences between these two approaches, see for Canada, F. Lafontaine, ‘Parties to
level functionaries and is not restricted to small-scale situations but can also apply to large criminal enterprises. Conversely, where the common purpose includes crimes committed over a wide geographical area, a person may be found criminally responsible for participation in the enterprise, joint criminal enterprise even if the contributions to the enterprise occurred only in a much smaller geographical area.

With respect to the first two categories, it has been made clear that mere membership in the group having a common criminal purpose is not sufficient. However, it is not required that each member in enterprise is identified by name but it can be sufficient to refer to categories or groups of persons. The common criminal objective of the joint criminal enterprise may also evolve over time, as long as the members agreed on this expansion of means. It means that the crimes that make up the common purpose may evolve and change over time and as such the joint criminal enterprise may have different participants at different times.

It is not necessary that the persons carrying out the actus reus of the crime forming part of the common purpose have been participants in or members of the joint criminal enterprise. Consequently, persons carrying out the crime need not share the intent of the crime with the participants in the common purpose. Nor is the mental state of persons carrying out the crime a determinative factor in finding the requisite intent for the participants in the enterprise. But if a joint criminal enterprise member used a non-member to commit a crime, that crime must be traced back to this original member.

In regards to the contribution factor, the participation or contribution of an accused to the common purpose need not be substantive but it should at least be a significant contribution to the crimes committed. The fact that different persons might have

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Offences under the Canadian Crimes against Humanity and War Crimes Act: An Analysis of Principal Liability and Complicity, 50 Les Cahiers de Droit (2009) at 999-1006 on a regular basis and which have had no problem adopting a methodology for determining what foreseeable consequences are for even the most serious offences; see for instance Rahman & Ors, R v [2008] UKHL 45 in the UK, McAuliffe v R [1995] HCA 37 in Australia, the Queen v Riki Rapira [2003] NZCA 217 in New Zealand and R. v. Jackson [1993] 4 S.C.R. 573 in Canada.

615 Judgment, Tadić (IT-94-1-A), Appeals Chamber, 15 July 1999, § 199 and Judgment, Popović et al. (IT-05-88-T), Trial Chamber, 10 June 2010, § 1024.
616 Judgment, Bradanin (IT-99-36), Trial Chamber, 1 September 2004, § 263.
620 Judgment, Krajišnik, (IT-00-39-A), Appeals Chamber, 17 March 2009, § 215. This implies a lesser level of contribution for joint criminal enterprise as compared to aiding and abetting, see also D. Robinson, ‘The Identity Crisis of International Criminal Law’, 21 Leiden Journal of International
different levels on involvement does not negate the existence of a joint criminal enterprise and a different level of involvement can be dealt with at the sentencing stage.\footnote{621}

A person connected to the third category of joint criminal enterprise

\begin{quote}
can only be held responsible for a crime outside the common purpose, if under the circumstances of the case: (i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk\footnote{622} \textit{(dolus eventualis)}. The crime must be shown to have been foreseeable to the accused in particular.\footnote{622}
\end{quote}

Willingly taking a risk means a decision to participate in a joint criminal enterprise with the awareness that crime was a possible consequence of the implementation of that enterprise.\footnote{623} For third category joint criminal enterprise liability, the accused does not need to possess the requisite intent for the crime falling outside the common purpose. The mental state of the person or persons carrying out the extended crime is not relevant for the finding of the mental state of the accused, but is determinative to the finding of which extended crime was committed.\footnote{624} A joint criminal enterprise can also be a basis for liability in genocide, including the third category.\footnote{625}

Joint criminal enterprise has been used outside the ICTY and ICTR context in the proceedings of the Special Court for Sierra Leone,\footnote{626} as well in the Extraordinary Chambers in the Court of Cambodia. The latter institution decided that the third category was not part of customary international law nor was it included in the law of Cambodia during the time period in the 1970s over which the Chambers exercise jurisdiction.\footnote{627}
The ICC Statute has included a concept similar to joint criminal enterprise, namely common purpose, the formulation of which was based on the 1997 International Convention for the Suppression of Terrorist Bombings and which is generally seen as encompassing joint criminal enterprise I and II but not the ‘outer limits’ of joint criminal enterprise III.\(^628\)

The Appeals Chamber of the ICTY has provided a number of indicators to the differentiate between aiding and abetting and JCE\(^630\), namely:

- aiding and abetting generally involves a lesser degree of individual criminal responsibility than co-perpetration in a joint criminal enterprise;\(^631\)
- the aider and abettor is always an accessory to a crime perpetrated by another person, the principal;
- ‘in the case of aiding and abetting no proof is required of the existence of a common concerted plan, let alone of the pre-existence of such a plan. No plan or agreement is required: indeed, the principal may not even know about the accomplice's contribution’;\(^632\)
- ‘the aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has an substantial effect upon the perpetration of the crime. By contrast, in the case of acting in pursuance of a common purpose or design, it is sufficient for the participant to perform acts that in some way are directed to


\(^{629}\) There might be some clarification on this issue as the most recent arrest warrant issued by the ICC is the first one exclusively based on the common purpose provision of the ICC Statute, charging the Executive Secretary of the Democratic Forces for the Liberation of Rwanda (FDLR) in the Democratic Republic of the Congo with war crimes and crimes against humanity committed by this armed group, see Warrant of Arrest for Callixte Mbarushimana, *Mbarushimana*, (ICC-01/04-01/10) Pre-Trial Chamber I, 28 September 2010, § 8.


the furthering of the common plan or purpose in at least a significant manner’; 633

- in the case of aiding and abetting, the requisite mental element is the knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal. By contrast, in the case of common purpose or design more is required, namely the intent to pursue a common purpose. 634

4.1.5: Command/superior responsibility

Both persons in a military or civilian hierarchy will be subject to individual criminal liability for offences committed by subordinates if the following elements exist: a superior-subordinate relationship; the superior knew or had reason to know that a criminal act was about to be, was being or had been committed, 635 and failure to take necessary and reasonable measures to prevent or punish the conduct in question. 636

A superior-subordinate relationship exists where a superior has effective control over a subordinate in the sense that the superior has the material ability to prevent or punish the subordinate’s criminal conduct. 637 Superior responsibility can arise by virtue of the superior’s de jure or de facto power over the relevant subordinate. 638 The possession of de jure power may not suffice for the finding of superior responsibility if it does not manifest itself in effective control. 639 A superior cannot incur responsibility for crimes committed by a subordinate before he assumed his position as superior. 640 A superior may however incur superior responsibility no matter how


635 This is the formulation for the mens rea for military commanders; this requirement for civilians with a superior responsibility is stricter due to the often less organized nature of the structure they operate in and is set out as follows in article 28(b)(i) and (ii) of the ICC Statute: ‘(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes; (ii) The crimes concerned activities that were within the effective responsibility and control of the superior.’


637 Judgment, Oric (IT-03-68-A), Appeals Chamber, 3 July 2008, § 20. In the Rwandan context it was held that a priest can have effective control, see Judgment, Nsengimana (ICTR-01-69-T), Trial Chamber, 17 November 2009, §§ 819-828.

638 Judgment, Mucić et al. (Čelebići Camp’) (IT-96-21), Trial Chamber, 16 November 1998, §§ 195-197.

639 Judgment, Halilović (IT-01-48-A), Appeals Chamber, 16 October 2007, § 204.

640 Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, Hadžihanovinov et al. (IT-01-47-AR72), Appeals Chamber, 16 July 2003, §§ 37-56 and Judgment, Halilović (IT-01-48-A), Appeals Chamber, 16 October 2007, § 67. For an analysis, see B. Sander,
far down the chain of authority the subordinate may be and even if the subordinate has participated in the crimes through intermediaries.

With respect to the second requirement, this element is fulfilled if a superior knew or had reason to know that a subordinate’s criminal act had been carried out, was taking place or was about the happen. A superior had reason to know only if information was available to him, which would have put him on notice of offences committed by subordinates. The reason to know standard is met if the superior possessed information sufficiently alarming to justify further inquiry.

In regards to the third requirement, necessary measures means appropriate action, which show that the superior genuinely tried to prevent or punish while reasonable measures are those reasonably falling within the material powers of the superior. A superior is not expected to perform the impossible but must use every means within his ability. Such measures may include carrying out an investigation, transmitting information in a superior’s possession to the proper administrative or prosecutorial authorities, issuing special orders aimed at bringing unlawful practices of subordinates in compliance with the rules of war, protesting against or criticizing criminal action, reporting the matter to the competent authorities or insisting before a superior authority that immediate action be taken.

4.1.6: Membership in a criminal organization

Membership was both a form of accessory liability as well as an inchoate offence after the Second World War. The statute of the International Military Tribunal allowed it to declare any organization criminal and four organizations were given this predicate in its judgment, namely the Leadership Corps of the Nazi Party, the Gestapo and SD and the SS. This concept was also applied to other organizations in national legislation and jurisprudence. Under this system a person was held liable if he or

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Judgment, Blaškić (IT-95-14-A), Appeals Chamber, 29 July 2004, § 67.
642 Judgment, Kordić and Čerkez (IT-95-14/2-A), Appeals Chamber, 17 December 2004, § 839.
644 Judgment, Strugar (IT-IT-01-42A), Appeals Chamber, 17 July 2008, § 298; Judgment, Popović et al. (IT-05-88-T), Trial Chamber, 10 June 2010, § 1041; Judgment, Đorđević (IT-05-87/1), Trial Chamber, 23 February 2011, § 1886.
645 Judgment, Orić (IT-03-68-A), Appeals Chamber, 3 July 2008, § 177.
646 Judgment, Popović et al. (IT-05-88-T), Trial Chamber, 10 June 2010, § 1043; Judgment, Đorđević (IT-05-87/1), Trial Chamber, 23 February 2011, § 1887.
647 Judgment, Popović et al. (IT-05-88-T), Trial Chamber, 10 June 2010, § 1045; Judgment, Đorđević (IT-05-87/1), Trial Chamber, 23 February 2011, §§ 1888-1890.
648 For a detailed analysis, see E. van Sliedregt at 20-28 and S. Darcy at 257-291.
649 Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 - 1 October 1946, Volume XXII at 505, 511, and 516-517; S. Darcy at 278.
650 E. van Sliedregt at 20-28 and S. Darcy at 26-28 referring to legislation in Norway, France and the Netherlands and decisions by Polish courts and U.S. Military courts in occupied Germany with respect to concentration camps as criminal organizations.
she had belonged to a designated organization and had knowledge that the organization was used for criminal purposes.652

This concept has fallen in disuse since that time,653 but the judicial reasoning for not applying this concept is unclear. The discussion of membership was part of developing the joint criminal enterprise approach and in that context it has been made clear that mere membership in a joint criminal enterprise without further plan or activities is not sufficient to attract liability.654

There has been one unequivocal comment about the notion of membership in the ICTY, namely in the Stakić case where the following was said:

the Trial Chamber emphasises that joint criminal enterprise can not be viewed as membership in an organisation because this would constitute a new crime not foreseen under the Statute and therefore amount to a flagrant infringement of the principle *nullum crimen sine leg*.655

This judgment refers to a decision by the Appeals Chamber, which comes to the same conclusion but in doing so makes mention of the explanatory report of the Secretary-General establishing the ICTY, including the following sentence: ‘the Secretary General believes that this concept should not be retained in regards to the International Tribunal’. 656

This could be interpreted as an acknowledgment that membership in criminal organizations was part of international criminal law in 1993 but that for jurisdictional reasons it was deemed not desirable to include it in the statute of the ICTY.657 The Stakic decision does not refer to this part of the Appeals Chamber’s decision and does not provide any further analysis of this statement nor does it make any reference to the practice in this regard after the Second World War.658

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652 Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 - 1 October 1946, Volume XXII at 500.
653 There have been some musings about this type of liability is modern times in academic literature as well as a result of a French proposal to include such a concept in the Statute of the ICTY; see S. Darcy, at 282-284; and A. Marston Danner and J.S. Martinez, ‘Guilty Associations: Joint criminal enterprise, Command Responsibility, and the Development of International Criminal Law’, in 93 California Law Review (2005) at 118.
654 Judgment, Kvočka (IT-98-30/1), Trial Chamber, 2 November 2001, § 281; Judgment, Simić (IT-95-9-T), Trial Chamber, 17 October 2003, § 158; Judgment, Brdanin (IT-99-36), Trial Chamber, 1 September 2004, § 263. See also C. Damgaard at 192-193.
656 Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction – Joint criminal enterprise, Milutinović (IT-99-37-AR72), Appeals Chamber, 21 May 2003, §§ 24-26; the report referred to is UN Doc. S/25704, 3 May 1993, The Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), which makes this comment in paragraph 51.
658 As well, the judgment is not clear whether membership is a crime or a mode of liability; although in the excerpt it speaks of membership as a crime, it also equates this notion with joint criminal enterprise, which is generally seen as a mode of liability.
During the negotiations for the ICC Statute, France made a proposal to include a provision dealing with criminal organizations as part of the debate to have legal persons fall within jurisdiction of the ICC but there was not sufficient support to make either variation part of the treaty.\footnote{S. Darcy at 283-284; W.A. Schabas, \textit{The International Criminal Court: A Commentary of the Rome Statute} (Oxford: Oxford University Press, 2010) at 425-427.}

\subsection*{4.1.7: Co-perpetration}

As much as the ICTY and ICTR used joint criminal enterprise as their main tool to hold people responsible for the commission of international crimes,\footnote{G. Boas, J.L. Bischoff and N.L. Reid at 420-422.} it appears that the ICC has become similarly enamoured with the concept of co-perpetration.\footnote{Section 25.3(a), which allows for direct co-perpetration (‘jointly with another’) or indirect co-perpetration (‘through another person’), which has been used in almost half of the warrants for arrest issued. Co-perpetration was rejected by a majority of judges of Appeals Chamber of the ICTY/ICTR in Judgment, \textit{Stakić} (IT-97-24-A), Appeals Chamber, 22 March 2006, §§ 58-63; Separate Opinion of Judge Shahabuddeen in Judgment, \textit{Gacumbitsi}, (ICTR-2001-64-A), Appeals Chamber, 7 July 2006, §§ 42-52; Separate Opinion of Judge Schomburg on the Criminal Responsibility of the Appellant for Committing Genocide in Judgment, \textit{Gacumbitsi}, (ICTR-2001-64-A), Appeals Chamber, 7 July 2006, §§ 17-27; Dissenting Opinion of Judge Schomburg in Judgment, \textit{Simić} (IT-95-9-A), Appeals Chamber, 28 November 2006, §§ 11-21; see also Special Tribunal for Lebanon, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative charging, STL-II-OI/I/AC/R176bis, Appeals Chamber, 16 February 2011, § 256; and G. Boas, J.L. Bischoff and N.L. Reid at 417-418.} There are three forms of committing a crime as a perpetrator, namely where a person:

\begin{itemize}
  \item[(a)] physically carries out the objective elements of the offence (commission of the crime in person, or direct perpetration);
  \item[(b)] has, along with others, control over the offence by reason of the essential tasks assigned to him or her (commission of the crime jointly with others, or co-perpetration); or
  \item[(c)] controls the will of those who carry out the objective elements of the offence (commission of the crime through another person, or indirect perpetration).\footnote{Decision on the Confirmation of Charges, \textit{Lubanga} (ICC-01/04-01/06), Pre-Trial Chamber I, 29 January 2007, §§ 332; Decision of the Confirmation of the Charges, \textit{Katanga and Chui} (ICC No. ICC-01/04-01/07), Pre-Trial Chamber I, 30 September 2008, § 488; Decision of the Confirmation of the Charges, \textit{Garda} (ICC-02/05-02/09), Pre-Trial Chamber I, 8 February 2010, §153.}
\end{itemize}

As well, the distinction between principals and accessories in a situation with a plurality of persons can be made along a spectrum, in which different aspects of the involvement are emphasized. If the objective manifestation of the crime (in that all the elements are carried out by the same person) is the focal point of investigation it can be called an objective approach with a person liable as a principal. The subjective approach does not primarily examine the level of contribution but instead the shared intent to carry out a crime, which is done in the joint criminal enterprise or common purpose doctrine. Co-perpetration focuses on the degree of control carried out by a
person who is removed from the scene of the crime but has control or is the mastermind behind the commission of the offences.\textsuperscript{663}

The *actus reus* of co-perpetration is twofold, the existence of an agreement or common plan between two or more persons and the co-ordinated essential contribution by each of these persons resulting in the commission of a crime.\textsuperscript{664}

The *mens rea* of this type of liability has three aspects, namely the subjective element of the co-perpetrators with respect to underlying crime, secondly the fact that the co-perpetrators are ‘all mutually aware and mutually accept that implementing their common plan may result in the realization of the objective elements of the crime’ and thirdly that the persons are aware of the factual circumstances enabling them to jointly control the crime.\textsuperscript{665}

The following table sets out the differences between aiding and abetting, joint criminal enterprise and co-perpetration:

\textsuperscript{663} Decision on the Confirmation of Charges, *Lubanga* (ICC-01/04-01/06), Pre-Trial Chamber I, 29 January 2007, §§ 327-331; Decision of Confirmation of Charges, *Bemba* (ICC-01/05-01/08), Pre-Trial Chamber II, 15 June 2009, §§ 346-347; Corrigendum of the Decision on the Confirmation of Charges, *Nourain and Jamus*, (ICC-02/05-03/09), Pre-Trial Chamber I, 7 March 2011, § 126; Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang (ICC-01/09-01/11), Pre-Trial Chamber II, 8 March 2011, § 39.


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<thead>
<tr>
<th></th>
<th>Actus reus</th>
<th>Mens rea</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aiding and abetting</td>
<td>substantial contribution</td>
<td>knowledge of commission of act</td>
</tr>
<tr>
<td>Joint criminal enterprise (only basic and systemic forms)</td>
<td>common plan</td>
<td>intent to further common plan</td>
</tr>
<tr>
<td>Co-perpetration</td>
<td>common plan</td>
<td>mutual awareness and acceptance of plan resulting in a crime</td>
</tr>
</tbody>
</table>

4.2: National Refugee Jurisprudence

4.2.1: Australia

Four court decisions have provided guidance regarding the notion of complicity\(^{666}\) in the refugee context,\(^{667}\) two at the Federal Court of Australia level\(^{668}\) and two at the appeal level.\(^{669}\)

\(^{666}\) There have been findings based on personally carrying out killings, such as in VZL and Minister for Immigration and Multicultural Affairs [2000] AATA 191 (killing civilians in Sri Lanka as a member of the Sri Lankan army); N95/08964 [1996] RRTA 691 (as a member of an army liquidation squad in the Philippines); N93/00914 [1994] RRTA 828 (as a member of a killing team in the Philippine police) and V94/02580 [1995] RRTA 1918 (as a commando leader in the Phalange/Lebanese Forces); bombings (MD Shahidul and Minister for Immigration and Multicultural Affairs [1998] AATA 331 (in Bangladesh in 1995); and acts of torture, such as in N96/1441 and Minister for Immigration and Multicultural Affairs [1998] AATA 619 (as a member of the Lebanese Armed Forces between 1991 and 1993); and V94/01334 [1995] RRTA 1626 (as a member of the Turkish police between 1986 and 1989). Another case from Lebanon was decided on the concept of ordering killings during the massacre at the Sabra refugee camp in 1982, namely V95/03566 [1997] RRTA 334.

\(^{667}\) There have been some cases in the immigration context, which shed some further light on the notion of association. At the court level, both the Federal Court of Australia and the Federal Court of Australia, Full Court, provided clarification on this issue in the Haneef case (Haneef v Minister for Immigration and Citizenship [2007] FCA 1273 and Minister for Immigration & Citizenship v Haneef [2007] FCAFC 203). This case involved Dr. Haneef who had been arrested on July 2, 2007 by the Australian Federal Police and later charged with having intentionally provided resources, namely a SIM card, to a
The SHCB case involved a person from Afghanistan who reported individuals to security service, the KhAD, in the knowledge that these individuals could become victim of war crimes or crimes against humanity. The Federal Court of Australia upheld the tribunal decision to exclude this person based on complicity by indicating that the international crimes can be committed as accessories but that mere membership in the KhAD was not sufficient. Accessory liability, according to the court, requires evidence of acting intentionally and with the knowledge of the group’s intention to commit the crime. The court found in addition to this factor the applicant’s rank in the KhAD and his role in providing information was sufficient to establish the element of joint purpose. On Appeal, the Federal Court of Australia, Full Court agreed with all aspects of the decision below, especially the finding that it is not necessary that the appellant personally committed a war crime or a crime against humanity or that there be a finding with respect to a specific incident. In its view, what is required is evidence of many such incidents and a conclusion that the appellant took steps as an officer of KhAD knowing that such acts would be the consequence of his steps.⁶⁷⁰

In the WAKN case, the applicant was a former senior member of the Wahdat Army in Afghanistan, charged with supervising a regiment. Senior members of this organization had been identified as those likely responsible for human rights violations in Afghanistan. Citing SCHB, the court found that more than membership in an organization was required but upheld the decision of complicity because the applicant had held a position of authority and would therefore have been expressly

terrorist organisation. The Minister for Citizenship and Immigration cancelled his visa based on association with an individual, group or organisation suspected of having been, or being, involved in criminal conduct. Both levels of court were of the view that the Minister’s approach re association, namely any type association, even friendship or innocent association, was too wide and that association means ‘some sympathy with, or support for, or involvement in, the criminal conduct of the person, group or organisation. The association must be such as to have some bearing upon the person’s character’ (paragraph 130 of the FCAFC decision; the FCA decision in paragraph 230 expresses the notion of association as follows: ‘an alliance or link or combination between the visa holder with the persons engaged in criminal activity’. At the level of the Australian Administrative Tribunal the issue of association was discussed in the cases of Hapugoda and Minister for Immigration and Multicultural and Indigenous Affairs [2002] AATA 330; Grabovica and Minister for Immigration and Multicultural and Indigenous Affairs [2003] AATA 110 and Lunja and Minister for Immigration and Multicultural and Indigenous Affairs [2004] AATA 563 cases; the tribunal was of the view that association required an alliance or a link, but not membership in an organization and also indicated that whether such a link constituted an association should be determined using such factors as the duration, nature, degree and frequency of the association.

⁶⁷⁰ SHCB v Minister for Immigration & Multicultural and Indigenous Affairs [2003] FCAFC 308 at paragraph 23; this is the judicial review of the SAL and Minister for Immigration and Multicultural and Indigenous Affairs [2002] AATA 1164.
involved in decision-making and security questions and would have had specific knowledge of the human rights violations that were being committed.\textsuperscript{671}

In the \textit{SZCWP} decision, involving a Nepalese citizen who had been associated with Maoist insurgents, the tribunal had used the ICC Statute definition for criminal liability and had found that membership was not enough, and cited the test for complicity from the \textit{SHCB} case, namely aiding, abetting or contributing to an intentional act and knowing the group’s intent to commit a crime. The judges of the majority of the Federal Court of Australia, Full Court, found that the tribunal had been correct in focussing on a common purpose rather than on identifying specific acts in which the applicant had been involved and upheld the exclusion of the applicant.\textsuperscript{672}

In an early case, the Administrative Appeals Tribunal of Australia had to assess whether complicity was present in a situation, where a member of the Burmese Navy participated in the shooting of fleeing student activists during the 1988 democracy movement. The claimant had said that he himself had not shot anybody; indeed he tried not to do so but was aware that during this period at least 10 to 15 students were being killed each day in this manner in August and September 1988. In addition female students were being brought into the Navy barracks and, under the pretext that they were prostitutes, were being raped and killed. He himself never participated in this. The tribunal, while being of the view that crimes against humanity were committed during this time period, did not find the claimant excludable as he was a

\textsuperscript{671} \textit{WAKN v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 1245; this is the judicial review of WBR and Minister for Immigration and Multicultural Affairs [2006] AATA 754.}

\textsuperscript{672} \textit{SZCWP v Minister for Immigration and Multicultural and Indigenous Affairs [2006] FCAFC 9; this was the judicial review of SRDDDD and Minister for Immigration and Multicultural and Indigenous Affairs [2004] AATA 150. The Administrative Appeal Tribunal in earlier cases had relied quite heavily on Canadian jurisprudence to circumscribe the notion of complicity and had used the same wording as Canadian cases such as the fact the membership in a brutal organization can amount to complicity (WAV and Minister for Immigration and Multicultural Affairs [2002] AATA 463 and "AXOIB" and Minister for Immigration and Multicultural Affairs [2002] AATA 365); or the terminology of knowing and personal participation (the cases of N1998/532 and Minister for Immigration and Multicultural Affairs [1999] AATA 116; W97/164 and Minister for Immigration and Multicultural Affairs [1998] AATA 618; SAL and Minister for Immigration and Multicultural and Indigenous Affairs [2002]; AATA 1164; "AXOIB" and Minister for Immigration and Multicultural Affairs [2002] AATA 365; SAH and Minister for Immigration and Multicultural and Indigenous Affairs [2002] AATA 26; SROOOO and Minister for Immigration and Multicultural and Indigenous Affairs [2006] AATA 91; WBR and Minister for Immigration and Multicultural Affairs [2006] AATA 754) or shared or common purpose (the cases of N1998/532 and Minister for Immigration and Multicultural Affairs [1999] AATA 116; W97/164 and Minister for Immigration and Multicultural Affairs [1998] AATA 618; VAG and Minister for Immigration and Multicultural and Indigenous Affairs [2002] AATA 1332; SAH and Minister for Immigration and Multicultural and Indigenous Affairs [2002] AATA 263; SAL and Minister for Immigration and Multicultural and Indigenous Affairs [2002] AATA 1164; SROOOO and Minister for Immigration and Multicultural and Indigenous Affairs [2006] AATA 91; WBR and Minister for Immigration and Multicultural Affairs [2006] AATA 754). More recently reference has been made to the accountability provision in the ICC Statute (as well as the Canadian jurisprudence, but excluding membership FCAFC \textit{SHCB} case) in WBV and Minister for Immigration and Citizenship [2007] AATA 2046.
minor player during these events and did not share the common purpose of killing fleeing activists. An officer in the Sri Lankan army between 1978 and 1983 and between 1989 and 1993 who had been involved personally in what he termed low level torture and who then handed his victims over for more severe treatment if they did not co-operate was found to have been involved in war crimes and crimes against humanity.

The issue of responsibility in situations where information was gathered and passed on for repressive purposes has been the subject of discussion in a number of Administrative Appeals Tribunal decisions. In 1998, a person was excluded from refugee protection for carrying out surveillance activities on behalf of the Front Islamique du Salut (FIS) in Algeria between 1994 and 1997, which resulted in systematic assassination of police officers by that organization. In another case, the claimant held the position of volunteer leader of a Village Protection Unit in Sri Lanka for about 6 years from 1988 to 1994. In this capacity he led a group of up to 30 people who carried out patrols in the local villages seeking out information to suppress anti government violence and terrorism. He had also personally reported at least ten or 12 people to officials of the United National Party in the knowledge that such people would be tortured or killed by the Sri Lankan army or security forces. The claimant was excluded for complicity. In a similar situation, this time involving an officer working for KhAD in Afghanistan who reported suspicious activities to his superiors resulting in people being arrested by KhAD with dire consequences, a finding of complicity in international crimes was also arrived at by the Administrative Appeals Tribunal.

On the other hand, a person working in the coding department of KhAD in which capacity he was responsible for transferring information such as repairing of roads, building or repairing of mosques or financial matters such as the wages of employees from non-military government departments including KhAD, to other departments, was found not be complicit. In this context, the tribunal commented that mere membership in an organization was not sufficient to attract liability under Article 1F. An officer in the Iraqi army was found not to be complicit in the crimes against humanity committed by the army between 1986 and 2003 even though he admitted knowledge of the activities of the Iraqi Army. The Administrative Appeals Tribunal

673 W97/164 and Minister for Immigration and Multicultural Affairs [1998] AATA 618.
674 SRNN and Department of Immigration and Multicultural Affairs [2000] AATA 983.
677 VAB and Minister for Immigration and Multicultural and Indigenous Affairs (2001) AATA 990.
678 SROOO and Minister for Immigration and Multicultural and Indigenous Affairs [2006] AATA 91.
indicated that knowledge in itself does not mean that he was a part of a common purpose or aided or abetted those activities.\textsuperscript{679}

In another decision, a person was found not to be complicit even though the organization he belonged to, the Patriotic Union of Kurdistan, had committed war crimes and crimes against humanity, according to the tribunal. The claimant was not complicit because he had only carried out political activities, such as persuading people that the PUK supported their interests and was the party they should support. He also found food and accommodation for party members. The only activity going beyond this work was one occasion involving handing over prisoners who had been captured after a clash with an Islamic group. Subsequently it was found these prisoners had been killed but the claimant had had no appreciation that this was going to happen.\textsuperscript{680}

From the jurisprudence at both the court and tribunal level it can be ascertained that most cases have dealt with the notion of aiding and abetting in which the specific aspects of handing over a person to maltreatment or providing information with the same result comprised the majority of the situations assessed. The cases in which liability was found not to exist appeared to be based on the fact that the link between the person concerned and the commission of the international crime was too tenuous, which could have been expressed in international criminal law language as a lack of a substantial contribution. However, the refugee decision makers have not relied (apart from one instance) on international criminal law but have charted their own course in determining what amounted to extended liability without providing a detailed analytical framework but using \textit{ad hoc} reasoning, which in the circumstances yielded in all likelihood the same result as would have been accomplished if utilizing an international criminal law approach. In this context, it should be pointed out that the notion of membership has been rejected.

\textbf{4.2.2: Belgium}

The general principles with respect to indirect involvement,\textsuperscript{681} based on the legislative text that article 1F also applies to persons who have intentionally incited or participated in article 1F activities,\textsuperscript{682} have remained constant in Belgium although the wording to describe these principles have fluctuated somewhat over the years.

\textsuperscript{679} SAH and Minister for Immigration and Multicultural and Indigenous Affairs [2002] AATA 263 at paragraph 59.
\textsuperscript{680} VAG and Minister for Immigration and Multicultural and Indigenous Affairs [2002] AATA 1332. For another case where lack of knowledge of the purpose of information could have led to unfortunate consequences, see "WAR" and Minister for Immigration and Multicultural Affairs [2001] AATA 475.
\textsuperscript{681} There have been a number of cases where persons were excluded for direct involvement in the crimes against humanity of torture (CCE No. 13.733, 4 July 2008 for a member of a security service during the Saddam Hussein regime in Iraq; CCE No. 16991, 8 October 2008 in regards to a soldier of the Charles Taylor regime in Liberia; CCE No. 18.233, 31 October 2008 involving a soldier in charge of a rebel group in Ivory Coast in 2001-2005 and CCE No. 24.924, 24 March 2009 for a soldier of a border unit during the Saddam Hussein regime in Iraq).
\textsuperscript{682} Aliens Act, section 55/2.
The Council of State stated in 2001 that to commit international crimes, it is sufficient that a person participates in the preparation or execution of acts, which amount to article 1F(a) activities. 683 In 2006, the same court said that the requirement was more akin to knowing participation and personal participation, 684 while in 2008 the court adjusted this language saying that an individual could be responsible for the commission of crimes, in addition to personally committing them, by making a substantial contribution with knowledge of the crime. 685 A later refinement was that it had to be a substantial personal contribution with knowledge and no defence. 686 The Council has also indicated that in situations with a large number of killings and acts of torture there is no need to precisely describe to which acts a person has made the contribution. 687 At the tribunal level, the substantial contribution requirement set out by the Council of State has been repeated but with the addition of the notion of an immediate effect. 688

These principles have been applied in a variety of situations, mostly in aiding and abetting or association type analyses but also on occasion in situations where a person had a command function, in which capacity he gave orders for the killing and raping of civilians in Somalia during its civil war. 689 Membership as a heading for liability has been usually rejected. 690 Persons who facilitated international crimes with material assistance have been excluded, 691 as has a person who had encouraged crimes against humanity during the 1994 Rwanda genocide. 692

With respect to the aiding and abetting type cases, arresting persons and then handing them over has led to exclusion for persons involved in this activity in Afghanistan (member of military security who would conduct surveillance on other soldiers and would hand over persons suspected of anti-government activities to the KhAD in the knowledge that death or torture would follow) 693 and Iraq (a member of the Fedayeen Saddam security service who was involved in arrests and handing people over to the

683 CE No. 94.321, 27 March 2001, at paragraph 2.4.2.
684 CE No. 165.722, 8 December 2006, at paragraph 1.2; while the judgment is in Dutch, these words are in English, which mirrors the language used in Canadian and Dutch jurisprudence.
685 CE No. 184.647, 24 June 2008, at paragraph 3.1.1 with reference to the ICC Statute.
686 CE No. 186.913, 8 October 2008, at paragraph 2.4 also with reference to the ICC Statute; this approach was also used in the case of CCE 14.567, 29 July 2008.
687 CE No. 165.722, 8 December 2006, at paragraph 1.2.
688 CCE No. 11.020, 8 May 2008 and CEE No. 25.649, 3 April 2009 (which refers to article 25 of the ICC Statute).
689 CCE No. 49.298, 10 October 2010; this case concerned the second in command of the rebel group Somali Patriotic Movement (SPM) and its faction, the Somali Salvation Democratic Front (SSDF).
690 See S. Kapferer, ‘Exclusion Clauses in Europe’ at 211 with respect to the FIS in Algeria as well as CPRR No. 99-0316/E430, 16 July 2001 and CPRR No. 04-2088/E666, 22 February 2006, both with respect to members of the KhAD in Afghanistan
691 See S. Kapferer, ‘Exclusion Clauses in Europe’ at 211, re Algerian and Rwandan situations.
692 CCE No. 5393, 21 December 2007; this case relied heavily on ICTR jurisprudence both for legal concepts and for factual information.
693 CPRR No. 99-0540/W5789, 2 September 1999.
other security services for severe interrogation, as well as for a member of the Mudiriyat Al-Amn al Am security service with the same functions and a member of the military who was part of the massacre of Basra in 1999 where he handed over survivors to security services.

A more indirect application of this principle was the situation of a person who was a high level functionary of Amal in Lebanon between 1981 and 1988 and who was aware of the commission of crimes against humanity by this organization. However, responsibility was primarily derived from his involvement in a prisoner exchange between Amal and Syria knowing full well that the prisoners who would be handed over to Syria would be tortured.

Most cases in this area have found excludable those who carried out spying or surveillance as part of their functions and would pass on adverse information to the security apparatus of their country resulting in the torture and often killing of the people who were arrested as a result of this information. The person excluded would have been aware of the fate, which awaited the people about whom they provided the information.

A number of cases from claimants from Iraq who had performed such activities during the Saddam Hussein regime were considered in recent years. The Council of State found this behaviour objectionable when done by a member of the Baath party who passed on information to the Mukhabarat security service and when a member of the JAK did the same in relation to other security departments. At the tribunal level, Baath members’ activities amounting to passing information to security services was also found to be a nefarious form of participation as was the gathering of information about deserters of a member of the military and by a PUK (Patriotic Union of Kurdistan) member about fellow associates. The same result befell persons who had, while being students in Ethiopia during the Red Terror period of the Mengistu regime, informed on fellow students who they suspected of anti-governmental activities or tendencies, as did a person involved in spying for the KhAD.

A large group of cases made use of the exclusion ground in situations where no contribution or direct result of an activity could be discerned but the association of

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694 CCE No. 30.244, 31 July 2009; for another case with a member of the Fedayeen Saddam, see CCE No. 5855, 17 January 2008.
696 CCE No. 11.020, 8 May 2008.
697 CCE No. 37.011, 14 January 2010.
698 CE No. 186.913, 8 October 2008.
701 CCE No. 24.662, 17 March 2009.
702 CCE No. 36.054, 16 December 2009.
704 CPRR No. 2779/W10, 12 January 2005.
the person in question with questionable organizations or crimes was close enough to attract liability.

A case of Rwanda involved a chief of staff of a Minister in the cabinet responsible for the 1994 genocide. The tribunal was of the view that, since this minister was one of the architects of the genocide, a close association with such a person, which would involve participation in policy making, would lead to exclusion. In other situations, a number of factors were considered indicative of close association and therefore responsibility. A senior officer in the Iraqi Republican Guard, who had a long career in the army, had a high position as a commander of tank unit in this organization, in which he had command of between 3800 and 8000 men. He was excluded as these indicators pointed to a sufficient connection with the military and security apparatus that has been involved in gross human rights violations.

Along the same lines, some factors considered for persons who had a lower position in organizations involved in crimes against humanity, were the duration of the service with that organization, whether the person had joined voluntarily and whether they had an opportunity to leave safely but had not availed themselves of that possibility.

This approach was used in a case involving an individual who served as a guard for 10 years for the Iraqi Olympic Committee, headed by Uday Hussein, a notorious paramilitary organization. It was also used against a person who had been a driver and personal assistant of the head of the Jash military command, a relatively small unit of about 1500 soldiers who had been actively involved in the brutal Anfal campaign in northern Iraq. A similar result was achieved in a case of a member of the Special Forces and then the Republican Guard of the Iraqi army, which had been involved in the putting down of the insurrection in Kerbala in 1991. Involvement in other notorious organizations, such as special units in the Mobutu regime in Zaire for over two years without any disassociation or having a senior position with authority in a violent organization, such as FIS in Algeria also drew negative attention.

This willingness to find persons liable for an association with nefarious organizations does not extend to all entities. While persons who carried out specific activities, which contributed to international crimes for the KhAD in Afghanistan were excluded, this has not been the case for more senior members whose connection was less direct. Two cases in 2001 involving directors of sections within this organization were not held responsible for the well-known crimes against humanity committed by

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705 CPRR No. 97-0017/W5049, 5 November 1998, which referred to Canadian jurisprudence; see also See S. Kapferer, ‘Exclusion Clauses in Europe’ at 213 for another, similar situation in Rwanda.
706 For some older cases, see See S. Kapferer, ‘Exclusion Clauses in Europe’ at 210-211 regarding involvement in the Turkish Dev-Sol terrorist organization and a member of a Zairean security organization operating in youth and student circles.
707 CCE No. 25.061, 26 March 2009.
709 CCE No. 25.001, 24 March 2009.
710 CCE No. 25.649, 3 April 2009.
711 See S. Kapferer, ‘Exclusion Clauses in Europe’ at 212-213.
this organization. Both persons had long careers, had several promotions leading to a senior position, both knew about the activities of KhAD and both could have left when they had an opportunity to do so. In both cases the tribunal was of the view that not every high functionary or member in this organization should be painted with the same brush of exclusion as such an approach would ignore the principle of individual responsibility.712

More recently, the same outcome was arrived at in a situation of a person who had been the Minister of State Organs in Afghanistan between 1982 and 1989. The tribunal said that one should not equate function within a government with the commission of human rights abuses by that government and that a person who has no influence on the policy related to such abuses should not suffer negative consequences from being in a particular function. In this case, the person’s job duties were more of an administrative nature or amounted at best to ideological propaganda.713

Like in Australia, Belgium refugee tribunals have not relied on the international criminal law concepts related to extended liability but were willing to extend the parameters of this type of responsibility into peripheral areas if the situations in their view demanded it. Apart from the aiding and abetting type of complicity which were applied to activities of handing persons and information over to organizations, which would in most cases lead to torture for the victims, the refugee decision makers applied this type of reasoning also to situations where persons carried out support functions in notorious organizations although falling short from finding that membership in such organizations was sufficient. At times factors such as the manner of joining an organization, the manner and reason for abandoning an organization and a person’s career path in an organization carried a great deal of weight to come to a finding of liability. While no international criminal law was referred to in the decisions under consideration, the adding and abetting approach has a clear resemblance to ICTY/ICTR jurisprudence while some of the factors mentioned to arrive to a conclusion of a common purpose can be detected in some of the earlier ICTY case-law.

4.2.3: Canada

Canadian courts714 have now clearly distinguished four types of complicity, all derived from the word ‘committed’ in article 1F(a) of the Refugee Convention, namely being present at the commission of an international crime if combined with authority; membership in a brutal, limited purpose organization; personal and knowing participation in an international crime; and having a shared criminal

714 The Department of Citizenship of Immigration Canada has issued a Manual, which addresses the issue of complicity for war crimes and crimes against humanity in the context of immigration but the principles stated are directly derived from the exclusion jurisprudence in this area, see Operations Manual, Enforcement 18 – War Crimes and Crimes against Humanity, Chapter 7; see also A. Kaushal and C. Dauvergne at 80-84.
purpose. The latter two are applicable to all type of organizations. The difference between the participation and the shared purpose type of complicity appears to lie in the proximity between the person being complicit on one hand and the organization this person belongs to. If the proximity is close and can be seen making a contribution to the organization the participation type complicity is at play while a more distant connection between such a person and the criminal activities of an organization the shared purpose analysis appears to be the more preferable approach to take.

The first case for complicity is the 1992 decision of Ramirez of the Federal Court of Appeal, which sets out a number of guiding principles by saying:

What degree of complicity, then, is required to be an accomplice or abettor? A first conclusion I come to is that mere membership in an organization, which from time to time commits international offences is not normally sufficient for exclusion from refugee status. It seems apparent, 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. Similarly, mere presence at the scene of an offence is not enough to qualify as personal and knowing participation though, again, presence coupled with additional facts may well lead to a conclusion of such involvement. At bottom, complicity rests in such cases, I believe, on the existence of a shared common purpose and the knowledge that all of the parties in question may have of it. Such a principle reflects domestic law (e.g., subsection 21(2) of the Criminal Code), and I believe is the best interpretation of international law.

Three other Federal Court of Appeal cases have added to this understanding in the nineties. Moreno repeated the general tenets of the Ramirez case by indicating that it is well settled that personal involvement in international offences must be established and that acts or omissions amounting to passive acquiescence or mere membership are not a sufficient basis for invoking the exclusion clause. An exception to this general rule arises where the organization is one whose very existence is premised on achieving political or social ends by any means deemed necessary. Membership in a secret police force may be deemed sufficient grounds for invoking the exclusion clause.

Footnote: [1992] 2 F.C. 306 at 317. It goes on to say ‘in my view, it is undesirable to go beyond the criterion of personal and knowing participation in persecutorial acts in establishing a general principle. The rest should be decided in relation to the particular facts’ (at 318). The court relied on two U.S. Federal Court of Appeals Second World War cases to come to this conclusion, namely Laipenieks (which it turns refer to the U.S. seminal case on this issue, the Fedorenko case by the United States Supreme Court) and Osidach. It also relied on the Charter of the International Military Tribunal, including the provision dealing with membership (albeit indirectly by referring to A. Grah-Madsen, The Status of Refugee in International Law, Volume I, at 277). With respect to the interpretation of the exclusion clause, the court says ‘it would nevertheless appear that, in the aftermath of Second World War atrocities, the signatory states to this 1951 Convention intended to preserve for themselves a wide power of exclusion from refugee status where perpetrators of international crimes are concerned’ (at 310) and ‘an international convention cannot be read in the light of only one of the world's legal systems’ (at 312). Incidentally, section 21(2) of the Criminal Code to which the court refers is the section setting out the concept of common intention.
clause. Membership in a military organization involved in armed conflict with guerrilla forces comes within the ambit of the general rule and not the exception.\footnote{[1994] 1 F.C. 298. This case has been mentioned by the Appeals Chamber of the ICTY in Judgment, \textit{Kunarac et al.} (IT-96-23/IT-96-23/1), Appeals Chamber, 12 June 2002, § 98, footnote 114.} This was followed by the \textit{Sivakumar} judgment, in which the Court was of the view that association with a person or organization responsible for international crimes may constitute complicity if there is personal and knowing participation or toleration of the crimes. Mere membership in a group responsible for international crimes, unless it is an organization that has a limited, brutal purpose, is not enough. Moreover, the closer one is to a position of leadership or command within an organization, the easier it will be to draw an inference of awareness of the crimes and participation in the plan to commit the crimes.\footnote{See \textit{Sivakumar} v. Canada (Minister of Employment and Immigration), [1994] 1 F.C. 433 at 448 (the Sivakumar case has also been mentioned by the Appeals Chamber of the ICTY in Judgment, \textit{Kunarac et al.} (IT-96-23/IT-96-23/1), Appeals Chamber, 12 June 2002, § 98, footnote 114). This judgment, at 444, also came to the conclusion that non-governmental organizations can also commit crimes against humanity by relying on the Charter of the International Military Tribunal, post-Second World War jurisprudence, the decision of the International Court of Justice in the case \textit{Reservations to the Convention on Genocide, Advisory Opinion} (28 May 1951, ICJ Reports (1951) 15) and the work of the International Law Commission with its Draft Code of Crimes Against the Peace and Security of Mankind (UN Doc. A/51/10, \textit{Report of the International Law Commission on the Work of its Forty-eighth Session}, Official Records of the General Assembly, Fifty-first Session, Supplement No. 10, Chapter II). This proposition was confirmed in the cases of Cardenas v. Canada (Minister of Employment and Immigration), 93-A-171; Baqri v. Canada (Minister of Citizenship and Immigration) [2002] 2 F.C. 85; and Thomas v. Canada (Citizenship and Immigration) 2007 FC 838; however, more recently a more direct connection between this form of liability involving people occupying high positions and the concept of command/superior responsibility was sought in the case of Ezokola v. Canada (Minister of Citizenship and Immigration), 2010 FC 662.}

Lastly, \textit{Bazargan} has set out in general the parameters of complicity, by saying that active membership in an organization carrying out war crimes or crimes against humanity is not required, but that a person is complicit if this person contributes, directly or indirectly, remotely or immediately, to this organization or makes these activities possible while being aware of the activities of the organization.\footnote{Ministre de la Citoyenneté et de l'Immigration c. Mohammad Hassan Bazargan, A-400-95. See also in general R. C. Slye, ‘Refugee Jurisprudence, Crimes against Humanity and Customary International Law’, in A. F Bayevsky (ed), \textit{Internally Displaced Persons and Migrants Workers, Essays in Memory of Joan FitzPatrick and Arthur Helton} (The Hague: Martinus Nijhoff Publishers, 2006), at 253-258.} The general principles in respect to brutal, limited purpose organizations have been fleshed out in subsequent jurisprudence both in terms of the parameters of such organizations are and in terms what the notion of membership entails. The Federal Court has specifically stated that, when dealing with membership in an organization, the first step is to look at the type of organization and whether the main purpose of the organization is achieved by means of crimes against humanity or war crimes.\footnote{Pushpanathan v. Canada (Minister of Citizenship and Immigration) 2002 FCT 867; Thomas v. Canada (Citizenship and Immigration) 2007 FC 838.} If so, membership in an organization that has a limited brutal purpose does not
automatically result in exclusion by itself; rather, it creates a rebuttable presumption of complicity.\footnote{136}

It has also become increasingly clear that the Federal Court is of the view that since mere membership, as well as knowledge of the activities of a brutal, limited purpose organization are an almost foregone conclusion for the purposes of attracting liability, the characterization of an organization as brutal and limited will be subject to a high degree of scrutiny. This trend started with the Hajialakhani case in 1998\footnote{174} and was confirmed by the Mukwaya case in 2001.\footnote{177} The phrase used in both cases to express the level of scrutiny was that the initial decision maker has to be free from doubt that the organization is principally directed to a limited, brutal purpose; as well, membership in a brutal organization has to coincide in time with the period or periods that the organization was conducting activities that would attract the characterization of brutal, according to the Hajialakhani, Yogo\footnote{171} and Mukwaya cases.

Most determinations that organizations are brutal pertain to governmental security and secret services entities. Examples of this are the KhAD in Afghanistan,\footnote{110} the SHIK in Albania,\footnote{110} the ANR, MLC and SNIP in the Democratic Republic of the Congo,\footnote{110} the BNI in Ghana,\footnote{110} the Sahana or SAVAK in Iran,\footnote{110} the Mukhabarat in Iraq,\footnote{110} Securitate in Romania,\footnote{110} the AFRC in Sierra Leone,\footnote{110} and the ISO in Uganda.\footnote{110} Other governmental organizations have also deemed to have a brutal and limited purpose, such as the National Security Courts in Somalia\footnote{110} and the political organization PUK in Iraq\footnote{110} while specialized military units have also been given this predicate, the military courts in Somalia\footnote{110}, death squads such as Battalion 3-16 in

\footnote{120} Mendez-Leyva v. Canada (Minister of Citizenship and Immigration) 2001 FCT 523; see also Savundaranayaga v. Canada (Citizenship and Immigration) 2009 FC 51 and at the appeal level Oberlander v. Canada (Attorney General) 2009 FCA 330.
\footnote{121} See also Balta v. Canada (Minister of Employment and Immigration), IMM-2459-94 and Nagamany v. Canada (Minister of Citizenship and Immigration) 2005 FC 1554.
\footnote{122} Mukwaya v. Canada (Minister of Citizenship and Immigration) 2001 FCT 650.
\footnote{123} Yogo v. Canada (Minister of Citizenship and Immigration) 2001 FC 390.
\footnote{124} Canada (Minister of Citizenship and Immigration) v. Mohsen, IMM-3246-99, Rasuli v. Canada (Minister of Citizenship and Immigration), IMM-3119-95, Zadeh v. Canada (Minister of Employment and Immigration), IMM-3077-94 and Zazai v. Canada (Minister of Citizenship and Immigration) 2004 FC 1356.
\footnote{125} Lalaj v. Canada (Minister of Citizenship and Immigration), IMM-4779-99.
\footnote{127} Kudjoe v. Canada (Minister of Citizenship and Immigration), IMM-5129-97.
\footnote{128} Nejad v. Canada (Minister of Citizenship and Immigration), IMM-4624-93 and Shakarabi v. Canada (Minister of Citizenship and Immigration), IMM-1371-97.
\footnote{130} Szekely v. Canada (Minister of Citizenship and Immigration), IMM-6031-98.
\footnote{131} Thomas v. Canada (Citizenship and Immigration) 2007 FC 838.
\footnote{132} Mutumba v. Canada (Citizenship and Immigration) 2009 FC 19.
\footnote{133} Demiye v. Canada (Minister of Employment and Immigration), A-137-93.
\footnote{134} Hovaiz v. Canada (Minister of Citizenship and Immigration), IMM-2012-01.
Honduras and Guardia de Hacienda in Guatemala. Non-governmental organizations are not immune of being characterized as brutal as can be seen in the cases of the SLA in Uganda, the OPC in Nigeria and the LTTE in Sri Lanka.

The caselaw of the Federal Court makes a number of observations regarding the parameters of membership in a brutal, limited purpose organization. To be a member of a brutal and limited purpose organization, formal membership coupled with active participation in unlawful acts is not required; simply belonging to such an organization is sufficient. There is no need to be a formal member of the criminal group in question, in order to be found complicit of its crimes by association. According to the federal court, an individual is a member of an organization if one devotes oneself full time or almost full time to the organization or if one is associated with members of the organization, especially for a lengthy period of time. Belonging to an organization is assumed where people join voluntarily and remain in the group for the common purpose of actively adding their personal efforts to the group's cause. The expression membership in a particular group implies the existence of an institutional link between the organization and an individual, accompanied by more than nominal involvement in the activities of the organization. There is no need to identify the specific acts in which the individual has been involved because of the notoriety and singular purpose of the group.

An example where this low threshold was not met involved a person who had been involved in the distribution of pamphlets for the MKO (Mujahedeen-e-Khalq), a terrorist organization, as well as in the videotaping on international MKO broadcasts. The court felt that this did not amount to nominal involvement while it also felt the person did not have knowledge that the MKO was involved in violent activities but thought that it was only engaged in civil disobedience. The same was said for a member of the KhAD in Afghanistan who only performed administrative tasks far away from locations of torture and other crimes.

According to the case law, in order to determine whether a hybrid organization that not only has a brutal purpose but also engages in other, legitimate, activities such as education or providing health and other charitable services, should be considered a

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736 Valle Lopes v. Canada (Citizenship and Immigration) 2010 FC 403.
737 Cordon v. Canada (Minister of Citizenship and Immigration), IMM-1889-97.
738 Obita v. Canada (Minister of Citizenship and Immigration) 2006 FC 178.
739 Kabir v. Canada (Minister of Citizenship and Immigration) 2003 FCT 657
740 Pushpanathan v. Canada (Minister of Citizenship and Immigration) 2002 FCT 867 and Nagamany v. Canada (Minister of Citizenship and Immigration) 2005 FC 1554.
741 Shakarabi v. Canada (Minister of Citizenship and Immigration), IMM-1371-97 and Canada (Minister of Citizenship and Immigration) v. Mohsen, IMM-3246-99.
742 Canada (Minister of Citizenship and Immigration) v. Owens, IMM-5668-99, which also stated that membership goes beyond that of being a mere supporter or sympathizer.
743 Saridag v. Canada (Minister of Employment and Immigration), [1995] 1 F.C null.
744 Harb v. Canada (Minister of Citizenship and Immigration) 2003 FCA 39.
745 Pushpanathan v. Canada (Minister of Citizenship and Immigration) 2002 FCT 867.
746 Atabaki v. Canada (Minister of Citizenship and Immigration) 2005 FC 969.
747 Canada (Minister of Citizenship and Immigration) v. Mohsen, IMM-3246-99.
brutal limited purpose one, it is necessary to look at what is the organization's *sine qua non*, i.e. would the organization only exist for its benign projects? Or put differently, is there any evidence that the political objectives can be separated from militaristic activities? Being a member of a peaceful organization or section that has not severed its ties drastically with its violent sister organization, wing or section will bring a person within the parameters of membership of the entire organization which is then considered violent.

The Canadian jurisprudence has indicated that non-brutal organizations are entities that have a legitimate purpose, but have committed war crimes or crimes against humanity that were outside its main function or were incidental to its mandate. The types of organizations considered have ranged from regular armed forces, ministries of the interior, including prisons, other state organs that have the capacity to affect large numbers of people, such as other ministries, courts, and police forces, militias, liberation movements, and political parties.

The notion of complicity in non-brutal organizations based on knowing and personal participation, which is most akin to the criminal concept of aiding and abetting, has been applied in a number of different situations. Complicity has been inferred in situations where a person handed over people to organizations involved in the commission of crimes against humanity, with the knowledge that such people would come to harm. One example is a situation of a member of the National Police Force of Ghana between 1980 and 1991 who joined a special undercover unit and arrested people who were then handed over to the Bureau of National Investigations, the BNI,

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748 Mehmoud v. Canada (Minister of Citizenship and Immigration), IMM-1734-97 (with respect to the SSP (Sepah-e-Sahaba) in Pakistan); Pushpanathan v. Canada (Minister of Citizenship and Immigration) 2002 FCT 867 (involving the LTTE in Sri Lanka); Obita v. Canada (Minister of Citizenship and Immigration) 2006 FC 178 (involving the LRA in Uganda); Thomas v. Canada (Citizenship and Immigration) 2007 FC 838 (in general).

749 Cardenas v. Canada (Minister of Employment and Immigration), 93-A-171.


751 Gutierrez v. Canada (Minister of Employment and Immigration), IMM-2170-93; Mohammad v. Canada (Minister of Citizenship and Immigration), IMM-4227-94; Alza v. Canada (Minister of Citizenship and Immigration), IMM-3657-94.

752 Aden v. Canada (Minister of Citizenship and Immigration), IMM-2912-95; Omar v. Canada (Minister of Citizenship and Immigration) 2004 FC 861; Kaburundi v. Canada (Citizenship and Immigration) 2006 FC 361; Han v. Canada (Minister of Citizenship and Immigration) 2006 FC 432.

753 Randhawa v. Canada (Minister of Employment and Immigration), IMM-5540-93; Kiared v. Canada (Minister of Citizenship and Immigration), IMM-3172-97; Cabrera v. Canada (Minister of Citizenship and Immigration), IMM-4657-97.


755 Goncalves v. Canada (Minister of Citizenship and Immigration) 2001 FCT 806; Shrestha v. Canada (Minister of Citizenship and Immigration) 2002 FCT 887; see in general also A. Kaushal and C. Dauvergne at 89-91.
for interrogations that regularly included beatings and other forms of torture.\(^{756}\) Similarly, a soldier of the Uruguayan military\(^ {757}\) who transported prisoners to clandestine detention centres and a sergeant in the ANP (Angolan National Police) in Angola in 1997–1998 who escorted prisoners to and from interrogations and trial where they knew torture was carried out, were excluded.\(^ {758}\)

A large group of cases involves situations where individuals provided information to organizations, which might result in harm to those about whom this information was provided. This has happened in countries such as Ethiopia (names disclosed to the Ethiopian security service);\(^ {759}\) Iran (liaison agent between regular police and SAVAK, the secret Iranian police);\(^ {760}\) Ecuador (liaison officer between two army groups);\(^ {761}\) Iraq (providing information regarding the opposition to the Mukharbat secret police);\(^ {762}\) as well as providing information to the Patriotic Union of Kurdistan or PUK, resulting in assassinations by that group);\(^ {763}\) Albania (overseer of the information-gathering activities of SHIK, the secret police);\(^ {764}\) Angola (member of youth organization which had as purpose the infiltration of Unita);\(^ {765}\) Lebanon (providing information to the South Lebanese Army\(^ {766}\) or Syrian Army);\(^ {767}\) Sri Lanka (identifying innocent people as LTTE members to the Sri Lankan army)\(^ {768}\) and Congo (working in the CSE–Comité de Sécurité de l’Etat) in the Republic of Congo in the late 1990s in which capacity she would listen incognito to conversations of individuals in public places and report on their opinions to the CSE).\(^ {769}\)

Another category of cases involves persons who provided support functions. Examples include being a guard, which was the situation in the Ramirez case and more recently the Carrasco Varela case involving a prison guard in Nicaragua,\(^ {770}\) and a driver and part-time bodyguard of the local militia leader and local KhAD chief in Afghanistan.\(^ {771}\) This category also applied to a soldier of the Yugoslav People’s army

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\(^{757}\) Gutierrez v. Canada (Minister of Employment and Immigration), IMM-2170-93.

\(^{758}\) Januario v. Canada (Minister of Citizenship and Immigration) 2002 FCT 527; for similar situations, see also Gracias-Luna v. Canada (Minister of Citizenship and Immigration), [1995] F.C.J. No. 812; Guardado v. Canada (Minister of Citizenship and Immigration), IMM-2344-97; Yang v. Canada (Minister of Citizenship and Immigration), IMM-3422-97.

\(^{759}\) Bamlaku v. Canada (Minister of Citizenship and Immigration), IMM-846-97.

\(^{760}\) Ministre de la Citoyenneté et de l’Immigration c. Mohammad Hassan Bazargan, A-400-95; Shakarabi v. Canada (Minister of Citizenship and Immigration), IMM-1371-97.

\(^{761}\) Albua v. Canada (Minister of Citizenship and Immigration) [2000] 2 F.C. 538.


\(^{763}\) Hovaiz v. Canada (Minister of Citizenship and Immigration), IMM-2012-01.

\(^{764}\) Lalaj v. Canada (Minister of Citizenship and Immigration), IMM-4779-99.

\(^{765}\) Gonzalves v. Canada (Minister of Citizenship and Immigration) 2001 FCT 806.

\(^{766}\) Harb v. Canada (Minister of Citizenship and Immigration) 2003 FCA 39; Alwan v. Canada (Minister of Citizenship and Immigration), 2004 FC 807; Salami v. Canada (Minister of Citizenship and Immigration), IMM-6023-02.

\(^{767}\) Diab v. Canada (Minister of Employment and Immigration), IMM-3162-93.

\(^{768}\) Kathiravel v. Canada (Minister of Citizenship and Immigration) 2003 FCT 680.

\(^{769}\) Bukumbe v. Canada (Minister of Citizenship and Immigration) 2004 FC 93.

\(^{770}\) Carrasco v. Canada (Minister of Citizenship and Immigration), 2008 FC 436.

\(^{771}\) Zadeh v. Canada (Minister of Employment and Immigration), IMM-3077-94.
peripherally involved in the killing of civilians; a soldier of the Honduran armed forces involved in the torturing and killing of prisoners; a soldier involved in counter-insurgency operations in El Salvador; a civilian driver on a military base in El Salvador between 1988 and 1992 (in which capacity he would drive persons belonging to a death squad to and from the base, together with captives); a person who transported weapons and ammunitions and who found safe meeting places for the commandants of the FMLN in El Salvador; as well as a member of the Venezuelan military involved in the suppression of riots.

Yet another group of cases deals with assisting in increasing the efficiency of an organization, such as being an intelligence officer in a prison in Iran; a policeman in charge of political prisoners in a military hospital in Uruguay; a security guard at a hospital where forced abortions were carried out in China or a soldier providing maintenance and loading ordinance onto planes used to bomb civilians in Guatemala. Lastly, financing of war crimes or crimes against humanity will also lead to imputation of liability.

Some connections between activities of individuals and organizations involved in international crimes have been too tenuous to qualify as complicity, such as the case of a pilot in the Peruvian air force without sufficient links between his employment and the security zones were crimes against humanity were committed, an aircraft mechanic and flight engineer in the Nicaraguan/Sandinista air force whose rank was too low to attribute liability, an executive member of the youth wing of the Awami League in Bangladesh without a sufficient link between the human rights abuses of the Bangladeshi police and members of the AL; an accounting assistant in the headquarters of the Mexican army who organized the material resources required for the operations in the Chiapas region were human rights abuses were carried out.

772 Cibaric v. Canada (Minister of Citizenship and Immigration), IMM-1078-95.
773 Fletes v. Canada (Minister of Employment and Immigration), 83 F.T.R. 49.
775 Guardado v. Canada (Minister of Citizenship and Immigration), IMM-2344-97.
776 Aguilar v. Canada (Minister of Citizenship and Immigration), IMM-4491-99.
777 Rojas v. Canada (Minister of Citizenship and Immigration), 2003 FCT 394.
778 Torkchin v. Canada (Minister of Employment and Immigration), A-159-92.
779 Alza v. Canada (Minister of Citizenship and Immigration), IMM-3657-94.
780 Chen v. Canada (Minister of Citizenship and Immigration), IMM-541-00.
781 Ordonez v. Canada (Minister of Citizenship and Immigration), IMM-2821-99; see also Salgado v. Canada (Minister of Citizenship and Immigration), IMM-2463-05, for a similar situation in El Salvador.
782 Aguilar v. Canada (Minister of Citizenship and Immigration), IMM-4491-99; Chitrakar v. Canada (Minister of Citizenship and Immigration) 2002 FCT 888; Pushpanathan v. Canada (Minister of Citizenship and Immigration) 2002 FCT 867.
783 Zoeger la Hoz v. Canada (Minister of Citizenship and Immigration) 2005 FC 762.
784 Murillo v. Canada (Minister of Citizenship and Immigration) 2002 FCT 1240.
785 Chowdhury v. Canada (Minister of Citizenship and Immigration) 2003 FCT 744.
786 Collins v. Canada (Minister of Citizenship and Immigration) 2005 FC 732.
The concept of complicity based on a shared purpose was applied and given more substance by the Federal Court in five 2005 cases. This mode of liability was originally identified by the Federal Court of Appeal but had not been fleshed out or had been conflated with the notion of personal and knowing participation. While the Canadian jurisprudence in these five cases did not provide an in-depth analysis of the notion of shared purpose, it provided an approach to determine whether a person should be considered excluded on this basis based on six distinct factors: the nature of the organization, the method of recruitment, age, position and rank of the individual, knowledge of atrocities, the length of time in the organization and whether there was an opportunity to disassociate from the organization.

These six factors were applied in 2006 and 2007 when 12 out 14 persons applying for refugee protection were excluded on this basis. The diverse situations included organisations such as the Uzbekistan police; the Sri Lankan police; the Colombian army; the Philippine army; the Minister of the Interior of Angola; the Algerian terrorist group FIS (Islamic Salvation Front); the Burundian government; the Peruvian Republican Guard; the Russian Department of Criminal Investigation in Chechnya; the Administrative Security Agency in Colombia; the Zimbabwean police; the Mauritanian army; and the Haitian National Police.

The reasons for this success in 2006 and 2007 could be the fact that unlike in 2005 where the tribunal applied this concept to either vast areas of a country or large organizations, in the latter two years the six factor approach was acceptable when used in smaller but notorious parts of the country such as the Emergency Zones in Peru in the eighties, the city of Grozny in Chechnya; or specific regions in

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787 Fabella v. Canada (Minister of Citizenship and Immigration) 2005 FC 1028; Bedoya v. Canada (Minister of Citizenship and Immigration) 2005 FC 1092; Ali v. Canada (Solicitor General) 2005 FC 1306; Catal v. Canada (Minister of Citizenship and Immigration) 2005 FC 1517; and Ardila v. Canada (Minister of Citizenship and Immigration) 2005 FC 1518.
788 Akramov v. Canada (Minister of Citizenship and Immigration) 2006 FC 122.
789 Kasturiarachchi v. Canada (Minister of Citizenship and Immigration) 2006 FC 295.
790 Torres Rubianes v. Canada (Minister of Citizenship and Immigration) 2006 FC 1140 although not in Bonilla Vasquez v. Canada (Minister of Citizenship and Immigration) 2006 FC 1302.
791 Sabadao v. Canada (Minister of Citizenship and Immigration) 2006 FC 292 although in an indirect fashion by not mentioning or analysing the six factors but instead making inferences in that regard.
792 Justino v. Canada (Minister of Citizenship and Immigration) 2006 FC 1138.
793 Chougui v. Canada (Citizenship and Immigration) 2006 FC 992 although in an indirect fashion by not mentioning or analysing the six factors but instead referring to a common purpose.
794 Ryiuze v. Canada (Citizenship and Immigration) 2007 FC 134.
795 Ponce Vivar v. Canada (Public Safety and Emergency Preparedness) 2007 FC 286.
796 Petrov v. Canada (Citizenship and Immigration) 2007 FC 465.
797 Rivaldo Escorcia v. Canada (Citizenship and Immigration) 2007 FC 644.
798 Dzimba v. Canada (Citizenship and Immigration) 2007 FC 500.
799 Sindia v. Canada (Citizenship and Immigration) 2007 FC 1046.
800 Meceron v. Canada (Citizenship and Immigration) 2007 FC 265.
801 Ponce Vivar v. Canada (Public Safety and Emergency Preparedness) 2007 FC 286.
802 Petrov v. Canada (Citizenship and Immigration) 2007 FC 465.
Colombia; or with respect to persons with a very long service record in organizations with a notorious reputation.

The most recent cases continue this trend for persons working for the secret service of Cameroon; for a member of the Algerian national police (Direction générale de la Sûreté nationale or DGSN) and the Algerian prison system; a person who was an infiltrator as part of secret operations against drug traffickers of the special operations services of the Mexican army; a member of the Georgian police; a member of the Colombian military operating in the Uraba region; the head of a neighbourhood self-defence organization/security committee in Burundi, a prefect during the genocide in Rwanda and a member of the Mouvement pour la Libération du Congo (MLC) in the Democratic Republic of the Congo. However, it has been rejected in a situation of a magistrate for a short period of time in the DRC as she had no influence on any decisions of the government related to the commission of crimes against humanity in that country.

The 2006 cases of Kasturiarachchi and Torres Rubianes make it clear that not all six factors are of equal importance and it would appear that of the six the factors age and method of recruitment might not figure as prominently as the other four criteria. The case of Justino, decided in the same year, stands for the proposition that rank does not necessarily involved a leading position within an organization.

The mens rea in all types of complicity is knowledge of war crimes or crimes against humanity, which also includes the fact that one must have known about the criminal activities committed by the organization to which one belonged or was wilfully blind to those activities.
Canada has applied the notion of complicity to the largest number of cases in all the countries under consideration, namely over 200 cases. While the earliest case in this area of law, the *Ramirez* case, sought a close link with international criminal law as it existed at the time of its decision, 1992, to develop the various computations of extended liability, personal and knowing participation, membership and common purpose, the jurisprudence since that time has built on the principles developed in that case rather than relying on more recent development in international criminal law.\(^{819}\) Even so, the situations in which the personal and knowing participation doctrine was applied would have found resonance at the international level if this type of extended liability would have found more usage internationally.

It is interesting to note that in the common purpose or joint criminal enterprise context an ostensibly divergent development occurred in that Canadian courts only allowed this type of extended liability for smaller units than previously applied at the tribunal level while the ICTY did the opposite by expanding joint criminal enterprise from smaller units to larger organizations. However, while this development appears to be contradictory this is not the case as both decision makers ended up in the same place in terms of the type of organizations namely the ones, which were involved in international crimes at a regional rather than national level even though the reasoning to arrive at that conclusion differed, it being more analytically at the international level while more intuitively by relying on six factors in Canada.

4.2.4: *France*

In general, a person can be excluded from refugee protection in France if he or she has personally participated\(^{820}\) in article 1F activities. Membership in a political or government organization associated with international crimes is not a concept which has been applied in France.\(^{821}\)

This general principle has been applied in a number of cases,\(^{822}\) primarily in situations arising out of the 1994 genocide in Rwanda where there had been no evidence of direct involvement by individuals in international crimes.\(^{823}\) It should be noted that in these cases the notion of dissociation has been deemed of great importance in that when a person has an association with an undesirable group or a

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\(^{819}\) Although a recent case referred to the ICC Statute for the notion of command responsibility in passing, see Ezokola v. Canada (Minister of Citizenship and Immigration), 2010 FC 662.


\(^{821}\) CE, 25 March 1998, 170172, Mahboub; see also N. Michel, at 297 and *Asylum Procedures* at 152.

\(^{822}\) Principles of complicity have also been considered in 1F(b) and especially 1F(c), the latter of which has been used extensively to address crimes against humanity. The caselaw pertaining to these clauses will be discussed below.

\(^{823}\) There had been one case of direct involvement, namely where a Russian soldier had killed about 30 civilians during the Chechnyan conflict in 1995, in CRR, 5 May 1997, 307510, Galimow.
criminal event and has not severed his or her ties with that situation, this has been considered in a negative light in each of the cases below.\footnote{824}{See in general on this trend, N. Michel, at 298.}

The wife of President Habyarimana, whose death in April 1994 became an important impetus for the genocide in Rwanda, was excluded from refugee protection in France because of the fact that she belonged to the premier inner circle or akasu, which planned the genocide, and because within this group she was also instrumental in enunciating the policy surrounding the execution of that event.\footnote{825}{CRR, 15 February 2007, 564776, Mme K. veuve H.}

Remaining at the national level, the Minister of Justice who served in the interim government in place during the genocide was also found to have been complicit, not only because of his function in a government guilty of systematic massacres but also because in the exercise of his function he participated in a radio broadcast asking the population for solidarity with the government. The fact that he was also mentioned as a category 1 suspect on the government of Rwanda list of genocide suspects (meaning he was sought as a person involved in the planning of the genocide) played an important role for the article 1F determination.\footnote{826}{CRR, 12 October 2006, 558295, Mponampeka.}

A career major in the Rwandese army who was the commander of a battalion west of the capital Kigali in an area notorious for the massacres carried out during the genocide, was also found to be complicit.\footnote{827}{CRR, 21 March 2003, 352817, Ntilikina.}

Likewise, a journalist who had been in charge with broadcasting the extreme propaganda of the interim government and thereby contributing indirectly to the genocide was also excluded.\footnote{828}{CRR, 23 October 1997, 294336, Bicamumpaka.}

The same result was achieved with powerful local functionaries, such as a bourgmestre,\footnote{829}{CNDA, 15 July 2009, 549950/05024108, N. alias N.} who had facilitated and encouraged the local militia in the killing of Tutsis by his authoritative presence at roadblocks; a préfet,\footnote{830}{CRR, 25 March 2003, 383865, Bucyibiruta.} who had taken the job on a voluntary basis and presided over the prefectural security council, which decided where to place roadblocks, and in that manner contributed to the executions of Tutsis; and a sous-préfet\footnote{831}{CRR, 13 April 2005, 375214, S.; the tribunal also indicated that the fact that this person’s name did not appear on any of the lists of genocidaires emanating from the government of Rwanda was irrelevant for serious reasons for considering that he was complicit in the genocide.} who was excluded in more general terms by saying that during the genocide most persons with his and higher positions had been indispensable for making the genocide possible by tolerating and encouraging the acts accompanying it. Similarly, a local university teacher and doctor was also excluded because of the fact that he been part of a number of meetings to plan the genocide in his community.\footnote{832}{CRR, 16 December 2003, 420926, Rwamucyo.}
On the other hand, a bank manager of the national bank of Rwanda who had no
connection with any of the radical political parties and who had not expressed any
extremist views in the exercise of her functions fell outside the parameters of the
exclusion provision.\textsuperscript{833} This was also the case for a lieutenant colonel in the north of
the country who had helped a number of students escape from being killed.\textsuperscript{834}

In more recent times, a captain in the Rwandan army officer who was stationed in the
Kivu region in the Democratic Republic of the Congo in 2001, during a time that the
Rwandan army committed war crimes and crimes against humanity against the local
population, was excluded because his troops had killed 60 civilians. Although he
claimed that he had not participated or assisted in the massacre, the tribunal was of
the view that the fact he was in charge of the burial of the bodies of the murdered
victims in an area notorious for atrocities carried out by the Rwandan army was
sufficient to bring him within article 1F of the Refugee Convention.

There has been one French exclusion case not involving Rwanda, namely that of a
Serbian police officer who was stationed in Kosovo in 1999 during the armed conflict
between Serbia and the Kosovo Liberation Army (KLA). While it was clear that
Serbian forces, including the police, carried out war crimes and crimes against
humanity in Kosovo during that time, there was no evidence that this individual had
been involved.\textsuperscript{835}

The jurisprudence in France, like in Australia and Belgium, has not relied on
international criminal law with respect to the extended liability. In most cases liability
was found in the most egregious cases arising out of the Rwandan genocide and as
such not in contradiction with similar results as arrived at by the ICTR. The
methodology used in France to come to a conclusion of complicity was often a
combination of finding that a person occupied a high position in the Rwandan
government or the militia while also giving a great deal of weight to the factor of
disassociation from the organization involved in the genocide. An analysis along the
lines of command responsibility would have been more in line with international
criminal law but would have resulted in exclusion as well.

4.2.5: Germany

The Asylum Procedure Act states that article 1F(a) also applies to persons ‘who have
incited others to commit the crimes or acts listed there or otherwise been involved in
such crimes or acts.’\textsuperscript{836} There has been no jurisprudence so far in Germany, which
has interpreted this provision.

\textsuperscript{833} CRR, 3 January 2005, 434055, Mme N. ép. B.; in this case the fact that her name did not appear on
any list was seen as another piece of exculpatory evidence.

\textsuperscript{834} CRR, 18 January 2000, 337421, Nzungize; the fact that his name does not appear on any lists is
again seen as exculpatory.

\textsuperscript{835} CRR, 18 May 2006, 548090, Kurta.

\textsuperscript{836} Section 3(2), last sentence; this is as a result of the implementation of the Qualification Directive,
which employs the same language in articles 12.3.
4.2.6: The Netherlands

The main parameters of indirect liability are set out in the Aliens Manual, which states that if a person had knowing and personal participation in international crimes, exclusion under article 1F can be applied against such a person.\textsuperscript{837} The Manual also says that for interpretation of this concept recourse can be had to the ICC Statute.\textsuperscript{838}

According to the Manual knowing participation present when:

a) the alien was employed in an organ or organization which according to influential reporting has committed in a systematic or widespread manner crimes set out in article 1F during the time period of his employment unless the alien can show that there was a significant exception in his individual case;

b) the alien was employed in an organization of which the Minister has determined that certain categories of persons belonging to that organization will be considered to fall within article 1F unless the alien can show that there was a significant exception in his individual case;

c) an alien has participated in activities, which he knew or should have known, were activities set out in article 1F, without being associated with an organ or organization as set out above.

Personal participation is present when:

a) it is apparent that the alien has personally committed a crime as set out in article 1F;

b) a crime as set out in article 1F has been committed under the order or responsibility of the alien;

c) the alien has facilitated crimes as set out in article 1F in the sense that his commission or omission has contributed substantially to the crime;

d) the alien has belonged to a category of persons within an organization, of which the Minister has determined that certain categories of persons belonging to that organization will be considered to fall within article 1F unless the alien can show that there was a significant exception in his individual case.

\textsuperscript{837} Vreemdelingencirculaire 2000 (C), article C4/3.11.3.3; while the Manual is in Dutch the words ‘knowing participation’ and ‘personal participation’ are set out in English, a parlance, which is used in other official documents and the jurisprudence. This terminology stems originally from the Canadian caselaw, which is clear from the fact that the seminal Canadian case, Ramirez, is mentioned in this context in the Dutch case of Rb, The Hague, Awb 02/12057, 19 December 2002; see also Rb, The Hague, 04/51818, 28 June 2006; Letter from the State Secretary of Justice to the House of Commons, 1997-1998 Session, 19 637, nr. 295, 28 November 1997 at 7-8; and Adviescommissie voor Vreemdelingenzaken `Artikel 1F Vluchtelingenverdrag in het Nederlands vreemdelingenbeleid’ (The Hague, Adviescommissie voor Vreemdelingenzaken, 2008) at 15.

\textsuperscript{838} Namely articles 25 and 27-33.
The category under (c) is further clarified by indicating that a substantial contribution means a contribution, which had a factual effect on the commission of the crime and which would likely not have taken place if nobody had fulfilled the role of the person concerned or if the person concerned had taken the opportunity to prevent the crime.

The Council of State has approved this approach. While there is no particular sequence, which has to be followed in assessing personal and knowing participation, both aspects of this test have to be addressed by the decision maker. There is no need to provide concrete examples of the results of the personal and knowing participation of the asylum seeker, as long it can be shown that he or she was involved in acts, which increased the risk of death or torture of the victim and the asylum seeker was aware of that risk.

The Minister responsible for refugee matters has designated a number of categories within organizations where membership results in the rebuttable presumption set out above under both knowing and personal participation, namely non-commissioned officers and officers in the KhAD and WAD, security organizations in Afghanistan between 1978 and 1992, senior and general officers of the police (Sarandy) and

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839 Vreemdelingencirculaire 2000 (C), article C4/3.11.3.3.
840 AbRS 27 October 2003, nr. 200305116/1 and AbRS 13 April 2005, nr. 200408522/1 at paragraph 2.2.6.
842 Rb, Roermond, Awb, 01/48721, 4 February 2003.
843 AbRS 13 August 2004, nr. 200402430/1, AbRS 2 August 2005, nr. 200401637/1 and AbRS 31 August 2005, nr. 200502650.
844 A designation to declare senior persons undesirable has happened elsewhere. Canada, in the immigration context, has a provision in the Immigration and Refugee Protection Act, section 35(1)(b), which allows the Minister of Citizenship and Immigration to designate a regime which has been involved in genocide, war crimes, crimes against humanity and terrorist activities, the result of which senior officials (as set out in the Immigration and Refugee Protection Regulations, section 16) are inadmissible, as part of a non-rebuttable presumption, to Canada in the immigration context. In the refugee context a number of Federal Court decisions have found senior people in notorious regimes excludable using the same reasoning as in the immigration context but this practice had been recently declared inappropriate as, among other reasons, the designation by a Minister was missing (Ezokola v. Canada (Minister of Citizenship and Immigration), 2010 FC 662). In New Zealand the connection between a notorious government and persons working for such a government results in visa refusal, which is set out in the following manner: ‘applicants are considered to pose a risk to New Zealand’s international reputation if they have or have had an association with, membership of, or involvement with, any government, regime, group or agency that has advocated or committed war crimes, crimes against humanity and/or other gross human rights abuses’ (sections A5.30 and A5.50 of the Operations Manual of the New Zealand Immigration Service).
845 Letter from the State Secretary of Justice to the House of Commons, 1999–2000 Session, 19 637, nr. 520, 3 April 2000, at paragraph 3.1. This decision was based on an extensive official report (Ambtsbericht) by the Minister of Foreign Affairs earlier in the year regarding the security services in Afghanistan and their close connection to the human rights abuses carried out in Afghanistan during that time period as well as the role played by the officer corps in those abuses. This organization was called the KhAD from 1978 until 1987 after which it was called the WAD.
846 Letter from the Minister of Immigration and Integration to the House of Commons, 2002–2003 Session, 19 637, nr. 695, 7 November 2002. The letter specifies in more detail which parts of the
certain specific categories of persons belonging to the Hezb-i-Wahdat (or Islamic Unity Party of Afghanistan) of the same regime in Afghanistan;\textsuperscript{847} certain senior officials in Iraq during the Baath party regime of Saddam Hussein;\textsuperscript{848} and corporals and non-civilian leaders in the RUF during its terror campaigns between 1998 and 2001 in Sierra Leone.\textsuperscript{849}

These designations and the evidence, upon which they were based, have been the subject of judicial consideration. In general, the approach whereby a rebuttable presumption is introduced has received judicial approval.\textsuperscript{850}

With respect to specific designations, the KhAD/WAD one has received the most attention. The Council of State determined that the Minister responsible for immigration and asylum is entitled to rely on the official report of the Minister of Foreign Affairs including the conclusion that all non-commissioned officers and officers were part of the more notorious section of the KhAD/WAD and as such were personally involved in the interrogation, torture and execution of suspects. From this it follows that there is a presumption of personal and knowing participation of person employed in these named categories.\textsuperscript{851}

The same court was of the view that the evidence brought forward by organizations, such as Amnesty International, the UNHCR\textsuperscript{852} and others\textsuperscript{853} to show that the evidence in the report by the Minister of Foreign Affairs was flawed was not sufficient to cast doubt on the accuracy and fulsomeness of that report.\textsuperscript{854} With respect to the UNHCR

\textsuperscript{847} Notitie betreffende de toepassing van artikel 1F Vluchtelingenverdrag at 12, footnote 10.

\textsuperscript{848} Namely officers in the Special Security Services and the heads of the General Security Services, the Military Intelligence Services and the General Intelligence Service. Letter from the Minister of Immigration and Integration to the House of Commons, 2003–2004 Session, 19 637, nr. 811, 8 April 2004; the designation was again based on an official report by the Minister of Foreign Affairs.

\textsuperscript{849} Letter from the Minister of Immigration and Integration to the House of Commons, 2003–2004 Session, 19 637, nr. 829, 23 June 2004, again based on a report from the Ministry of Foreign Affairs.

\textsuperscript{850} AbRS 28 August 2003, nr. 200302892/1; AbRS 30 November 2004, nr. 200404008/1; and AbRS 17 January 2005, nr. 200406828/1. The information in the official report of the Minister of Foreign Affairs was also found to be conclusive where the applicant provided different information about these organizations (AbRS 13 April 2005, nr. 200408522/1 and AbRS 12 July 2004, nr. 200401436/1).


\textsuperscript{852} See for instance, Adviescommissie voor Vreemdelingenzaken ‘Artikel 1F Vluchtelingenverdrag in het Nederlands vreemdelingenbeleid (The Hague, Adviescommissie voor Vreemdelingenzaken, 2008) at 15, and 45-57.

\textsuperscript{853} AbRS 24 September 2009, nr. 200901907/1 (which also indicated that the difficulty in finding more substantial information given the situation in Afghanistan is no reason not to rely on the original official report) and AbRS 17 March 2010, nr. 200906595/1 (which even rejected a number of documents of the Afghan government in this respect).
report, it was of the view that although that organization should be given a great deal of deference, the fact remained that most of its submissions were based on sources, which had already been rejected earlier by the Council and as such was not conclusive to displace the conclusions in the foreign affairs report.855

With respect to the second designation, the police in Afghanistan, persons belonging to sections, which were specifically included in the letter by the Minister, were found to be justifiably excluded based on their functions.856 On the other hand, in situations where the persons had belonged to the police but in sections not mentioned in the report, it was incumbent on the decision maker to find personal and knowing participation by regular types of evidence,857 The designation approach was also successfully used in Iraqi cases858 and one Sierra Leonian case.859

The presumption of personal and knowing participation for designated categories can be rebutted if there was a significant exception to the policy applicable to the individual’s particular situation. A short training period before taking up duties with a designated organization,860 employment with the civilian (as opposed to the military) KhAD/WAD,861 documents from the Afghan government that the claimant has no criminal record862 or that he or she was not listed as a human rights abuser were not deemed to be exceptional.863

In situations outside the designation approach, persons have been held responsible for knowing and personal participation in a myriad of situations ranging from presence at the scene with authority to common purpose type cases.

Membership in an organization or government does not lead necessarily to exclusion unless the person was responsible for or facilitated the commission of article 1F crimes and unless the person continued to be employed in a high function within a government involved in international crimes knowing that such activities took

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857 AbRS 28 September 2007, nr. 200705217/1.
858 Rb, The Hague, Awb 02/81866, 3 November 2004; AbRS 26 Juni 2009, nr. 200808309/1/V3; Rb, Maastricht, Awb 08/28430, 17 June 2009; Rb, Haarlem, Awb 08/34187, 1 June 2010.
860 AbRS 22 December 2009, nr. 2009040231; a government document indicates that such an exception could also be applied in situations where the person had a short appointment or the person was not promoted, see Notitie betreffende de toepassing van artikel 1F Vluchtelingenverdrag at 14.
861 Rb, The Hague, Awb 09/8838, 13 April 2010; in another case it was said that an officer for the National Guard, a part of the KhAD/Wad could be painted with the same brush as the officials mentioned in the official report (AbRS 27 June 2005, nr. 200410175/1).
862 AbRS 29 October 2009, nr. 200901921/1.
Presence at the scene was considered once but rejected as a sufficient basis in a situation where a member of the Sarandoy in Afghanistan was present during house searches, which did not result in any arrests.\footnote{Rb, The Hague, Awb 00/77691, 5 December 2002.} Presence at the scene was considered once but rejected as a sufficient basis in a situation where a member of the Sarandoy in Afghanistan was present during house searches, which did not result in any arrests.\footnote{AbRS 12 December 2003, nr. 200305099/1. For exclusion of a member of the local Sarandoy who held responsible for handing over political prisoners, see Rb, The Hague, 02/6467, 9 November 2004.}

Handing over persons to organizations where these persons would be subject to torture or killing in the knowledge that this would be the result has been found objectionable in a number of cases, including in Afghanistan where involvement in house searches with arrests and handovers to the KhAD was knowing and personal participation,\footnote{AbRS 7 August 2003, nr. 200301812/1.} as was handing over a file to the KhAD by a prosecutor.\footnote{AbRS 28 April 2004, nr. 200307677/1.} The same conclusion was reached in a case in the same country of a member of the Hezb-i-Wahdat who handed over thieves to the military operational section of the same organization.\footnote{AbRS 13 August 2004, nr. 200402430/1.}

Personal and knowing participation was also present in handing over people in countries as diverse as Azerbaijan (member of the Ministry of National Security to another, notorious section of the same department),\footnote{AbRS 31 August 2005, nr. 200502650/1.} Eritrea (member of military police passing on people to his commanders),\footnote{Rb, The Hague, Awb 06/3863, 5 April 2007.} Iraq (commander of unit involved in combating Kurdish guerrillas, which were transferred after capture to the Iraqi intelligence service\footnote{Rb, The Hague, Awb 02/46550, 24 June 2004.} and an informer for the Mukhabarat who was instrumental in capturing and handing over deserters to that security service);\footnote{Rb, The Hague, Awb 03/46645, 21 February 2006.} and Iran (member of Islamic Revolutionary Guard handing over persons to other sections of the same organization).\footnote{Rb, The Hague, Awb 03/62793, 7 April 2005.}

Another form of personal and knowing participation has, as in other countries, been used in the Netherlands, namely providing information to organizations which are known to inflict death or torture on their victims with the result that the persons about whom information was provided came to harm. Six such cases were decided in the context of Afghanistan. A person who worked for the KhAD as an analyst who had as function to gather anti-government sentiments from letters, which had been opened, and to pass on this information to other sections of KhAD for further action was excludable even if this information was screened first by another section. The Council of State was of the view that this person was responsible because his actions were the starting point of later human rights abuses.\footnote{AbRS 2 August 2004, nr. 200401637/1.} It held the same view for an officer in the army who as head of the communication division transferred coded messages to Kabul with serious human rights consequences.\footnote{Rb, The Hague, Awb 02/3934, 25 September 2003.} Excluded as well were a member
of the political committee of the university, informing on fellow students and teachers;\(^{876}\) a political secretary of the Political Affairs section of the Sarandoy;\(^{877}\) and another person of the Political Directorate of the Sarandoy who had discussions with village elders regarding views about the government, which were reflected in his reports for the Ministry of Internal Affairs.\(^{878}\)

The Courts excluded from refugee protection a courier for the HOS (Croatian Defence Forces) in Bosnia-Herzegovina who transported secret information, which contributed to the crimes committed by the HOS,\(^ {879}\) a member of the intelligence services AND and SNIP during the Mobutu regime in the Democratic Republic of the Congo who maintained files and interrogated people who had been arrested,\(^ {880}\) a member of the Baath party in Iraq who kept tabs on fellow citizens in his neighbourhood\(^ {881}\) and a person who worked for the surveillance section of SAVAK in Iran and whose reports would have been used for interrogation purposes including torture.\(^ {882}\)

Not all information gathering and sharing with repressive organizations will lead to exclusion. A member of the PUK in Kurdistan in Iraq who reported on activities of the Kurdistan Democratic Party was found not to fall within article 1F because he thought that his reporting would at most lead to an oral warning.\(^ {883}\)

A third form of excludable behaviour can be generally described as carrying out support functions. This type of aiding and abetting has been the subject of discussion in a number of cases as well. A captain in the Afghan army who carried out interpreter and translation function for the Soviet occupying army facilitated the human rights abuses perpetrated by the Soviets,\(^ {884}\) as did a fighter pilot in the Afghan air force with the task of the protection of bombers targeting civilian targets.\(^ {885}\) A soldier in the Iraqi army who provided target co-ordinates during the Iran-Iraq war and the Anfal campaign against Kurdish civilians was seen as having contributed to the commission of war crimes.\(^ {886}\) Likewise, a member of UNITA in Angola who shot at enemy columns, helped abducting young persons to fight for UNITA and who gathered food from villages was excluded.\(^ {887}\)

\(^{876}\) AbRS 11 July 2005, nr. 200503613/1.
\(^{879}\) Rb, The Hague, Awb 03/51827, 5 April 2005.
\(^{880}\) Rb, The Hague, Awb 05/41229, 18 April 2006; similarly for a member of the DEMIAP, another intelligence agency, see Rb, The Hague, Awb 03/11376, 9 June 2005.
\(^{882}\) Rb, Utrecht, Awb, 09/3965, 27 October 2010.
\(^{883}\) AbRS 16 January 2004, nr. 200305320/1.
\(^{884}\) AbRS 2 June 2004, nr. 200308871/1; however, the opposite conclusion was reached in the situation of an interpreter with the Iraqi security services, Rb, Assen, Awb, 25 May 2010.
\(^{885}\) Rb, The Hague, Awb 03/53060, 5 August 2005.
\(^{886}\) AbRS 14 December 2010, nr. 200909884/1/V3; for another case were a person was excluded for support activities during the Anfal campaign, see Rb, Assen, Awb 09/18111, 9 September 2010.
Two cases dealing with persons who were employed in the military industrial complex in Iraq were excluded under article 1F. One person was the supervisor of a secret facility, which produced airplane bombs with chemical or explosive charges. These bombs were later used as part of military action. The second person was responsible for part of the production of poison gas, which was used in the Iraq-Iran war. Both were aware of the outcome of the weaponry they helped produce. The personal secretary of the director of the Shahid Nazaran prison in Tehran, who was responsible for the co-ordination of the work of the director and the distribution of director’s instructions, made a substantial contribution to the crimes committed in that facility.

At times the link between the activities of an individual and the international crimes committed by a government was too tenuous to amount to knowing and personal participation. For instance, an Iraqi fighter pilot who was involved in bombardments during the Anfal campaign and during the war with Iran was found not to be excludable as there was not more precise evidence of his role in crimes committed against civilians in these events. Also in relation to Iraq, an officer of the security service in charge of the maintenance of buildings was also seen as too far removed to attract liability. Similarly, a prison official in the Ghasr detention centre in Tehran who only had responsibility for food quality, hygiene and safety in the cell blocks but was not involved in a decision making regarding interrogation or the fate of the prisoners was found not to fall within the parameters of article 1F. Along the same lines, with respect to a person working in an abortion clinic in China who administered injections and provided general treatment, it was not clear whether these duties contributed to the babies being aborted as part of the one-child policy.

The largest group of cases in which personal and knowing participation discussed in the jurisprudence has been where the refugee claimant was not as closely associated with atrocities as those under the aiding and abetting type approach above. These cases with a more remote association usually involved people occupying very senior positions in organizations with an overall responsibility for the implementation of a policy of human rights violations or functionaries with senior ranks who were closer to the actual carrying out of war crimes or crimes against humanity.

Cases involving senior officials involve situations such as high level members of the Baath party and generals in the Iraqi army, all of whom were, because of their

890 Rb, The Hague, Awb 0340505, 10 January 2006.
891 Rb, The Hague, Awb 06/60302, 14 September 2004; where the connection between the pilot’s actions and the resulting crimes against humanity had been closer, exclusion followed, see Rb, Zwolle, Awb 01/55128, 6 February 2004.
892 Rb, Zwolle, Awb 09/40840, 28 April 2010.
895 Rb, Haarlem, Awb 08/34187, 1 June 2010; Rb, Zutphen, Awb 10/5445, 1 December 2010.
896 Rb, Den Bosch, Awb 08/22199, 1 March 2010; Rb, Zwolle, Awb 09/40819, 9 April 2010.
influential involvement in military, political and legislative policy, found to be closely associated with this regime, which carried out crimes against humanity. In Afghanistan, members of the Central Committee of the People’s Democratic Party of Afghanistan (PDPA)\textsuperscript{897}, a very senior member of the Hezb-i-Whadat, an organization well known for the use of torture of civilians, was excluded\textsuperscript{898} as were two ministers of the Ministry of Justice and the deputy minister of the Ministry of Tribes and Nationalities because their departments provided logistical and personnel support to the KhAD/Wad and as such played a crucial role in the work of that organization.\textsuperscript{899}

The governor of the National Bank of Rwanda who was responsible for the funds for the Rwandan government, which were in part used to purchase weapons to carry out the genocide, was found to have contributed, especially in view of the fact that he had not distanced himself from the regime even months after the genocide had started.\textsuperscript{900}

A person in charge of 50 PKK fighters, who was also a member of the most important policy and executive organs of the PKK, was excluded as she had personally and knowingly participated in war crimes committed by this organization.\textsuperscript{901} A colonel in the army of the Mobutu regime in the Democratic Republic of the Congo who had leading functions in a government organization, which carried out systematic and widespread human rights abuses, must have known of these abuses and facilitated them.\textsuperscript{902} Two senior officers in the Iraqi army who were heads of units (including the notorious Jash unit) during the Anfal campaign, which had been actively involved in war crimes and crimes against humanity were also excluded.\textsuperscript{903} A major in the Afghani police force in Kabul, in charge of a unit of 10 police officers, which not only investigated crimes but also had the authority to carry out preventative arrests, substantially contributed to the crimes committed by this police force considering his position and the tasks he was asked to carry out.\textsuperscript{904} A lieutenant in charge of a commando unit in Afghanistan, regiment 466, consisting of 60 soldiers, which was notorious for human rights abuses, was also considered a personal and knowing participant.\textsuperscript{905} At a lower level, a member of the Abu Nidal Organization, a terrorist entity in the Palestine Territories, who had voluntarily joined, stayed with the organization for ten years and did not disassociate at an

\textsuperscript{897} AbRS 11 February 2004, nr. 200306693/1; Rb, The Hague, Awb 03/38359, 31 December 2004; and Rb, The Hague, Awb 03/23265, 9 March 2005. Such an approach was not uniform as can be seen from two cases where the policy function was not as clear-cut as in the preceding three judgments (Rb, The Hague, Awb, 01/37861, 4 September 2003 and Rb, The Hague, Awb 04/28989, 8 September 2005) and exclusion was not applied. The same result was achieved for regular members of the PDPA, many of which had connections with the KhAD but not always close enough to reach a finding of knowing and personal participation (Rb, The Hague, Awb 02/48953, 26 January 2004).

\textsuperscript{898} Rb, The Hague, Awb 00/7608, 1 March 2004.

\textsuperscript{899} Rb, The Hague, Awb 03/44039, 14 February 2006; Rb, The Hague Awb 01/20518, 29 April 2004; and AbRS 11 February 2004, nr. 200306693/1.


\textsuperscript{901} AbRS 23 July 2004, nr. 200402639/1 and 200402651/1.

\textsuperscript{902} Rb, The Hague, Awb 03/19330, 9 November 2004.

\textsuperscript{903} AbRS 28 June 2005, nr. 200500478/1 and Rb, The Hague, Awb 03/53739, 16 February 2006.

\textsuperscript{904} AbRS 12 November 2003, nr. 200304459/1.

\textsuperscript{905} Rb, The Hague, Awb 01/17246, 13 November 2002.
opportune and safe time, while also teaching young people the ideology of the organization, participated knowingly and personally.\textsuperscript{906}

Sometimes the line between participation as a result of close association and non-exclusion is finely drawn. A member of the powerful Loya Jirga was not found to have personally and knowingly participated since it was not clear from the evidence presented exactly how much influence this body had on the communist regime in Afghanistan.\textsuperscript{907} Similarly, in two cases out of Bosnia-Herzegovina, exclusion was not applied because of a lack of influence on the decision making process leading to international crimes for a person in the Territorial Defence Force without an important position\textsuperscript{908} or because of the person was a civilian in the defence secretariat and did not have any power.\textsuperscript{909}

A soldier in the Yugoslav army in Kosovo was found not to be responsible for war crimes although he belonged to unit which was involved in forcibly removing Albanian Kosovars on the ground that these activities were carried out by dozens of soldiers, including him, but that it had not been shown that he had made a direct contribution or that his presence made a difference in the outcome of the events.\textsuperscript{910} Similarly, a member of the LTTE who had been part of the propaganda apparatus, a spy, an administrative clerk and involved in a failed suicide mission was not sufficiently associated with this organization to be excluded.\textsuperscript{911}

The Netherlands in unique among the countries examined in this study that the legislator has set out in some detail what amounts to personal and knowing participation while also in this context making provision for certain members of specifically designated organizations to have complicity raised against them as a rebuttable presumption. A great deal of the jurisprudence has examined the details of the designation, the evidence used to come to such a conclusion and which members would fall under the designation.

Outside the designation approach, exclusion based on complicity bears more than a passing resemblance to the Canadian jurisprudence in that three types of extended liability have been examined by the courts, namely presence at the scene of an international crime, aiding and abetting and a form of common purpose, the latter two in most detail. Aiding and abetting has been applied the most to situations involving handing over people to harm or passing along information resulting in persons being subject to international crimes. The common purpose doctrine has not been analysed as precisely as in Canada where a framework of six specific factors has been set out within which a finding of complicity can emerge if a majority of these factors is present. In the Netherlands common purpose is found more readily if two factors are

\footnotesize{\textsuperscript{906} Rb, The Hague, Awb 01/8334, 2 June 2003. \textsuperscript{907} AbRS 17 December 2004, nr. 200406525/1. \textsuperscript{908} AbRS 11 July 2007, nr. 200702071/1. \textsuperscript{909} Rb, The Hague, Awb 04/50120, 17 January 2006. \textsuperscript{910} Rb, The Hague, Awb 05/377, 8 may 2007. \textsuperscript{911} Rb, The Hague, Awb 03/6907, 1 June 2004.}
present, namely a senior position in an organization and knowledge of the commission of international crimes by that organization. If the person was employed in such an organization at a lower level, more factors akin to the ones found in the Canadian jurisprudence such as duration of involvement, disassociation and the matter of joining the organization are required to come to a conclusion of personal and knowing participation. This jurisprudence was developed by the Dutch courts without using international criminal law jurisprudence but as with the other countries discussed so far little fault can be found in the lines drawn between exclusion and non-exclusion.

4.2.7: New Zealand

There have been two cases in New Zealand regarding of exclusion and modes of criminal liability, which have attracted judicial consideration. The first court decision, the Sequeiros Garate case, was decided in 1997 and involved a policeman from Peru who was a member of an anti-terrorist squad in 1991 and 1992 responsible for the capture and interrogation of members of the Shining Path, a terrorist organization according to the court. In that capacity he had arrested between 30 and 40 suspects and had personally carried out acts of torture on a number of occasions. While not necessary for determination for the case at hand, the Court adopted the position set out in the Canadian jurisprudence that membership in a brutal, limited purpose organization could amount to liability for the purpose of exclusion under article 1F(a).

The second court decision, X & Y v. Refugee Status Appeals Authority, involved the exclusion of a person who was the chief engineer of a ship, which was owned by the LTTE and which was sunk during a confrontation with the Indian Navy in January 1993. At the time, it was carrying several LTTE members and substantial quantities of arms and explosives and it has been found by the Refugee Status Appeal Authority that the LTTE had committed crimes against humanity. The notion of complicity was summarized by again relying on the Canadian caselaw as participating, assisting or contributing to the furtherance of a systematic and widespread attack against civilians knowing that the acts will comprise part of it or takes the risk that it will do so without the need for a specific event to be linked to the accomplice's own acts. The tribunal decision was upheld.

The Court of Appeal overturned this decision for a number of reasons in 2009. With respect to complicity, one judge of the court, Hammond J., was of the view that instead of the Canadian jurisprudence the more recent caselaw of the UK Court of

912 Sequeiros Garate v. Refugee Status Appeals Authority, M826/97, High Court, 9 October 1997.
913 It referred to the cases of Ramirez and Equizabal.
914 X & Y v. Refugee Status Appeals Authority, CIV-2006-404-4213, High Court, 17 December 2007; this was the judicial review of the RSAA Appeal No. 74796 & 74797, 19 April 2006.
915 Paragraph 81.
916 Paragraph 110.
Appeal should be followed resulting in a less generous acceptance of the notion of membership but instead a close linkage with international criminal law concepts of extended liability such as set out in the Rome Statute or as developed by the international tribunals in respect to joint criminal enterprise. Applying these principles, the court felt that the combination of the unquantifiable risk that the cargo on the ship would be used unlawfully and the person’s presence on the ship (even in the face of the lack of credibility of the claimant) could not result in a finding of complicity based on joint criminal enterprise. Another judge, Arnold J., was less equivocal of the lack of the importance of the Canadian jurisprudence in the area of complicity and when examining this jurisprudence in detail together with the recent UK court of appeal jurisprudence he was of the view that membership could still be used as a form of complicity. However, he agreed in the result with Hammond J.

The Supreme Court of New Zealand issued a decision on August 27, 2010 in which it might several relevant findings. In terms of sources of extended liability, the ICC Statute was found to be the most authoritative instrument to provide the various modes of liability in international criminal law, one of which is joint criminal enterprise, which was also the most appropriate one in the situation at hand. After canvassing in detail the concept of joint criminal enterprise and the Canadian and UK jurisprudence in the area of extended liability, the court came to the following conclusion:

Refugee status decision-makers should adopt the same approach to the application of joint enterprise liability principles when ascertaining if there are serious reasons to consider that a claimant seeking recognition of refugee status has committed a crime or an act within art 1F through being complicit in such crimes or acts perpetrated by others. That approach fully reflects the principle that those who contribute significantly to the commission of an international crime with the stipulated intention, although not direct perpetrators of it, are personally responsible for the crime. This principle is now expressed in arts 25 and 30 of the Rome Statute and was earlier well established in customary international law. Its application recognises the importance of domestic courts endeavouring to develop and maintain a common approach to the meaning of the

918 Discussed in the next section.
919 Paragraphs 95-107.
920 Paragraphs 109-112.
921 Paragraphs 152-155.
922 Paragraphs 156-168.
923 Paragraphs 169-171.
924 The Attorney-General (Minister of Immigration) v Tamil X and the RSAA, [2010] NZSC 107.
925 Paragraphs 51-53.
926 Paragraphs 56 and 71, referring to joint criminal enterprise III.
927 Paragraphs 51-69; the court indicates in paragraphs 58-61 that the notion of shared purpose as used in the Canadian jurisprudence is in effect a reference to joint criminal enterprise while in paragraphs 66-69 the court discusses and agrees with the JS decision of the UK Supreme Court, which is also discussed below.
language of an international instrument which is given effect as domestic law in numerous jurisdictions of state parties.\textsuperscript{928}

Based on the facts of the case, the court comes to the conclusion that the claimant should not be excluded. While it was clear that he supported the LTTE in general and had done so in the past, the past activities did not reach the threshold of complicity while the activities underlying the case in question could not support an exclusionary finding, as the weapons on the ship never reached the LTTE for a possible criminal purpose. In the view of the court, while the conditions for a joint criminal enterprise were fulfilled,\textsuperscript{929} there could be no exclusion as joint criminal enterprise required a completed crime or in the words of the court, ‘had it been shown that he participated in voyages where armaments were delivered to the Tamil Tigers in Sri Lanka and subsequently that organisation committed crimes against humanity, the position would be different.’\textsuperscript{930} In this context, the court finds that the words in article 25.3(d) of the ICC Statute ‘in any other way contributes’ still requires the commission of an offence; conspiracy cannot be read into this provision.\textsuperscript{931}

At the tribunal level, it should be pointed out that in its jurisprudence the Refugee Status Appeals Authority has relied heavily on the Canadian jurisprudence, in most cases by direct reference but sometimes also by quoting New Zealand cases, which had in turn mentioned Canadian caselaw. The jurisprudence most used is the early trilogy of the Federal Court of Appeal cases of \textit{Ramirez}, \textit{Moreno} and \textit{Sivukamar}\textsuperscript{932} but also the more recent Supreme Court of Canada case of \textit{Mugesera}.

\textsuperscript{928} Paragraph 70.
\textsuperscript{929} Expressed by the court as follows in paragraph 71: ‘at all times he knew the vessel was transporting its cargo of armaments and munitions for use by the Tamil Tigers. By applying his expertise in a pivotal role for the voyage he was making a significant contribution to the Tamil Tigers’ activities. He knew of the crimes against humanity that were being committed by that organisation and must have foreseen the likelihood that the arms, if delivered, would be used by the Tamil Tigers to commit future offences. His assistance, albeit in advance of operations, would further that purpose. It matters not on a test based on joint criminal enterprise principles that the actual cargo for the voyage might equally have been used only for legitimate purposes in military operations. The respondent took the risk that the armaments would be used to commit a crime against humanity. The Authority was entitled to hold that all this established the necessary elements of the respondent’s personal responsibility as part of a joint criminal enterprise under arts 25 and 30 of the Rome Statute.’
\textsuperscript{930} Paragraph 79. This approach whereby liability is not accepted in a situation where it is not clear that weapons did not reach the recipient or it is not clear that these weapons were used to commit international crimes is not unique. The same result was achieved in the criminal trial of Guus van Kouwenhoven in the Netherlands who had been involved in shipping weapons to Charles Taylor in Liberia. The trial court did not find him guilty of aiding and abetting in war crimes but only of circumventing United Nations sanctions (see Rb, The Hague, Awb 09/750001-05, 28 July 2006; on appeal he was acquitted of all charges by the Court of Appeal, or Gerechtshof, Hof, The Hague, 22-004337-06V, 10 March 2008 but the Supreme Court of the Netherlands or Hoge Raad, overturned the decision of the Court of Appeal, HR, 08/01322, 4 April 2010).
\textsuperscript{931} Paragraphs 71-76. There had already been agreement that the requirements of attempt as defined in the ICC Statute were not present on the fact of the case, paragraph 50.
\textsuperscript{932} It has also cited the Federal Court of Appeal cases of Bazargan, Sumaida and Harb but much less frequently while at times reference has been made to some cases of the Federal Court.
The general tenets of the main types of complicity as set out in Ramirez, shared common criminal purpose and knowing participation, have found their way into the jurisprudence of the Refugee Status Appeals Authority on a regular basis, in most cases as separate concepts but sometimes by mentioning them both. Along the same lines, two cases, again referring the Canadian Federal Court of Appeal jurisprudence indicate that it is possible for a person to commit a war crime or a crime against humanity as an accomplice, even though the individual has not personally committed the acts amounting to such a crime.

Presence at the scene of international crimes was considered in a case of a Bedouin applicant from Kuwait who became stateless. The applicant had worked for the Minister of the Interior of Kuwait. His role was primarily clerical although he also escorted individuals to a prison and was present during torture. The tribunal concluded that the only role he had in the torture of detainees was his voluntarily presence for no reason other than curiosity. It came to the conclusion that as the applicant had voluntarily placed himself at the scene of torture that he had shown a knowing and willing association with these extreme acts and that his presence had encouraged those engaged in those acts of torture. It also found that the evidence showed that he intended to give that encouragement.

Membership in a brutal, limited purpose organization has also attracted liability in New Zealand and this notion has been examined in a number of cases, namely the Iraqi Republican Guard (IRG) in Iraq; the Presidential Guard in Iraq; the KhAD in Afghanistan; the FIS in Algeria; and the LTTE in Sri Lanka. In the first case the RSAA was of the view that for an organization to be considered a brutal, limited purpose organization it needed to be shown that all or a sufficient number of the units of such an organization routinely engaged in human rights violations or breaches of the laws of war which was not the case for IRG. The other entities, with the exception of the FIS, were found to be such an organization.

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935 RSAA Appeal No. 74129 and 74302; in one case Ramirez was also cited for the concept that mere presence at a crime is not sufficient to be considered complicit, namely in 72635.
937 RSAA Appeal No. 72635, 6 September 2002.
938 However, ‘mere membership of a broad nationalist organisation that advocates and pursues armed struggle, in the course of which human rights abuses have occurred is not sufficient for exclusion’, see RSAA Appeal No. 73122-25/2001, 20 June 2002.
939 RSAA Appeal No. 75900, 21 November 2006.
940 RSAA Appeal No. 76142, 4 December 2007.
941 RSAA Appeal No. 71255, 21 October 1999.
942 RSAA Appeal No. 74540, 1 August 2003.
The application of the general principles of complicity based on personal and knowing participation covers a wide spectrum of activities. Handing over a person to an organization which has committed war crimes or crimes against humanity was considered in a case involved a person who had voluntarily enlisted in the Sri Lankan Army in which capacity he participated in three or four raids on Tamil villages over a period of three years service. He assisted in the roundups by preventing any people from escaping and forcing them into trucks, which took them to a SLA camp. The appellant knew that those who were brought to the camp would not return to their villages but would probably be tortured or killed in the camp. He took no active part in the interrogation, torture or killing of these civilians but he guarded them in the camp thus ensuring they did not escape. He was excluded because he did not take active steps to disassociate himself from these crimes, which he clearly knew were taking place.  

Providing another type of assistance was deemed to be insufficient in the case of a man from Nepal despite the fact that he knowingly provided medical supplies to the militia of Maoist separatists. Although the appellant admitted to other activities and involvement with the Maoists, it was decided by the RSAA that his political support was confined to the peaceful political platform of the CPN-Marxist and CPN-Marxist-Leninist parties and at no stage did he belong to, or support the aims, strategies and actions of, the CPN-Maoists.

Providing intelligence leading to harm has been considered complicity in a number of cases. In one case an applicant from Afghanistan who informed on fellow students, who were affiliated or sympathized with the Mojahedin, to the KhAD. There was evidence that at least one of the students on whom he informed was tortured and died as a result. The tribunal found that despite the applicant’s allegations not to have known what the information he supplied was used for, that he must have been aware of the policy of identifying and arresting anti-government individuals even if he did not know the specific plans of torturing those on whom he informed. Evidence was found to conclude that the appellant was aware that further investigation would come to those on whom he reported. He was aware that torture was a possibility that could result from his involvement and was therefore complicit.

Another case involved an applicant from India who had been part of the Congress Party. He served as an informant in the Indian security forces in the Punjab in the early 1990s. He testified that a substantial number of those on whom he informed were later killed or tortured by security forces as a result of the information he supplied on them. He claimed to have been fighting against terrorism. He did not himself commit the acts of murder or torture, but they resulted as a direct result from his espionage. The Refugee Status Appeals Authority found that because the applicant was a voluntary member of the forces, knew that the suspects he informed on were being killed or tortured and chose not to disengage at the earliest opportunity

944 RSAA Appeal No. 73343, 28 November 2002.
945 RSAA Appeal No. 75946, 2 March 2007.
946 RSAA Appeal No. 73823, 11 August 2003.
despite his knowledge of these consequences that he shared the common purpose of suppressing the Sikh militancy, fulfilling the requirements for complicity.  

Some other cases came to the conclusion that providing intelligence can amount to complicity but the persons were not excluded. The first case involved an applicant from Lebanon who was involved with the South Lebanese Army (SLA) as an informer. He provided this information for money. The information provided was found by the Authority to be ‘mundane’ and consisted of information on stolen vehicle sightings and similar information. There was no evidence any of the information he provided led to any crimes committed against anyone on whom he informed. As there was no evidence that the appellant directly participated in any acts, that he had a position of leadership, and did not provide information leading to actual mistreatment the applicant was not found to be complicit.  

Similarly, in a case involving a man from Afghanistan who was a ‘Turan’ (similar to Lieutenant) of the army it was decided that although the appellant worked with the KhAD by gathering information he had had no involvement with the imprisonment, torture or execution of informants or civilians, regardless of the fact that he was aware that a division of the KhAD did engage in torturing people. The appellant worked for a different, military, division and it was decided by the Authority that his duties could not have been considered to amount to personal and knowing participation in persecutory acts.  

A number of cases examined whether providing financial support to an organization involved in crimes against humanity could amount to complicity but came to the conclusion that while this would be possible in general, complicity was not established on the facts of these cases.  

Lastly, there are a number of decisions dealing with complicity based on a shared criminal purpose analysis. One case dealt with an applicant whose involvement with the LTTE had been heading a training camp, recruiting members, serving as a village military commander, forcibly collecting funds and forcibly conscripting children. The Authority, which did not engage in an analysis whether the LTTE was a brutal organization, unlike in another LTTE case, found that if he was not personally responsible, there were serious reasons to find the applicant was complicit in the crimes of the LTTE. He had been more than just a member, he had an important role

\[947\] RSAA Appeal No. 74273, 10 May 2006; see also RSAA Appeal No. 71335, 12 September 2000 and RSAA Appeal No. 74982, 7 May 2004 (the LTTE in Sri Lanka), as well as RSAA Appeal No. 75634, 24 May 2006 (the NSS in Somalia).

\[948\] RSAA Appeal No. 75130, 31 March 2005; RSAA Appeal No. 2071, 14 July 1995 (The Komiteh in Iran), RSAA Appeal No. 74646, 26 June 2003 and RSAA Appeal No. 74982, 7 May 2004 (both for the SLA in Sri Lanka).

\[949\] RSAA Appeal No. 71255, 21 October 1999.

\[950\] RSAA Appeal No. 73122, 20 June 2002 (the PKK in Turkey); RSAA Appeal No. 74302, 26 June 2006 (the CPNM in Nepal); RSAA Appeal No. 74951, 23 June 2004 (Conservative Party in Colombia) and RSAA Appeal No. 75896, 10 November 2006 (the UPF in Nepal).
in the organization, had been a long-time member and had the opportunity to leave and did not. As a result, he was found to have shared the organization’s purpose.951

On the other hand this type of complicity was found not to be applicable in a number of cases including a situation of an imam from Algeria who claimed to seek political change through democratic means. He had had some minor contact with a radical cleric in Syria who might have been involved in crimes against humanity. The tribunal found there was no basis for a link with any activities of the Syrian cleric.952

The same conclusion was reached in a case of a member of the CPN Maoist Party in Nepal. The person has been a low level member, who had been involved solely in administrative assistance, was interested in supporting humanitarian work rather than the violent aims of the party. Finally, as he did not hold a position of authority nor have any input into their decisions the applicant was not found to have a shared common purpose. This was found despite the tribunal’s finding that the applicant knew that the CPN was committing attacks, and that country information indicated that the attacks were widespread.953

In conclusion, until 2009 the courts and tribunals in New Zealand had not sought a connection with international criminal law in the area of extended liability. This has changed and will have an effect on the analysis of the future decisions of refugee decision makers although not necessarily on the result in every type of complicity. It is likely that the use of the aiding and abetting type of liability will remain largely unchanged since the language used to identify this concept was already similar as in international criminal law, namely making a substantial contribution with knowledge of its impact on the crime while at the same time little can be gained from applying international jurisprudence to specific fact situations given the paucity on the international level in this context.

However, two other areas of complicity law will most likely undergo modifications in the application by refugee decision makers. While the Supreme Court did not explicitly abandon the notion of membership, this form of complicity might lose some of its currency as no direct connection to current international criminal law can be made. The situation with common purpose is slightly different in that this notion is known in international law but the analysis to come to a finding of liability will become more complicated as the court and tribunals in New Zealand until 2009 almost intuitively would come to a conclusion of common purpose but will now be forced to apply a difficult legal concept to situations which might not always provide the evidence available to conduct a joint criminal enterprise analysis. This

951 RSAA Appeal No. 1248/93, 31 July 1995; see also RSAA Appeal No. 74129, 29 July 2005 (the RSS in India) and RSAA Appeal No. 71398, 10 February 2000 (the AFL in Liberia).
952 RSAA Appeal No. 73673, 15 February 2005.
953 RSAA Appeal No. 75095, 20 December 2004; see also for other examples of an insufficient link RSAA Appeal No. 2516, 21 June 1996; (the PDPA in Afghanistan), RSAA Appeal No. 74381, 15 December 2003 (the CPN-UML in Nepal); RSAA Appeal No. 72038, 30 November 2000 (the SJN in Nepal) and RSAA Appeal No. 76060, 18 December 2007 and RSAA Appeal No. 76505, 14 June 2010 (the Ba’ath Party during the Saddam Hussein regime in Iraq).
observation is based on the fact that a typical refugee decision is based on evidence provided by the refugee claimant in combination with general human rights reporting of the situation and organization with which this person is connected. It is not often that evidence in such proceedings allow for an assessment of the existence of a common plan.

4.2.8: United Kingdom

The seminal case in the United Kingdom on exclusion had been the Gurung decision by the Immigration Appeal Tribunal.\textsuperscript{954} This involved a person who as a member of the Nepalese Communist Party between 1996 and 2000 attended meetings and on occasion participated in protests against government land policies. Recently, a number of high-level court decisions have provided more contemporary guidance to the application of article 1F(a) of the Refugee Convention.

Gurung addressed the notion of complicity by reiterating that concepts found in the statutes of the international tribunals and the ICC such as aiding, abetting or otherwise assisting in the commission of international crimes, including providing the means for its commission should play an important role in setting the parameters of exclusion in that regard as well.\textsuperscript{955} As an example the tribunal found that providing a safe house to members of the LTTE would not amount to aiding and abetting but that transporting explosives for that organization would.\textsuperscript{956}

In the context of complicity the tribunal held that, relying on the Canadian case of Ramirez, that membership in an organization could lead to exclusion provided that the organization’s principal or dominant purpose was the commission of international crimes and taking into account the specific role of the individual within that organization.\textsuperscript{957} By way of example, the tribunal was of the view that an organization with very significant support amongst the population and with political aims and objectives covering political, social, economic and cultural issues leading to parliamentary, democratic mode of government and safeguarding of basic human rights but which has in a limited way or for a limited period created an armed wing in response to atrocities committed by a dictatorial government would not be considered an organization with such a dominant purpose. On the other hand, an organization that has increasingly come to focus on terrorism as a modus operandi and that in its recruitment policy, its structure and strategy has become almost entirely devoted to the execution of terrorist acts which are seen as a way of winning the war against the

\textsuperscript{954} Gurung [2002] UKIAT 04870.
\textsuperscript{955} Paragraph 109.
\textsuperscript{956} Paragraph 108.
\textsuperscript{957} Paragraphs 105, 114 and 151.3; this was slightly expanded upon in the case of MR v Secretary of State for the Home Department, UKAIT AS/00192/2007, 21 July 2008, which suggests in paragraph 31 that membership alone rather than the specific role of the individual would be sufficient, while in another AIT case, Sivanantharajan v SSHD, UKAIT AA/01049/2008, 4 December 2008, the view was held that membership in itself is not sufficient but that something more is required (paragraphs 36-38).
enemy, even if the chosen targets are primarily military would be seen as a problematic type of organization.\textsuperscript{958}

The Court of Appeal had an opportunity to pronounce itself on the issue of complicity in the article 1F(a) context in the JS case.\textsuperscript{959} This involved a member of the LTTE who, between 1997 and 2000, took part in various military operations against the Sri Lankan army. In 2000 he had been fighting as a platoon leader in charge of 45 soldiers trying to protect the LTTE’s supply lines to the coast when he was injured. He required medical treatment for 6 months. Upon his return, he became one of the chief security guards of the leader of the LTTE Intelligence Division while from 2004 to September 2006 he served as second in command of the Intelligence Division’s combat unit.\textsuperscript{960}

Since the main issue in this case evolved around the notion of complicity, the court canvassed in detail international materials on this issue, such as the ICC Statute and the jurisprudence of the ICTY,\textsuperscript{961} as well as the Canadian Federal Court of Appeal case-law,\textsuperscript{962} and the jurisprudence of the Immigration Appeal Tribunal and UK courts in all areas of exclusion.\textsuperscript{963} The court came to the conclusion that, as indicated in Gurung, there should be close link between international law sources and exclusion under article 1F(a) and that priority should be given to all aspects of indirect liability as regulated by the ICC Statute, including its concepts of command/superior liability, aiding and abetting and common purpose/joint criminal enterprise. Where such notions have not completely crystallized regard could be had to the ICTY jurisprudence, especially in respect to the development of joint criminal enterprise.\textsuperscript{964}

With respect to membership in a brutal organization the court agrees with Gurung in general by saying that ‘a person who becomes an active member of an organisation devoted exclusively to the perpetration of criminal acts may be regarded as a person who has conspired with others to commit such acts and will be criminally responsible for any acts performed in pursuance of the conspiracy’.\textsuperscript{965} The court goes on to state: ‘active membership is considered to be present when there is the requisite proximity between the person and the crime or crimes in question which in the case of an active member of an organisation dedicated entirely to terrorist activities is unlikely to present any problem’.\textsuperscript{966}

The court makes it clear that in situations of hybrid organizations or an organization, which pursues its political ends in part by acts of terrorism and in part by other means, the analysis has to be different. The court does not describe in detail how this

\textsuperscript{958} Paragraphs 112-113.
\textsuperscript{959} JS (Sri Lanka) and Secretary of State for the Home Department, [2009] EWCA Civ 364.
\textsuperscript{960} Paragraphs 8-14.
\textsuperscript{961} Paragraphs 30-52.
\textsuperscript{962} Paragraphs 53-58.
\textsuperscript{963} Paragraphs 54-92.
\textsuperscript{964} Paragraphs 115-122.
\textsuperscript{965} Paragraph 107.
\textsuperscript{966} Paragraph 107.
analysis should be conducted but agrees in general with Gurung that there is a need to consider the extent to which an organisation is fragmented but disagrees with the factors to be assessed in Gurung to determine the dominant purpose of an organization.\footnote{Paragraph 107 and 111-114.}

In conclusion with respect to the law to be applied, the Court says the following with respect to joint criminal enterprise liability:

1. there has to have been a common design which amounted to or involved the commission of a crime provided for in the statute;
2. the defendant must have participated in the furtherance of the joint criminal purpose in a way that made a significant contribution to the crime’s commission; and
3. that the participation must have been with the intention of furthering the perpetration of one of the crimes provided for in the statute.\footnote{Paragraph 119. In paragraph 120, referring to the common purpose article of the ICC Statute the court says: ‘the clause which may need the most unpacking is article 23(3)(d), dealing with joint criminal enterprise liability. In particular, the clause says nothing about the degree of contribution required or about the third category of joint criminal enterprise liability recognised in \textit{Tadic}, 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.’}

Indicating that the essence of complicity lies in ‘whether there are serious reasons to consider the asylum applicant to be guilty of an international crime or crimes applying those principles’,\footnote{Paragraph 120.} the court was of the view that the tribunal had not properly applied these principles of joint criminal enterprise to the case at hand.\footnote{Paragraph 123.}

The Court of Appeal decision was appealed to the Supreme Court, which issued its unanimous judgment on March 17, 2010.\footnote{Paragraph 123.} Like the Court of Appeal, the Supreme Court was of the view that the main issue in this case was the notion of extended liability and canvassed a wide range of sources in this area including the ICC Statute, the ICTY jurisprudence, especially in regards to joint criminal enterprise, foreign jurisprudence (including Canadian, American and German) and the views of the UNHCR to determine the desirable parameters of this concept.\footnote{Paragraph 9-24 (Lord Brown) and 42-43 (Lord Hope).}

Like the Court of Appeal, it was of the view that the starting point for assessing extended liability should be the ICC Statute.\footnote{Paragraph 47 (Lord Hope).}

The court says in \textit{obiter} that membership in a brutal organization by itself is not sufficient to result in complicity,\footnote{Paragraph 2 (Lord Brown), indicating this was a common grounds among the parties while in paragraph 57 Lord Kerr says it was wise for the Secretary of State not to rely on this aspect of the Canadian case of Ramirez; see also paragraph 49 (Lord Hope).} but that the essential test for extended liability is
‘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’.\textsuperscript{975} The court makes positive mention of the six-factor, common purpose, approach developed in the Canadian jurisprudence.\textsuperscript{976}

In the final analysis the Supreme Court was of the view that the Gurung approach was too broad for recognizing membership as a type of complicity\textsuperscript{977} while the path taken by the Court of Appeal was too narrow by using domestic notions of liability in requiring participation in international crimes.\textsuperscript{978} The case was sent back for a redetermination of the asylum claim.\textsuperscript{979}

In the first case at the Upper Tribunal (Immigration and Asylum Chamber) since the Supreme Court decision these principles were applied in a situation in Zimbabwe where a person had been involved in violent invasions of land owned by two white farmers and the violent expulsion of their black farm workers from their houses and jobs on those farms.\textsuperscript{980} It was found with respect to the person’s involvement, that she was excludable on the basis of a joint enterprise domestic law since she had been part of such mob violence including meting out beatings.\textsuperscript{981}

In summarizing the UK jurisprudence, the same observation made in respect to New Zealand can also be made for the UK with some additional comments more specific to the reasoning of the Supreme Court. The decision contains some puzzling aspects. One of them is the rejection of the Court of Appeal decision for confining ‘article 1F liability essentially to just the same sort of joint criminal enterprises as would result in convictions under domestic law’ since the analysis of the Court of Appeal took place completely within the realm of international law with only one reference to British law and not in the paragraph quoted by the Supreme Court as being problematic. Another methodological issue is the recognition of the six-factor approach as developed by the Canadian courts to ascertain a shared or common purpose. The court finds this approach useful although it would not restrict it to the six factors used by Canadian courts but it also says that one of the factors could be the nature of the organization thereby making it possible to engage in an assessment whether an organization has a brutal, limited purpose but only for the limited goal of establishing joint criminal enterprise or common purpose liability.

\textsuperscript{975} Paragraphs 38 (Lord Brown) and 49 (Lord Hope), although the latter equates the terms ‘significant’ with ‘substantial’ for the level of contribution.\textsuperscript{976} Paragraphs 30-31 (Lord Brown) and 54-55 (Lord Kerr) although the latter points out that these factors are not exhaustive.\textsuperscript{977} Paragraph 44-46 (Lord Hope).\textsuperscript{978} Paragraphs 26, 38 (Lord Brown) and 48 (Lord Hope); this seemed to be based on the analysis of joint criminal enterprise I of low level participants (Lord Brown in paragraphs 19-20, as well as 37.\textsuperscript{979} Paragraph 40.\textsuperscript{980} SK (Article 1F(a) – exclusion) Zimbabwe [2010] UKUT 327 (IAC)\textsuperscript{981} Paragraphs 42-43. The tribunal added in the following paragraph, that if there was an additional legal requirement of a substantial contribution to this concept that that elements was also fulfilled on the evidence.
Lastly, in terms of methodology the court is of the view that the tripartite distinction of joint criminal enterprise is not useful although it appears that the court meant only for the situation at hand, to which only a joint criminal enterprise I analysis was appropriate. However, it also says that the Krajišnik Appeals Chamber judgment is not relevant as it pertains to high-level operatives. This comment is odd as Krajišnik dealt specifically with joint criminal enterprise I rather than the case cited by the court, Brđanin. Also odd is the fact that when referring to the ICTY caselaw to set out the requirements for joint criminal enterprise, the court mentions only in passing the very aspect, which makes joint criminal enterprise unique, namely the common design (which incidentally is mentioned by the Court of Appeal and quoted by the Supreme Court as part of the objectionable paragraph in the Court Appeal decision).

The latter methodological issue probably explains why the Supreme Court comes to the conclusion that the essence for liability for exclusion ‘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’. While the analysis is couched in joint criminal enterprise language, the test for complicity suggested by the court by not including as part of this test the common design aspect resembles closely the notion of aiding and abetting in international criminal law, especially since the court equates ‘significant’ with ‘substantial’. This means that either the court has provided an incomplete definition of joint criminal enterprise or has collapsed all aspects of complicity known in international criminal law into only one type, namely aiding and abetting.

The result of the Supreme Court analysis in terms of the relationship between international criminal law and domestic criminal law for purposes of refugee law and in terms of laying down a test purporting to be in general test of complicity but in reality only represents one type of extended liability, is that it might not have helped elucidate the parameters of complicity as much as it had hoped. This is clear from the first judgment at the tribunal level, which states that the claimant is excludable on a joint criminal enterprise basis while the facts, namely beating people, would have allowed for a conclusion of aiding and abetting or even direct participation. This illustrates the problem that tribunals, when following the Supreme Court precedent, will attempt to put the facts in the legal straightjacket of the difficult concept of joint criminal enterprise and ignoring other, easier and more appropriate forms of extended liability.

4.2.9: United States

Extended liability of asylum seekers for serious criminal acts is addressed in the Immigration and Nationality Act, which says that such a claimant is not entitled to protection in circumstances of ‘ordering, inciting, assisting or otherwise participating
in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.\textsuperscript{982}

These concepts\textsuperscript{983} have been assessed in a number of cases, starting with the seminal decision of the Supreme Court of the United States in the case of Fedorenko of which the following \textit{dicta} regarding assisting has been repeated in the modern day context:

Thus, an individual who did no more than cut the hair of female inmates before they were executed cannot be found to have assisted in the persecution of civilians. On the other hand, there can be no question that a guard who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village, and who admitted to shooting at escaping inmates on orders from the commandant of the camp, fits within the statutory language about persons who assisted in the persecution of civilians. Other cases may present more difficult line-drawing problems, but we need decide only this case.\textsuperscript{984}

While personal culpability is required for a finding that an individual is responsible for persecution, personal involvement in killing or torture is not necessary to impose responsibility for assisting or participating in persecution.\textsuperscript{985} Assistance in persecution is present when a person objectively furthered the persecution of others,\textsuperscript{986} which has also been said to involve acts, which are more than peripheral,\textsuperscript{987} or by providing purposeful, material assistance.\textsuperscript{988} At the lowest level, the distinction lies ‘between genuine assistance in persecution and inconsequential association with persecutors\textsuperscript{989} or between active conduct with direct consequences for the victim and tangential to the acts of oppression and passive in nature.\textsuperscript{990} In terms of methodology, a two-step process is recommended in coming to a complicity finding, which requires

\textsuperscript{982} Section 208(b)(2)(A)(i); this exception can also be found in section 101(a)(42) as part of the definitional portion of the statute. This is one of the mandatory bars to asylum, namely the persecutor bar.

\textsuperscript{983} A number of the decisions mentioned here have come from denaturalization cases rather than immigration cases but the concepts have been deemed to be the same, see Naujalis v. INS, 240 F. 3d 642 (7th Cir. 2001); Hernandez v. Reno, 258 F.3d 806 (8th Circuit, 2001); Vukmirovic v. Ashcroft, 362 F.3d 1247 (9th Circuit, 2004); Singh v. Gonzales, 417 F.3d 736 (7th Circuit, 2005); Higuit v. Gonzales, 433 F.3d 417 (4th Circuit, 2006); Xie v. INS, 434 F.3d 136 (2d Circuit, 2006); and Gao v. U.S. Attorney General, 500 F.3d 93 (2d Circuit, 2007).


\textsuperscript{986} Higuit v. Gonzales, 433 F.3d 417 (4th Circuit, 2006)


\textsuperscript{988} Miranda Alvarado v. Gonzales, 449 F.3d 915 (9th Cir. 2006).


\textsuperscript{989} Balachova v. Mukasey, 547 F.3d 374 (2d Circuit, 2008).
that there must have been some nexus between the perpetrator's actions and the persecution of others and, if such a nexus is shown, that the person must have acted with knowledge.  

However, mere acquiescence or membership in an organization that engages in persecution is not sufficient to bar an individual from a grant of asylum. The claim must be denied ‘only if the individual's action or inaction furthered the persecution in some way’.

In the jurisprudence involving Second World War cases the following activities have been considered assisting in persecution:

- serving as a guard in a concentration camp;
- serving as a guard who stood armed at the edge of a pit in which both live and dead people had been thrown since his presence forced the victims to remain in the pit waiting to be murdered;
- being a member of the Death's Head Battalion who served as an armed uniformed guard at Sachsenhausen concentration camp patrolling outside camp gates and escorting prisoners to and from work sites with orders to shoot;
- being a member of a force dedicated to the extermination of large numbers of civilians;
- being a guard at a vital railway facility;
- being a writer for a Nazi propaganda newspaper; there was no showing of actual persecution resulting such propaganda activities, a climate of opinion in which such persecution was acceptable;
- as Latvian police chief ordering arrests under the instructions from the Nazis.

997 Naujalis v. INS, 240 F.3d 642 (7th Circuit, 2001).
999 Maikovskis v. INS, 773 F.2d 435 (2d Circuit, 1985).
On the other hand, a person performing various ministerial tasks for the Nazis when they occupied Latvia was seen as passively accommodating the occupying authorities rather than assisting in persecution.\textsuperscript{1000}

The parameters of complicity have also been considered in a number of modern day situations in some detail since 2003. They can be loosely grouped together in cases discussing presence at the scene of persecutorial activities, assisting in transferring persons or information resulting in harm to the victims and providing support functions.\textsuperscript{1001} The issue of knowledge or scienter has also been given some attention in the jurisprudence.

There has been two cases dealing with assistance while being present. The first one involved an army lieutenant assigned as an instructor at the military academy in San Salvador in 1989 who was ordered to be part of a mission to kill a Jesuit priest at the university in the same city. He prepared for the mission by donning battle fatigues, painting camouflage on his face, and fetching his rifle and ammunition. He then accompanied the 30 to 40 members of the Atlacatl Battalion assigned to the mission. At the university he walked around but did not give orders, fire his gun, seize anyone, or block anyone’s attempted escape. But when he returned to the base, he assisted in destroying logbooks identifying the soldiers who had participated in the raid and had killed eight persons. The court indicated ‘that mere, passive presence does not amount to assistance. The court concludes that if the person had been involved in the planning beforehand he would have been guilty in assisting but he was involved as an accessory after the fact, which is probably not enough to be a persecutor’.\textsuperscript{1002}

The second case involved a long time member (between 1983 and 1999) of the gendarmerie in Cameroon, who was considered to be involved in persecution because of his participation in the quelling of a student uprising at the University of Yaounde. The gendarmerie had beaten the students and he had been standing in line driving the students back. As well, according to the court, ‘he furthered persecution simply by his participation in what appears to be a phalanx or show of force by the gendarmerie against the students. An alien’s physical presence can provide assistance in persecution when that presence impedes the movement of those persecuted or otherwise subjects them to an increased risk of harm.’\textsuperscript{1003}

A case which could be considered to fall in the same category of being present without assisting involved a military cadet in Armenia who participated in a search operation together with two officers and other soldiers of a house after which two girls were taken to a car and then raped. The involvement of the cadet was that he reached out to take one of the girls to the car and was rebuffed while he refused to

\textsuperscript{1000} United States v. Sprogis, 763 F.2d 115 (2d Circuit, 1985).
\textsuperscript{1001} Direct participation in killing and torture is also included in assisting or participating, see Mendoza-Lopez v. Gonzales, No. 04-71182 (9th Circuit 2006).
\textsuperscript{1002} Doe v. Gonzalez, 484 F.3d 445 (7th Circuit, 2007).
participate in the rape. The act of reaching out to the girl was not sufficient to bring him within the persecutor bar nor was his inaction to prevent the rape as he had been relieved of his weapon, handcuffed when the rape took place and beaten afterwards for refusing to participate.1004

With respect to the handing over of persons or information, assisting in persecution includes arresting persons if the applicant believes these persons would be persecuted on account of a protected ground while it may also include reporting dissident activities, if the reporting leads to the persecution of others on account of a protected ground.1005

In the Singh case a member of the police force in the Punjab in India between 1979 and 1992 was involved in raids carried by the police against militant Sikhs, which often resulted in systematic arrests, torture and sometimes killings of detained persons. His role was to stand guard outside homes to prevent occupants from escaping while his colleagues arrested and beat people inside those homes while he would also be present during torture sessions at the police station. The court was of the view that simply being a member of the Punjabi police force was not sufficient to meet the threshold of complicity but the combination of participating in raids, preventing people from escaping, transporting detainees from those homes to the police station and being regularly present at torture sessions at the police station would raise his participation to level of assistance especially given his lengthy employment with the police and his knowledge of the abuse by his colleagues. The court did expand on the notion that mere membership cannot result in assistance by saying that it came to this conclusion with respect to the Punjabi police because the police also served traditional, legitimate enforcement purposes and did not exclusively engage in the persecution of innocent Sikhs unlike Nazi concentration camps whose complete existence was premised upon such persecution.1006

With respect to providing information resulting in persecution, in the Higuit case, an intelligence officer in the Philippine army during the Marcos regime provided information to his superiors about the leftist New People’s Army (NPA) which would result in the arrest, torture, imprisonment and death of members of that organization. This was deemed to be assistance in persecution in that he objectively furthered the persecution of others and had knowledge of the fate of the persons about whom he was providing information.1007 As well, the persecutor bar was applied in a situation where a member of the South Vietnamese Army sought out and interrogated communists and North Vietnamese sympathizers, in the process of which he would beat these individuals in order to extract information, and, if none was forthcoming, he would transfer them to another place for torture.1008

1004 Balachova v. Mukasey, 547 F.3d 374 (2d Circuit, 2008).
1006 Singh v. Gonzales, 417 F.3d 736, 740 (7th Circuit, 2005); regarding the issue that membership is not sufficient to be ineligible for asylum as a persecutor see also Kalubi v. Ashcroft, 364 F. 3d 1134 (9th Circuit, 2004).
On the other hand the court distinguished the above two cases in the *Diaz-Zanatta* decision. Diaz-Zanatta had begun working for Peruvian army intelligence in 1993 after graduating from military intelligence school. The Immigration Judge and Board of Immigration Appeal found that she had assisted or otherwise participated in persecution and was therefore ineligible for asylum and withholding of removal. They based this finding on an interpretation of *Fedorenko* as standing for the proposition that her knowledge with respect to the persecutions was immaterial. However, the Court of Appeals found there had been no consideration of whether the record established a nexus between the intelligence Diaz-Zanatta had gathered and the persecution of individuals at the hands of the Peruvian military, or whether she had prior or contemporaneous knowledge of such persecutions. While Diaz-Zanatta assisted the Peruvian military intelligence community, that community, like the Punjabi police in *Singh v. Gonzales*, engaged in traditional, legitimate exercises as well. Diaz-Zanatta’s case was therefore dissimilar to *Fedorenko*, which dealt with concentration camps whose complete existence was premised on the persecution of innocent civilians. The Court of Appeal also distinguished *Higuit* in that Higuit, a military intelligence official during the Marcos regime in the Philippines, had admitted that individuals he investigated were imprisoned and killed.1009

With respect to support functions, there have been a number of cases involving women who had been involved in enforcing the one child policy in China, which the U.S. considers persecution.1010 In the *Xie* case, it was decided that a person who was a driver between 1990 and 1992 for the Department of Health in Fujian Province in China, in which capacity he would transport pregnant women to hospitals where forced abortions were performed as part of Chinese one child policy, was assisting in persecution. After examining the post-Second World War jurisprudence in detail and coming to the conclusion that the main tenet of complicity is actively assisting rather than passively accommodating, the court was of the view that Xie played an active and direct, albeit minor, role in persecution.1011 The same was said for a person who had been a guard a birth control facility on an on-going basis1012 and a person who had guarded ten women scheduled for abortions over a time period of three months.1013

However, another person, Weng, was found not to be involved in persecutorial acts by the Federal Court of Appeals. She was a nurse’s assistant working at a public hospital in China in which forced abortions were performed pursuant to the country’s family planning policy. Regarding the question whether she was a persecutor, the court found that her involvement had not been ‘active with direct consequences for

1013 *Xiao Yun Dong v. Holder*, No. 09-1885-ag-NAC (2d Circuit, 2010).
the victims’, as had been the case in the Xie judgment. Her post-surgical care did not contribute to or facilitate the victim’s forced abortions in any direct or active way. While she did guard patients awaiting forced abortions one time, her conduct, taken as a whole, did not support a finding that the line had been crossed. It had been one time only, she had been unarmed, she only guarded the patients for 10 minutes, and she helped one person escape, for which she later lost her job as a result.\textsuperscript{1014}

In yet another case dealing with a person working in an abortion clinic, the same court, which had decided the Xie and Weng cases, was called upon to determine the contours of complicity in a situation involving a maternity nurse. Her duties included, among other things, tending to pregnant women, assisting in the performance of ultrasound and other prenatal examinations, participating in live-birth deliveries, caring for newborns, and providing recovery care to women who had undergone forced abortions. She did not participate in the abortion procedure itself, but the examinations in which she assisted were sometimes used to determine a fetus's position so that a forced abortion could be performed without threatening the life of the mother. The court was of the view that this situation was closer to the Weng case because the examinations in which she had assisted had not contributed to, or facilitated, the abortions in any direct or active way nor had it been was it more likely that abortions would occur as a result of her involvement.\textsuperscript{1015}

Another type of support function was explored in two detention situations. A female member of a prison staff in a detention facility in Armenia who was responsible for escorting prisoners to special cells where they would be severely beaten was found to be complicit on the ground that she was not a mere member of the staff but involved in acts which were more than peripheral to persecution. The court also said that the fact that she was under no compulsion to continue her employment plus the fact that she knew or was aware to a high probability that the prisoners she was escorting would be subject to abuse were factors to consider.\textsuperscript{1016}

The Miranda Alvarado decision touched on the outer limits of assistance in a situation of an interpreter at torture sessions of guerrilla members by the Peruvian Civil Guard. The court repeated the adage that complicity means providing purposeful, material assistance or put in other words did the acts further the persecution or were tangential to it. With respect to the situation at hand it felt that ‘without the translation there would be no reason for the torture to occur as it did, as its point was to elicit information’. As such the acts in this case amounted to assistance, as they were integral to the persecution.\textsuperscript{1017} Yet in the Im case, a prison guard in Cambodia in 1979 after the Vietnamese army had invaded the country and had removed the Khmer Rouge government a different conclusion was reached. Im’s duties included distributing rice to the prisoners, taking them to bathe or receive medical attention, overseeing their fitness and hygiene routines and unlocking the

\textsuperscript{1014} Weng v. Holder, 562 F. 3d 510 (2d Circuit 2009).
\textsuperscript{1015} Yan Yan Lin v. Holder, 584 F.3d 75 (2d Circuit 2009).
\textsuperscript{1017} Miranda Alvarado v. Gonzales, 449 F.3d 915 (9th Cir. 2006).
prisoners’ cells when scheduled for interrogation and hand them over to another guard who would escort them to the interrogation room. Relying on the *Fedorenko* case and contrasting this situation with that of the *Miranda Alvarado* judgment, the court was of the view that this case ‘falls safely on the non-culpable side’ since Im never beat any prisoner, did not decide who was imprisoned and had no say which prisoners would be interrogated.\footnote{Im v. Gonzales, 497 F.3d 990 (9th Circuit, 2007).}

In other types of support functions it was held that participating as a member of the Armenian police in raiding parties of homes of Jehovah’s Witnesses where beatings would occur, amounted to assistance in persecution.\footnote{Shirvanyan v. Gonzales, 03-70308 (9th Circuit, 2003).} The case of *Parlak* involved a leading member of the National Liberation Front of Kurdistan (ERNK), which had close ties to the Kurdistan Workers Party (PKK). Among a number of allegations the Board of Immigration Appeals had found that he had assisted with PKK fundraising and transported weapons into Turkey for use by the PKK, thus assisting in the persecution of others. The court distinguishes the case of *Diaz-Zanatta* by saying that in this case ‘Parlak's level of assistance is an order of magnitude greater than the harshest assessment one could possibly make about Diaz-Zanatta, and we find that a nexus exists between Parlak's actions and the persecution of others and that Parlak acted knowingly’.\footnote{Parlak v. Holder, 578 F.3d 457 (6th Circuit 2009); certiorari to the Supreme Court was denied on 14 June 2010 (see Parlak v. Holder, 130 S. Ct. 3445 - Supreme Court 2010).}

On the other hand, the *Gao* case involved the chief officer of the Quingdao City Culture Management Bureau from 1997 until 2000 who was responsible for inspecting bookstores to determine whether they were selling any prohibited materials, including politically sensitive materials. He was found not to be assisting in persecution because while the violation of the laws he was enforcing could result in arrest, prosecution or detention, there was no evidence that any person suffered this fate because of his inspections. The court contrasted this case with another Chinese case, the *Xie* decision, where there has been a direct connection between the person’s activities and persecution. The court also followed the *Singh* case by saying that if the Culture Management Bureau had solely existed to persecute individuals for distributing politically disfavoured materials and not also enforcing copyright and pornography laws culpability could have been found in membership in this organization.\footnote{Gao v. U.S. Attorney General, 500 F.3d 93 (2d Circuit 2007).}

The issue of knowledge of the acts committed by an organization, in which a person had been involved, was discussed in some detail in the case of *Castañeda-Castillo* in 2007. This person was a member of an anti-terrorist unit of the Peruvian military, which was carrying out operations against the Shining Path, described as a Maoist revolutionary organization in the judgment, in 1985. During one such operation the unit consisting of four patrols entered a village where a dozen innocent persons were shot and killed. Two patrols entered the village while two other units, including the
one to which Castañeda belonged stayed outside the village to block escape routes. Castañeda claimed that he only found out about the massacre three weeks later and did not know beforehand that such an event would occur. The Immigration Judge and the Board of Immigration Appeals had found him not credible while they also appeared of the view that the act of persecution does not require knowledge. The Court of Appeals disagreed and indicated that in order to assist in persecution not only an activity with a nexus to persecution is required but also knowledge or wilful blindness in the sense that the person must have had some level of prior or contemporaneous knowledge that persecution was being conducted.\textsuperscript{1022} The courts in \textit{Gao},\textsuperscript{1023} \textit{Díaz-Zanatta},\textsuperscript{1024} and \textit{Parlak} \textsuperscript{1025} have followed the \textit{Castañeda-Castillo} approach by saying that knowledge or wilful blindness is required to find that a person has assisted in persecution.

In conclusion, while the U.S. applies a different framework with respect to exclusion including extended liability than the other countries under consideration, the outcomes of the jurisprudence in drawing the circle of persons who should not be given the benefit of asylum as result of involvement in international crimes is not that different than in these other countries. As a matter of fact, the jurisprudence is quite similar in that the courts have identified a number of concepts of extended liability, which has also been used in the other eight countries. Presence at the scene of a crime can give rise to liability, as can aiding and abetting. The latter form of complicity has been applied in the case-law in the same manner as in the other countries, namely in situations of handing over people to be become the subject of illtreatment, in situations of providing information about a victim resulting in that person being subjected to maltreatment, and in situations involving support functions, often connected to detention facilities. Even the concept of membership, while said not to apply in earlier cases as a general principle, is mentioned with approval on some recent occasions.

Where the U.S. differs from the other countries is that there has been no jurisprudence providing guidance with respect to the notion of common purpose. This is not surprising as the legislation, on which the jurisprudence is based, is narrower by referring to ‘participating’ rather than ‘committing’ as is the case in exclusion IF(a). As a last comment, while it is likely that other countries will start relying on international criminal law, the U.S. will likely continue to develop its complicity principles independently.\textsuperscript{1026}

\textsuperscript{1022} Castañeda-Castillo v. Gonzales, 488 F.3d 17 (1st Circuit, 2007).
\textsuperscript{1023} Gao v. U.S. Attorney General, 500 F.3d 93 (2d Circuit 2007).
\textsuperscript{1024} Díaz-Zanatta v. Holder, 558 F. 3d 450 (6th Circuit 2009).
\textsuperscript{1025} Parlak v. Holder, 578 F.3d 457 (6th Circuit 2009).
\textsuperscript{1026} Although there has been a reference to the extended liability concepts set out in the ICC Statute in the civil liability case of The Presbyterian Church of Sudan v. Talisman Energy, Inc., No. 07-0016-cv (US 2d Cir 2009).
4.3: Conclusion

The relationship between international criminal law and refugee law in the area of extended liability has been, until recently, tenuous. Both areas of law developed their notion of who was indirectly culpable of committing international crimes independently from each other after a cautious foray into post-Second World War jurisprudence in some early refugee case-law, which has not been sustained in any meaningful and widespread manner since that time. Since international criminal law has come to the attention of domestic courts in applying refugee law since 2009 in the UK and New Zealand this part of the chapter will first set out the development of extended liability in international criminal law followed by the application of that law in the domestic arena.

International criminal law as practiced at the international level has been quite consistent in applying notions of indirect liability with the exception of co-perpetratorship and joint criminal enterprise III. The ICTY/ICTR jurisprudence rejected co-perpetratorship as a form of extended liability but it has figured prominently in the arrest warrants issued by the ICC while the reverse is true with joint criminal enterprise, which has been used in the majority of cases of the ICTY but less so at the ICC. To be sure, in both the ICC and ICTY context alternative charges were also laid together with either co-perpetration or joint criminal enterprise charges but the jurisprudence at the ICC re extended liability has been concentrating on the contours of co-perpetrators in the same manner the joint criminal enterprise case-law dominated the judicial debate at the ICTY in the last decade. While the ICC judges have not provided any insights yet as to the meaning of the common purpose notion in the ICC Statute, commentators have been of the view that while joint criminal enterprise I and II are undoubtedly included within article 25(3)(d) of the Statute, it is not clear whether joint criminal enterprise III is included in this concept and, if it is part of common purpose, whether all aspects of joint criminal enterprise III are concomitant with common purpose.

This debate will have an effect on the interpretation of joint criminal enterprise at the domestic level, both in the criminal and refugee context. In the criminal context, most common law countries have provisions in their criminal legislation for common intention, which is akin to joint criminal enterprise III and which will raise the issue whether these countries will apply their national interpretation of extended liability or will yield to the ICC interpretation of its Statute, which they have ratified and implemented into their domestic legislation. It is likely that if situations arise where domestic jurisdictions can charge persons with broader forms of liability they will likely do so. Countries such as Australia, Canada, New Zealand and the UK did not make exceptional provisions to adjust their regular forms or liability or inchoate offences when implementing the ICC Statute. Conspiracy, incitement, as well as common intention come to mind in this context.

Similarly, in regards to refugee law, the question will need to be addressed, now that all countries surveyed in this study will be relying on international criminal law
concepts as developed by the ICTY, ICTR and ICC, which notions prevail in the event of disagreement between the international institutions. Again, the joint criminal enterprise III question comes to mind as the two highest courts in the UK and New Zealand in 2010 examined joint criminal enterprise based on international law but left the joint criminal enterprise III question either undecided in that the situation before them did not require an analysis of that particular aspect of extended liability (UK) or did not conduct an in-depth legal analysis of this concept (New Zealand). The interaction between international criminal law, domestic criminal law and refugee law had been to some extent highlighted in the decision of the Supreme Court of the UK in the sense that it criticized the Court of Appeal for relying on UK criminal law as being too restrictive in the interpretation of the term committed in article 1F(a). It called upon refugee decision makers to apply the broader concepts embedded in international criminal law. This approach assumes that British criminal law is indeed narrower than international criminal law as presently embodied in the ICC Statute, which given the availability of the concept of common intention in UK law and the present uncertainty of the parameters of common purpose in the ICC, might eventually to be proven incorrect.

This interaction between international criminal law, domestic criminal law and refugee law can also cause some unexpected problems of interpretation in the area of membership as a head of extended liability in refugee law. At the domestic refugee level, this notion of membership is in flux at the moment. Canada, New Zealand and the UK had readily accepted that membership in an organization dedicated to a limited, brutal purpose can amount to a rebuttable presumption for complicity until the decision of the Supreme Court in the UK in 2010 (where this notion was rejected in *obiter*), while the courts in the U.S. are divided on this issue in that even though the statement that membership is not participation has been repeated in several cases, two courts are of the view that membership in an organization, which complete existence was premised upon persecution could amount to aiding and abetting. The courts in Australia have rejected this notion, albeit again in *obiter* and although while doing so they have provided a definition of association as a form of complicity (a link to an organization) which is very similar to the notion of membership (institutional link accompanied by more than a nominal involvement) given by the Federal Court Appeal in Canada. The Supreme Court of New Zealand did not address the issue of membership in its 2010 decision but followed the UK decision of the same year for all other aspects and might go the same direction as its British counterpart when called upon directly.

On the European continent, Belgium and France jurisprudence have rejected this notion while in the Netherlands a unique approach has been developed outside the judicial system. In the latter country, the Minister in charge of refugee and immigration matters can designate certain categories of functionaries in specific regimes against whom personal and knowing participation can be levelled as a rebuttable presumption, which seems very similar to the judicial processes used to come to a similar conclusion regarding brutal organizations in Canada and New Zealand.
When unpacking the origin of the brutal organization approach in Canada, which was the inspiration for this notion in New Zealand and the UK, it is clear that there was a direct link between adopting this version of liability and the post-Second World War jurisprudence in Europe where membership had been an inchoate crime in the Charter of the International Military Tribunal as well as a crime and form of liability in Allied Control Council Law No. 10. This was done in the Ramirez case by the Federal Court of Appeal in 1992 when international criminal law had as its only source these post-Second World War sources and as such was entirely legitimate. The question asked then with respect to the use of membership as a possibility for complicity is three-fold, namely, how far should refugee law decision makers be following international criminal law if this law has changed; what is the status of the concept of membership is at the moment in international law; and does domestic criminal law plays a role in this equation?

To begin with international criminal law, as stated earlier in this chapter, the status of membership as a form of liability, either as a crime or extended liability, is not entirely clear as it was recognized as such after the Second World War but not revived for any of the international tribunals, internationalized tribunals or the ICC, although some attempts were made to include this concept in the Statutes of the ICTY and ICC. What is also not clear is whether the fact that membership was not included in those statutes is a rejection on substantive grounds or a matter of jurisdiction in the sense that membership did exist in international criminal law at those times but it was deemed unwise to make it part of the statutes for policy or political reasons. The latter approach is certainly not unusual for liability related questions as can be seen from the fact that conspiracy, liability under 18 years of age and corporate liability did not find its way into the ICC Statute while it would not be difficult to argue that especially the first two forms of liability have been and still are part of international criminal law.

This then leads to the related question whether, given the fact that membership at one point certainly had been part of international criminal law, it is appropriate for refugee decision makers to apply concepts recognized in international criminal law at some point which but have fallen into disuse as a source for liability. This in turn

1027 The 1996 Report of the Preparatory Commission for the Establishment of an International Criminal Court indicated that ‘the need for including a provision setting an age limit at which an individual could be regarded as not having the requisite mens rea was widely supported. The question of what that age should be, however, would require common agreement.’ (UN Doc A51/22, page 45, paragraph 201). Two years later this concept of a minimum age for criminal responsibility was still retained in the final Report of the Preparatory Committee on the Establishment of an International Criminal, which was the basis for the Rome Conference (UN Doc A/CONF.183/2/Add.1, 14 April 1998, Addendum, Part One, Draft Statute for the International Criminal Court, Article 26 ‘Age of responsibility’) but no agreement on the exact age was set out in this document (it varied from 12 to 18 years old). Eventually, it was decided in article 26 that the court does not have jurisdiction over any person who was under 18 at the time of the alleged commission of the crime, thereby avoiding setting an age limit for criminal responsibility for minors (R.L. Lee, The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results (The Hague: Kluwer Law International, 1999).
raises the question of the nature of criminal law, including international criminal law as opposed to the character of exclusion in refugee law. The purpose of these different areas of law are not the same, as criminal law is in general more concerned with individual punishment while exclusion supports the larger purpose of refugee law in not providing benefits to undeserving claimants while also ensuring that the integrity of the refugee system remains intact.\footnote{See for instance The Attorney-General (Minister of Immigration) v Tamil X and the RSAA, [2010] NZSC 107 at paragraph 33.} A different standard of proof between the two systems (beyond reasonable doubt versus serious reasons for considering) is but one reflection of this difference.

From this it could be argued that a difference in goals could lead to a broader approach with respect to extended liability in so far as this approach needs to find its source in article 1F(a), which refers to international instruments set out for the regulation of international crimes without specifying a hierarchy in those instruments. From this the question can be asked that if a domestic court will be faced with the dilemma which forms of extended liability to choose if there is more than one, non-compatible, choice, as could be the case with joint criminal enterprise III should this court refer to the most recent version of liability or try to find compatibility in any event. This was the solution offered by the UK Court of Appeal when it said that the ICC Statute should be preferred instrument for assessing extended liability but with recourse to ICTY and ICTR case-law if necessary. The UK Supreme Court also examined both the ICC Statute and the ICTY jurisprudence regarding joint criminal enterprise. However, if it is possible to make room for interpretations of liability, which have once existed but have lost their currency over time, why should this be the case for one form of liability that will likely no longer be used in the near future (when the last joint criminal enterprise III application will ceased to be used upon the closing of the ICTY, ICTR and SCSL) but not another, which had not been displaced until possibly 1993 (as is the case with membership).

Therefore, a cogent argument can be made that even if current customary international law has lost interest in the notion of membership in a criminal organization this should not necessarily apply to refugee law for two main reasons. Firstly, as indicated above, exclusion in refugee law has a different purpose than criminal law, primarily to prevent access of asylum seekers to the same benefits as non-criminal refugee while another policy factor, which will be further explored in the next chapter, pertains to the fact that refugee granting states want to have the ability to determine which persons should be allowed to stay in their territories based on public interest considerations. Secondly, while not part of this thesis, there is a connection between excluding persons from refugee benefits at the beginning of the refugee determination process and the removal of persons with a criminal background at the end of this process.

The Refugee Convention contains a finely balanced approach between these two processes to the effect that persons who were excluded could not be removed to a situation of persecution (refoulement) unless they are a danger to the security or to the
public in the country of refuge. This delicate balance has been affected by the recent overlay of human rights concerns in that there is now an absolute prohibition to return a person to torture or inhuman or degrading treatment or punishment, even for persons with a very serious criminal background. While there is no doubt that human rights should be protected in a vigorous manner in all circumstances, there should also be no reason why the original approach where criminality would result in tangible consequences should not find a more contemporary expression. Retaining a form of extended liability with a legitimate source in international criminal law is one means of restoring the balance originally strived for by the drafters of the Refugee Convention.

This issue comes in even starker contrast when one considers domestic criminal law. While reliance on exclusively domestic criminal law has been discouraged by the courts in most countries under examination here, there is no persuasive reason why cannot play some role in framing the liability discussion. The decision of the Supreme Court in the UK overruled the decision of the Court of Appeal on the grounds that it applied domestic criminal law, which was more restrictive than international criminal law. Logically, this would mean in the view of the Supreme Court that if domestic criminal law is wider than international criminal law resort could be had to such domestic concepts of which common intention could be one.

However, it is interesting to note that the two common law countries with the most resistance from the judiciary on the issue of membership, Australia and the UK, have criminalized membership. While this is done for membership in terrorist organizations, one would not expect this to be a fatal problem as the language of the UK Supreme Court is quite general regarding criminal concepts. Nor should the fact that Australia and the UK made membership an offence rather than a mode of liability be considered overly problematic as a main tenet of refugee law is generally seen as encompassing broader notions with as result that a higher level of criminal responsibility with its concomitant higher sentencing regime (i.e. a criminal offence) can be transferred to a lower level of personal culpability (i.e. extended liability to commit an offence). As a matter of fact, creating membership as an offence is much broader than having membership as a liability provision as it would be possible to be a party or conspirator to the offence of membership as well to incite somebody to be a member, all forms of casting the net of involvement wider than for membership as a form of extended liability.

All this to say that while the notion of membership in exclusion has been put in doubt by the influential decision of the UK Supreme Court, the reasoning underlying this rejection are by no means clear or persuasive from either an international or domestic

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1029 For Australia it is section 102.3 of the Criminal Code Act of 1995 while in the UK it is section 11 of the Terrorism Act 2000.
1030 In Germany membership in a criminal or terrorist organization is form of liability rather than a substantive offence, see sections 129 and 129A of the Criminal Code; membership in a terrorist organization is also a ground for removal in German immigration law, see section 54.5 of the Residence Act)
point of view and it is hoped that when another court is faced with this issue in a
more direct manner and feels obliged to examine this aspect of liability it is done with
a fulsome understanding of international criminal law and an appreciation of the
notion of criminality in refugee law. As well, if countries are uncomfortable with a
wholesale application of the notion of membership a legislative implementation by
the executive rather than through judicial activism, as done in the Netherlands, could
be given consideration.

In the context of this area of complicity, two other aspects should be mentioned. First,
the temporal aspect of membership, namely that membership has to overlap in time
with the brutal nature of the organization, has been considered a requirement in
Canada and New Zealand. Secondly, Canada has also some case-law regarding
hybrid organizations where complicity can be established even when the brutal
aspects of an organization are intertwined with the legitimate purposes of that same
organization while this concept is mentioned in passing in the UK.

As explained above when discussing the decision of the Supreme Court of the UK,
the reasoning in that judgment is not without its methodological problems. The court
comes to the conclusion that the essence for liability for exclusion is ‘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’. While the analysis is
couched in joint criminal enterprise language, the test for complicity suggested by the
court by not including as part of this test the common design aspect resembles closely
the notion of aiding and abetting in international criminal law, especially since the
court equates ‘significant’ with ‘substantial’. This means that either the court has
provided an incomplete definition of joint criminal enterprise or has collapsed all
aspects of complicity known in international criminal law into only one type, namely
aiding and abetting.\textsuperscript{1031}

The result of the Supreme Court analysis in terms of the relationship between
international criminal law and domestic criminal law for purposes of refugee law and
in terms of laying down a test purporting to be in general test of complicity but in
reality only represents one type of extended liability, is that it might not have helped
elucidate the parameters of complicity as much as it had hoped.

Other countries, including New Zealand until the pronouncement of the decision of
its Supreme Court, have not used the joint criminal enterprise analysis to find liability
on a common purpose basis. This category of complicity, called shared or common
purpose (Australia, Canada, New Zealand) or sometimes joint purpose (Australia) in

\textsuperscript{1031} The Supreme Court of New Zealand was clearer in describing joint criminal enterprise by
including the common intention element and restricting the general definition given in the UK
Supreme Court to the joint criminal enterprise concept. However, this judgment not free from
confusion either as it had stated earlier in its judgment that the situation at hand pertained to a joint
criminal enterprise III fact pattern but then uses the UK judgment and adopting its general definition
even though that definition pertained to joint criminal enterprise I.
the jurisprudence, which have also been slotted under the general personal and knowing participation rubric (Belgium and the Netherlands) or even more generally as part of committed under article 1F(a) (France) has not been conceptually analyzed in any of the countries which make use of this but instead assessed a number of factors to determine whether the presence of such factors would result in complicity.

It would appear that in the cases examined, when using these factors to assess almost intuitively whether an association with a criminal group or organization amounted to culpable exclusion, would have yielded a similar result as when using a formal joint criminal enterprise analysis. Taken the comment made above about the conceptual difficulty of using joint criminal enterprise together with the evidentiary difficulty of finding a common design in the often-cursory refugee proceedings, a factor approach might not be too much out of place when employing exclusion. The validity of this approach is also confirmed by the fact the ICTY in an earlier case employed a number of these same factors at the same time as using a joint criminal enterprise analysis thereby preserving a link with international criminal law.

Factors examined have been: the manner in which a person joined an organization (Belgium, Canada, The Netherlands, New Zealand, UK); the nature of the organization (Belgium, Canada, France, the Netherlands, UK), the size of the organization (UK), whether the organization was proscribed and by whom (UK), the rank obtained in the organization (Australia, Belgium, Canada, France, New Zealand, the Netherlands, UK), the standing or influence in the organization (the Netherlands, UK), the time served (Belgium, Canada, New Zealand, UK), the person’s age (Canada), the manner in which a person disassociated him or herself from the organization (Belgium, Canada, France, New Zealand, the Netherlands, UK). Not all factors are of the same significance (Canada) nor are they exhaustive (UK). The U.S. has not examined this notion in its courts, most likely because of the wording in its enabling statute.

The courts in all the countries have examined other aspects of complicity in a wide array of cases thereby contributing to the development of international criminal law in these areas as these forms of liability, such as presence at the scene of a crime and especially aiding and abetting have rarely been given a detailed factual treatment by the international institutions due to their policies of only pursuing only those most responsible for international crimes.\textsuperscript{1032}

The jurisprudence in Canada, the Netherlands, New Zealand and the U.S. and a manual in the UK are of the view that presence at an international crime can amount to complicity if this presence was with authority (Canada, UK), with influence (the Netherlands), of long duration and with a view to encourage the perpetrators (New Zealand), or if such presence impedes the movement of those persecuted or otherwise

\textsuperscript{1032} Very few persons have been convicted at the ICTY and the ICTR for indirect involvement; at the ICTR in Judgment, 
\textit{Ntawukulilyayo} (ICTR-2005-82), Trial Chamber, 3 August 2010, a conviction was entered for transporting ammunition, soldiers and gendarmes while in Judgment, 
\textit{Rutaganda} (ICTR-96-3-T), Trial Chamber, 6 December 1999 the same done was done for distributing guns and other weapons but in conjunction with other, more serious, activities.
subjects them to an increased risk of harm (U.S.). Acquiescence or inaction would not result in liability according to Canadian and U.S. case-law.

The last type of complicity is universally accepted under the headings of participation, furthering, personal and knowing participating, assisting, being integral or actively involved in an organization, all of which require a substantial contribution to international crimes with a knowledge that these crimes would occur. Activities such a providing information or intelligence about a person resulting in harm have been considered complicity by the courts or tribunals in all countries while activities such as financing (Canada, New Zealand), arresting a person and handing the person over (Belgium, Canada, the Netherlands, New Zealand and the U.S.) and providing support functions (Australia, Canada, Netherlands, New Zealand and the U.S.) have also attracted negative attention from the courts.

Command responsibility has been given some attention in Canada by saying that the more senior a person is the more likely that person will be complicit (although more recently the international criminal law concept of command responsibility has been utilized) and in Australia where a court examined whether a person had a position of authority to determine complicity while in the UK jurisprudence it has been mentioned as a head of indirect liability. Knowledge has been considered to be always a requirement for complicity while lesser forms of actual knowledge such as awareness (New Zealand) and wilful blindness (Canada and the U.S.) have been also included in the mens rea to commit crimes.

The jurisprudence examined in eight countries around the world with respect to extended liability, apart from the membership, is remarkably consistent in utilizing the various forms of liability, such a presence at the scene of a crime, the aiding and abetting type of complicity and the common purpose guilty association as is the fact that within the aiding and abetting category all countries found that handing over people or information with the knowledge of harm amounted to complicity. Since the factual situations underlying such legal determination move along a wide spectrum, variations in results can be observed especially in the outer reaches of complicity. Even so, it is striking to see that for instance interpreters carrying out work for people involved in human rights abuses were excluded both the Netherlands and the US.

As a final comment when comparing the complicity jurisprudence of the countries in this study it can be said that the eight countries with dissimilar legislative frameworks have been very similar in their approach to war criminals while their courts have been in general supportive of this approach and in doing so have utilized the basic concepts of international criminal law in a very similar fashion even though there had been no reliance on international jurisprudence until recently. However, in the context of this

\[1033\] It has also been expressed as exercising ‘a decisive influence on the criminal acts’ by the Swiss Asylum Commission, see UNHCR Statement on Article 1F of the 1951 Convention, issued in the context of the preliminary ruling references to the Court of Justice of the European Communities from the German Federal Administrative Court regarding the interpretation of Articles 12(2)(b) and (c) of the Qualification Directive, July 2009 at 24.
study, another question needs to be asked, namely whether the developments at the national level have been consistent with international criminal law and whether this consistency or possible lack thereof is desirable.

In general it would appear that the concepts developed by the national courts bear a high level of resemblance to the same concepts under consideration by the international courts although the analysis has rarely been as detailed as employed by the international institutions, most likely because the courts at the national level are not specialized in international criminal law nor do they provide lengthy deliberations generally for any issues related to refugee matters, especially in civil law countries. As well, a number of the countries under considerations, such as Belgium, Canada, France and New Zealand were called upon to circumscribe the parameters of complicity before there was any international criminal law apart from the post-Second World War jurisprudence. While in some instances post-Second World War cases were initially relied upon, like in Canada, it is understandable that the national courts and tribunals felt obliged to follow their own path after a precedent had been set in setting the principles gleaned from this jurisprudence. It is remarkable that in continuing their own developments in the absence of any crossover from international criminal law the national jurisprudence in the area of extended liability is so consistent with the concepts of extended liability as expressed by their international counterparts.

For instance, the concept of knowing and personal participation and its essential criteria of substantial contribution with knowledge at the national level is the same as the parameters given at the international level. The national decision makers have applied these general tenets of aiding and abetting to many more factual situations than the international institutions, both in a positive and negative manner thereby providing guidance in drawing a line between culpable behaviour leading to exclusion and acts which fall outside the periphery of extended liability. Since international jurisprudence typically deals with persons most responsible the notion of aiding and abetting has not been applied to factual situations as much as at the national level and the international institutions could very well benefit from paying more attention to their national counterparts in this specific area of law than they have done so far.

The situation is different with other aspects of extended liability where the international jurisprudence has not only developed the analytical framework for these forms of liability but has also applied them to a large number of situations. The examples of command responsibility and joint criminal enterprise come to mind with the new notions of co-perpetration and common purpose in the ICC Statute as examples, which can be used in the future. As seen above none of these types of liability have found any traction at the national level until very recently and then only in a small number of countries. It is likely that the other common law countries, Australia and Canada, will follow their counterparts in New Zealand and the UK in finding a connection with international criminal law in general and the ICC Statute in particular when assessing complicity in the future.
This is desirable up to a point. When adopting international criminal concepts for refugee purposes, a number of considerations should be kept in mind, some of which have been mentioned above in this conclusion in the discussion regarding membership but are worthwhile repeating in a general sense. One such consideration is the criminal law of the countries in question as they inform the sense of culpability in that particular country. The criminal laws of the countries under consideration differ from each other with the most obvious examples in the area of extended liability being conspiracy and common intention (except the U.S.) in common law countries and co-perpetration in civil law countries (although only in Germany in the countries under consideration).

Another consideration is the nature of refugee proceedings compared to criminal proceedings. Because of the lower standard of proof, the relaxed rules of evidence and the need to keep asylum procedures short in order to accommodate the large number of asylum seekers, the evidence in asylum proceedings is typically of a different magnitude than in criminal trials, either nationally or internationally. Most asylum hearings consist of the testimony of an asylum applicant often accompanied with a written statement given at an earlier stage in combination with reputable human rights reporting, which in general terms set out general country situations and the activities of specific organizations with a connection to the applicant.

With respect to the first consideration, it will be tempting for national refugee decision makers to infuse their reasoning with reference to national laws where those national laws provide a possibility of extended liability where international criminal law does not. However, if those decision makers profess to apply exclusion 1F(a) and intend to have the reference to international instruments in that article to apply to both the international crimes and the modes of liability, a reference to national variations of liability is less desirable than seeking a connection with international criminal law. The question can then be raised whether international criminal law should be applied in all circumstances even when these international legal concepts have been introduced from specific national systems such as joint criminal enterprise III and co-perpetration. The answer to that question lies in the development from the transfer of national concepts to the international plane where these concepts were further developed at the international level to situations not anticipated by national legislators and courts and thereby reaching the status of a *sui generis* body of law. In that sense the concepts related to extended liability have achieved their own meaning in international criminal law and should be applied in their own independent manner by refugee decision makers.

The second consideration, which deals with the nature of refugee procedures are of more practical than principal nature but still no less of a concern, would call for an approach where the fundamental reasons for having chosen a less formal type of process are not violated while at the same time applying as much as possible the concepts of liability set out in international criminal law. Based on this reasoning, the notion of command responsibility could be utilized at the national level in situations
involving very high officials in either military or civilian organizations. General human rights reporting combined with the narrative of the person concerned will allow generally a finding of the requirements of control and knowledge. Having come to the point whereby these two requirements have found to exist it is the most cases not a stretch to include a deliberation of the third requirement, namely the lack to prevent or punish as these factors can be fairly easily deduced from the same sources of information used in refugee procedures. Only the analysis of the facts requires an adjustment to bring the reasoning in line with international criminal law.

On the other hand, joint criminal enterprise and co-perpetration pose a unique challenge for refugee decision makers in that the situations where this type of liability has occurred (exclusively in the joint criminal enterprise aspect until now) involve persons who operated at a fairly low level in an organization but about whom the evidence did not allow for a finding of aiding and abetting. Like the Tadić case at the international level, the connection to an international crime combined with the collective nature of such crime would usually place a person close enough within the periphery of criminality that refugee decision makers felt that culpability should follow. However, the evidence adduced in such proceedings would usually not provide sufficient information to make an informed decision about the common plan aspect of joint criminal enterprise or co-perpetration.

The solution to this dilemma is twofold. The first one is to change the approach in obtaining evidence by also including in the questioning of the asylum seeker answers regarding this common plan aspect if possible or adopt a legal approach to this type of liability, which at a minimum pays lip-service to established international criminal law principles. This approach can be found in giving the decision makers the choice depending on the evidence before them to either utilize the joint criminal enterprise or co-perpetration analysis or resort to the existing methodology or employing a number of factors to come to the conclusion that a person has a sufficient link to an organization carrying out international crimes. There are number of advantages to this approach. Most countries in this study have already experience with this methodology while at the same time early ICTY case-law saw a connection between the practicalities of setting out a number of factors in addition to developing the joint criminal enterprise analysis. As well, it is not clear at the moment where the jurisprudence of the ICC will lead in developing the notion of common purpose in the sense whether it will adopt some of the joint criminal enterprise analysis, set a new course or might even find the factor approach attractive in its own context. While this uncertainly of the future of the joint criminal enterprise continues, the factor approach offers some stability for refugee decisions makers whose work continues unabated.

In conclusion, a great deal can be said for incorporating international concepts into the practice of national refugee decision makers as long as these international concepts have been developed in a coherent and easy-to-apply framework. Of the notions of extended liability mostly utilized at the national level, aiding and abetting and command responsibility present the fewest problems while for the joint criminal enterprise and co-perpetration concepts some concerns exists both in terms of
consistency at the international level and the practical application in the refugee context. For that reason the factor approach utilized at the national level offers a suitable alternative for the moment. In regards to the membership form of liability, from a legal perspective a cogent argument can be made that this form of liability is not yet moribund.
Chapter 5  

Serious non-political crimes as grounds for exclusion from refugee protection (article 1F(b))

5.1: Introduction

In contrast to article 1F(a), which excludes persons involved in international crimes, article 1F(b) addresses the issue of common crimes and its effect on obtaining refugee status. The relevant provision of the article reads as follows: ‘he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee’.

The most important issues, which have the subject of academic debate and jurisprudence, have been the concept of what constitutes a serious crime and the parameters of the notion of political crime. The latter issue has also been raised in the context of the development of the legal proscription of terrorism while the relationship between extradition and exclusion has also been explored in the national jurisprudence. Given the impact of international extradition law and the work internationally carried out to define the concept of terrorism, this chapter will begin with an examination of the law of extradition and terrorism followed by the national jurisprudence at the national level of article 1F(b).

5.1.1: Extradition in international law

As seen in chapter 2, extradition and asylum figured somewhat during the debates leading up to the Refugee Convention but not prominently and again primarily in conjunction with the issue of refoulement. The main reason this issue had surfaced at the negotiations of the Convention was the fact that the UNHCR Statute excluded persons who had ‘committed a crime covered by the provisions of treaties of extradition’.

While the comparable provision of the Convention was drafted in broader language similar to the final text set out above. Most commentators are of the view that because of this difference in language, an automatic transfer of extradition principles to the exclusion context was not intended and is therefore not justified.

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1034 Article 7(d).
a view, which has been repeated in the jurisprudence. Two aspects of extradition law, which have found resonance in exclusion law, are the double criminality requirement and the concept of political offender.

The double criminality requirement means that the conduct of the person whose extradition is requested is a crime both in the country, which made the request as well as in the country to which the request is directed. While this does not appear to be a difficult condition to comply with there are three different manners in which to interpret this requirement. There is the objective method in which the label of the offence has to be the same in both countries. Then there is the subjective methodology whereby an inquiry is made whether the essential elements of the offence charged in one country correspond to the elements of an offence in the other country, no matter what the offences are called in either country. Lastly, double criminality can be accomplished by assessing whether the conduct of the accused is criminal in both countries in what has been termed the subjective, abstract approach. The first method was never applied while the comparing of elements was popular until recently when the abstract approach gained more currency.

Related to the issue of double criminality is the definition of extraditable crimes. Two approaches are employed, namely either setting out an enumeration of all extraditable offences in the extradition treaties between two countries or, alternatively, indicate in the treaty that all offences with a minimum penalty amount to an extraditable offence. The latter approach is used more often nowadays. In this context it is useful to

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1037 G. Gilbert, *Responding to International Crime* (Leiden/Boston: Martinus Nijhoff Publishers, 2006) at 101-109; R.J. Currie, *International & Transnational Criminal Law* (Toronto: Irwin Law Inc. 2010) at 450-451. Gilbert notes at 73 that double criminality is not always necessary and gives as an example the UK Extradition Act 2003 where for serious, enumerated offences no double criminality is required; see also C. Nicholls, C. Montgomery and J.B. Knowles, *The Law of Extradition and Mutual Assistance, Second Edition* (Oxford: Oxford University Press, 2007) at chapter 2.33; and UNHCR, *The Interface Between Extradition and Asylum* at 64-68. The correspondence of essential elements approach is used in Canadian immigration law where sections 36(1)(b) and (c) of IRPA makes a person inadmissible who has been convicted or has committed an offence outside Canada, see Li v. Canada (Minister of Citizenship and Immigration), [1997] 1 F.C. 235.

1038 G. Gilbert, *Responding to International Crime* at 71-74, who indicates that the minimum punishment in the European system is either one year within the European Extradition Convention approach or three years as part of the European Arrest Warrant framework. In Australia, the minimum penalty is one year (article 5 of the Extradition Act 1988), in Canada, it is two years (article 3(1) of the Extradition Act), New Zealand has the same minimum as Australia (article 4 of the Extradition Act 1999) while the U.S. does not state a minimum but refers to acts of violence as extraditable offences (United States Code, Chapter 18, section 3181); see also UNHCR, *The Interface Between Extradition and Asylum* at 59-63.
mention that in an international law instrument the notion of serious crimes in the area of organized crime has been set at four years.\textsuperscript{1039} The political offender concept in extradition law has been controversial as this doctrine attempts to justify the commission of crimes in extraordinary circumstances such as resistance against dictatorships or violent regimes or as an exercise of the right of self-determination.\textsuperscript{1040} Extradition law has developed mechanisms to ensure that persons involved in what would be otherwise common crimes would not be subject to extradition if the offence had been committed for a political purpose. Several theories, which have been developed to circumscribe the circumstances amounting to such a political purpose, are now reflected in two main types of political offences. The first category is the absolute or purely political offences, which are direct attacks on the integrity of the state, such as treason, espionage, subversive propaganda or membership in a prohibited political party. Secondly, there are the relative political offences, which are regular offences but with the political motivation to bring about a change within a state. A combination of these two types is also possible such as with compound political offences with elements of both absolute and relative offences while a sequential commission of first a common offence and then a political offence is called a connected political offence.\textsuperscript{1041}

The second type of offences has been the subject of extensive national jurisprudence and from this jurisprudence the most satisfactory approach has come out of the Swiss judiciary, which developed the predominance and proportionality test. This test entails an assessment of the political motivation and if the reason for engaging in common crimes is predominantly political, in the sense of there being a direct relationship between the offence and political goal sought one part of the test is fulfilled. Connected to this part of the test is the context, in which the crimes are carried out in that the more oppressive a state apparatus is or if the crime are carried out during a civil war, the more likely this aspect of the test can be accepted. Conversely, resort to violent means in a democratic society with a fully independent court system will rarely be considered a political offence, as are there other means in such a society to accomplish political objectives. Furthermore, the requirement of proportionality must be fulfilled, which means that the violence of the criminal act or the damage caused by it needs to be weighed against the purpose to be achieved. If the result of the crimes cause unpredictable or large amount of damage or victims,

\textsuperscript{1040} W. Kälin and J. Küntzli, ‘Article 1F(b)’ at 47-59.
which have no connection to the object of the attack, this part of the test has not been met.\textsuperscript{1042}

Not only has the methodology whereby a person can rely on a political offender exemption been clarified and narrowed over the years, in some circumstances international treaties regulating state responses to certain criminal behaviour have simply excluded this exemption from the offences set out in these treaties. This has been especially the case with treaties in the area of counter-terrorism.\textsuperscript{1043}

\textbf{5.1.2: Terrorism in international law}

At the international level defining terrorism has been elusive, which has prompted one commentator to question the use of this type of crime in the exclusion context.\textsuperscript{\textit{\textit{1044}}} Even if it had been possible to define terrorism before the Second World War as ‘criminal acts directed against the State and intended to create a state of terror in the mind of particular persons, or a group of persons or the general public’,\textsuperscript{1045} such a definitional consensus proved more difficult since that time.\textsuperscript{\textit{\textit{1046}}}

An attempt to conclude a comprehensive counter-terrorism treaty has not been successful so far primarily because of the fact of finding an all-encompassing definition and the related issue of whether such a definition should apply to both states and national liberation movements.\textsuperscript{1047} However, the negotiations on a Comprehensive Convention on International Terrorism resulted in the following draft definition of terrorism in 2005:

\begin{quote}
\textsuperscript{\textit{\textit{1043}}} G. Gilbert, \textit{Responding to International Crime} at 259-276; W. Kälin and J. Künzli, ‘Article 1F(b)’ at 68. Outside the counter-terrorism area, such a provision can also be found in the International Convention for the Protection of All Persons from Enforced Disappearance, which came in force on 23 December 2010 (article 13.1) while in the European Union two Directives have added to the equivalent of exclusion 1F(b) the following provision: ‘Particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes’ (article 28.1(a)(ii) of the Council Directive 2001/55/EC of 20 July 2001 regarding temporary protection and article 12.2(b) of the Council Directive 2004/83/EC of 29 April 2004, the Qualification Directive.
\textsuperscript{\textit{\textit{1045}}} The Convention for the Prevention and Punishment of Terrorism (16 November 1937), (19 League of Nations Official Journal 23 (1938) article 1.2; article 2 sets out which type of serious criminal acts are included in the definition of terrorism, namely very serious offences against the person, as well as serious damage to property. The Convention never came into force, see A. Sambie, A. Du Plessis and M. Polaine at 6.
\textsuperscript{\textit{\textit{1046}}} A. Sambie, A. Du Plessis and M. Polaine at 6-9; R.J. Currie at 295-297.
\textsuperscript{\textit{\textit{1047}}} A. Sambie, A. Du Plessis and M. Polaine at 6; R.J. Currie at 298-299.
\end{quote}
1. Any person commits an offence within the meaning of the present Convention if that person, by any means, unlawfully and intentionally, causes:
(a) Death or serious bodily injury to any person; or
(b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or to the environment; or
(c) Damage to property, places, facilities or systems referred to in paragraph 1 (b) of the present article resulting or likely to result in major economic loss;
when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.\textsuperscript{1048}

While a binding definition at the international level has not been accomplished,\textsuperscript{1049} certain manifestations of terrorism have been the subject of 10 specialized treaties,\textsuperscript{1050} which prohibit criminal acts against aviation,\textsuperscript{1051} maritime terrorism,\textsuperscript{1052} hostage taking\textsuperscript{1053} and acts against internationally protected persons\textsuperscript{1054}, as well as, more recently, treaties addressing broader issues related to terrorism, such as terrorist bombings,\textsuperscript{1055} financing of terrorism\textsuperscript{1056} and nuclear terrorism.\textsuperscript{1057} As a result of the

\textsuperscript{1048} UN Doc. A/59/895, Appendix II, article 2; the political exception is excluded in article 6.
\textsuperscript{1050} See for a background, R.J. Currie at 344-366; for a table setting out the essential aspects of these treaties, see A. Sambie, A. Du Plessis and M. Polaine at 25-28; for an examination of the material and mental elements see ibidem at 85-117 and R. Cryer, H. Friman, D. Robinson and E. Wilmhurst at 346-347. Sometimes the Convention on the Safety of United Nations and Associated Personnel is also included in the list of counter-terrorism offences (R.J. Currie at 353-356) and at other times the Convention on the Marking of Plastic Explosives for the Purpose of Detection and the Convention on the Physical Protection of Nuclear Material (see United Nations Treaty Collection, Text and Status of the United Nations Conventions on Terrorism).
\textsuperscript{1055} International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997. This instrument criminalizes activities where ‘person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility: (a) with the intent to cause death or serious bodily injury; or (b) with the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss’ (article 2.1). See also G. Gilbert, ‘Current Issues in the Application of Exclusion Clauses’ at 441.
description in the last three treaties a general definition of terrorism is emerging, which is very similar to the one set out above as part of the draft Comprehensive Treaty. Only the first and the last three of the above treaties have excluded the political offence exception.

One international declaration has had an impact on the interpretation of the relationship between terrorism and exclusion, namely Security Council Resolution 1373, which says:

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

(g) Ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists …

5 Declares that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations.

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1056 International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on 9 December 1999. This convention asks states to criminalize these activities: ‘any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act’ (article 2.1(b) while article 2.1(a) criminalizes acts already prohibited by the earlier UN counter-terrorism treaties).

1057 International Convention for the Suppression of Acts of Nuclear Terrorism New York, adopted by the General Assembly of the United Nations on 13 April 2005. This treaty makes a number of activities related to nuclear materials criminal all of which have to be carried out with the additional elements of (i) with the intent to cause death or serious bodily injury; or (ii) with the intent to cause substantial damage to property or to the environment (articles 2.1 and 2.2).

1058 Resolution 1566 of the Security Council (UN Doc. S/RES/1566(2004), paragraph 3, already contained a combination of a reference to the international counter-terrorism conventions in combination with the added mental element of the intention to intimidate a population or compel government; see also Special Tribunal for Lebanon, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative charging, STL-II-OI/I/AC/RI76bis, Appeals Chamber, 16 February 2011, §§ 85-113.

1059 A. Sambie, A. Du Plessis and M. Polaine at 421-422.

1060 UN Doc. S/RES/1373 (2001); see also G.S. Goodwin-Gill and J. McAdam at 194-197; for an analysis of this resolution, see P. Mathew, ‘Resolution 1373 – A Call to Pre-empt Asylum Seekers? (or ‘Osama, the Asylum Seeker’), in J. McAdam (ed.), Forced Migration, Human Rights and Security (Oxford and Portland, Oregon: Hart Publishing, 2008) at 23-30. The connection between terrorism and exclusion has been confirmed in other resolutions of the Security Council, such as UN Doc. S/RES/1377 (2001) and UN Doc. S/RES/1624 (2005) There had been an earlier resolution (UN Doc. S/RES/1269 (1999), which stated in more general terms: ‘deny those who plan, finance or commit terrorist acts safe havens by ensuring their apprehension and prosecution or extradition and take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of
There are also regional counter-terrorism treaties in Europe, the Americas, the Arab world, Africa and Asia. Their approach to defining terrorism varies, although none of them recognizes the political offences exception.

ensuring that the asylum-seeker has not participated in terrorist acts.’ This connection between acts contrary to the purposes and the principles of the United Nations and terrorism can also be found in preambular paragraph 22 of the European Union Qualification Directive.

European Convention on the Suppression of Terrorism, concluded at Strasbourg on 27 January 1977. There is also European Convention for the Prevention of Terrorism, concluded at Warsaw on 16 May 2005, which does not contain a definition of terrorism but criminalizes extended liability, such as recruitment and training. The source for these two instruments was the Council of Europe. However, in the context of the European Union, the Council Common Position of 27 December 2001 (which was repeated a year later in the 2002 Council Framework Decision of 13 June 2002 on combating terrorism) on the application of specific measures to combat terrorism provides a more detailed definition, namely:

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

(i) seriously intimidating a population, or
(ii) unduly compelling a Government or an international organisation to perform or abstain from performing any act, or
(iii) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation:

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


Arab Convention on the Suppression of Terrorism, signed at a meeting held at the General Secretariat of the League of Arab States in Cairo on 22 April 1998 and Convention of the Organization of the Islamic Conference on Combating International Terrorism, adopted at Ouagadougou on 1 July 1999.


South Asian Association for Regional Cooperation (SAARC) Regional Convention on Suppression of Terrorism, signed at Kathmandu on 4 November 1987.
Most of the treaties criminalize conduct, which had already been mentioned in the international treaties dealing with the various aspects of terrorism and which were in force at the time of the conclusion of the regional instrument with the exception of the OAS treaty which limited itself to the narrow issue of its title and with the exception of the OAU treaty which defines terrorism by combining the general description of both the Terrorist Bombing and the Terrorist Financing Conventions. Some of the regional treaties, in addition to the reiteration of the international treaty offences, also added some other components, such as the use of bombs or other weapon, which could endanger the public (the European convention), or add damage to the environment and natural resources to the definition as well as engaging in a general insurrection (OAU Convention), murder and serious attacks against the physical integrity of persons, as well as the use of weapons to carry out indiscriminate violence (the SAARC Convention), and activities which causes panic among people by harming them or causing damage to property or the environment (League of Arab States Convention and the Islamic Conference instrument).

The two treaties pertaining to the Americas also have a reference to asylum, the older one indicating that nothing in the convention ‘shall impair the right of asylum’\(^\text{1066}\) while the more recent instrument takes the opposite approach by saying that:

\[
\text{each state party shall take appropriate measures, consistent with the relevant provisions of national and international law, for the purpose of ensuring that refugee status is not granted to any person in respect of whom there are serious reasons for considering that he or she has committed an offense established in the international instruments listed in Article 2 of this Convention.}\(^\text{1067}\)
\]

On the national level, recent anti-terrorism criminal legislation follows a variation of the pattern set out in the draft Comprehensive Treaty by having similar type of offences related to serious crimes against persons or property combined with the added mental element of the intention to intimidate a population or compel government, often accompanied with a reiteration of the crimes contained in the ten international conventions in this area. For the countries under consideration in this study the following table sets out the various elements of the terrorism offences in their criminal statutes:

<table>
<thead>
<tr>
<th></th>
<th>Intimidation or compel element</th>
<th>Underlying crimes from international conventions</th>
<th>Additional mental element</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia(^\text{1068})</td>
<td>No</td>
<td>Yes with some refinements</td>
<td>No</td>
</tr>
</tbody>
</table>

\(^{1066}\) Article 6.

\(^{1067}\) Article 12; article 13 has the same wording but in relation to asylum.

\(^{1068}\) Criminal Code Act 1995, section 100.1(2) with some refinements.
<table>
<thead>
<tr>
<th>Country</th>
<th>Yes</th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgium</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Canada</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes; acts carried out for ideological, political or religious purpose</td>
</tr>
<tr>
<td>France</td>
<td>Only reference to intimidation or terror in general</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Germany</td>
<td>Yes while adding ‘to significantly impair or destroy the fundamental political, economic or social structures of a state or an international organization’</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Netherlands</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>New Zealand</td>
<td>Yes plus introduction or release of a disease bearing organism</td>
<td>Yes</td>
<td>Yes; acts carried out for ideological, political or religious purpose</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>United States</td>
<td>Yes plus affecting the conduct of a government by mass destruction, or kidnapping in combination with violent acts or acts dangerous to human life</td>
<td>Yes</td>
<td>No</td>
</tr>
</tbody>
</table>

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1069 Criminal Code, section 137.
1070 Criminal Code, section 83.01; this additional mental element had been declared unconstitutional in the first criminal case under this legislation on 24 October 2006 by a trial judge (R. v. Khawaja (2006), 214 C.C.C. (3d) 399) but this was decision was overruled and this element restored on appeal on 17 December 2010 by the Ontario Court of Appeal in R. v. Khawaja, 2010 ONCA 862.
1071 Criminal Code, section 421-1.
1072 Criminal Code, section 129(a)(2); for a background of anti-terrorism legislation in Germany, see U. Davy, ‘Immigration, Asylum and Terrorism in Germany’, in A. Baldaccini and E. Guild (eds), Terrorism and the Foreigner: A Decade of Tension around the Rule of Law in Europe (Leiden/Boston, Martinus Nijhoff Publishers, 2007) at 178-182.
1073 Criminal Code, sections 83-83a.
1074 Terrorism Suppression Act 2002, section 5
1075 Terrorism Act 2000, section 1, as amended by Terrorism Act 2006.
1076 United States Code, Title 18, section 2331.
One recent aspect in dealing with international terrorism has been the listing of organizations or individuals involved in terrorist activities. The practice of listing serves two distinct purposes. At the international level, the listing of organizations and purposes has as main purpose to have the assets of these persons frozen and forfeited while at the national level, a designation of an organization as a terrorist entity would result in ameliorating the burden of proving that such an entity fits within all the requirements of the definition of terrorism.

The international practice by the United Nations Security Council to issue sanctions expanded in 1999 from purely economic sanctions to also add two new elements to the sanctions regime, namely the freezing of assets of organizations and individuals as well as the use of travel bans against individuals, both government functionaries and private individuals, which were set out in a list attached to the resolution. This practice has been followed by a number of other Security Council resolutions adding names to the original listing, of which the above Resolution 1373 became a landmark as it was issued very soon after the 9/11 event and added new forms of freezing assets.

The implementation of these resolutions at the national level is done in the European Union through regulations issued by the Council of the European Union. In other countries, these resolutions are implemented directly by specific legislation and again updated when necessary. The listing and de-listing of persons by the Security Council has been criticized because of its lack of transparency and lack of judicial oversight, as a result of which some of the implementation in Europe has also come under increased scrutiny in recent years.

A relatively new development in the European Union has been the use of the European Council regulations in other areas than the freezing of assets. The European Court of Justice examined two of these practices in 2010 in cases stemming from Germany. In the first case, German prosecutors had charged two members of a listed organization with the criminal offence of being a member of terrorist organization without adducing further evidence of the purposes of that organization. While the

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1077 UN. Doc S/RES/1267 (1999). This was the result of 1999 bombings in Kenya and Tanzania.
1078 See A. Sambie, A. Du Plessis and M. Polaine at 288-299.
1079 For instance, European Council Regulation of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, implements UN Security Council Resolution 1373 but other regulations have been issued before as well as after, each time the Security Council issued a new or amended listing.
1080 This is done by regulations under unique legislation, namely the Charter of the United Nations Act 1945 in Australia; the United Nations Act in Canada; the United Nations Act 1946 in New Zealand; and the United Nations Act 1945 in the UK. In the U.S. there is no overarching legislation and each resolution is implemented by a specific legislative act.
1081 See A. Sambie, A. Du Plessis and M. Polaine at 289 and 299-302. The Security Council of the United Nations has attempted to address some of these problems by appointing an ombudsperson to assist the Al-Qaida and Taliban Sanctions Committee in its consideration of de-listing requests received from individuals and entities subject to the Security Council’s relevant sanctions measures against Al-Qaida and the Taliban, who seek removal from the Committee’s consolidated list (UN Doc. S/RES1904 (2009)).
court felt that in this specific case this reliance on the regulation was unwarranted as
the membership preceded the listing, the court appears in general to have no
objections with the use of the listed entities for other purposes than originally
anticipated.\textsuperscript{1082}

The second case examined the use of listing in the context of an exclusion 1F(b) and
(c) situation, in which it came to the conclusion that a listing is conclusive for the
determination with respect to the terrorist organization but not for the individual
liability of a member of that organization, or in the words of the court:

First, it is clear that terrorist acts, which are characterised by their violence
towards civilian populations, even if committed with a purportedly political
objective, fall to be regarded as serious non-political crimes. ... it is clear that the
Security Council takes as its starting point the principle that international
terrorist acts are, generally speaking and irrespective of any State participation,
contrary to the purposes and principles of the United Nations. ... It follows that –
as is argued in their written observations by all the Governments which
submitted such observations to the Court, and by the European Commission –
the competent authorities of the Member States can also apply Article 12(2)(c)
of Directive 2004/83 to a person who, in the course of his membership of an
organisation which is on the list forming the Annex to Common Position
2001/931, has been involved in terrorist acts with an international dimension. ...
As a consequence, first, even if the acts committed by an organisation on the list
forming the Annex to Common Position 2001/931 because of its involvement in
terrorist acts fall within each of the grounds for exclusion laid down in
Article 12(2)(b) and (c) of Directive 2004/83, the mere fact that the person
concerned was a member of such an organisation cannot automatically mean
that that person must be excluded from refugee status pursuant to those
provisions.

Common law countries, in addition to using listing for freezing purposes, have
provisions in their criminal legislation, which allows the executive at the ministerial
level to designate an entity as a terrorist organization.\textsuperscript{1084} This designation is done on
the standard of reasonable grounds, which would give rise to an argument that since

\begin{footnotes}
\textsuperscript{1082} Generalbundesanwalt beim Bundesgerichtshof v E and F, Case C-550/09, European Court of
\textsuperscript{1083} Bundesrepublik Deutschland v. B and D, C-57/09 and C-101/09, European Court of Justice, 9
November 2010, at paragraphs 81, 83, 84, 88; see E. Guild and M. Garlick, ‘Refugee Protection,
Counter-Terrorism, and Exclusion in the European Union’, 29 Refugee Survey Quarterly (2011) at 78-
80; the court decision has been applied in the Netherlands in the case of Rb, The Hague, Awb
06/24277, 22 February 2011.
\textsuperscript{1084} In Australia this is regulated in section 102.1 of the Criminal Code Act 1995; in Canada in section
83.05 of the Criminal Code; in New Zealand in section 20 (for interim designations) and 21 (for final
designations) of the Terrorism Suppression Act 2002; and in the UK in section 3 of the Terrorist Act
2000. In the US the approach is slightly different in that while it also at the highest executive level (the
Secretary) the standard of proof is not framed as reasonable grounds but as ‘finds’; secondly, the
designation is not made in the context of a criminal statute but in the context of immigration, namely
by virtue of section 219 of the Immigration and Nationality Act, to which the criminal statute, section
2339B of the United States Code, Title 18 refers.
\end{footnotes}
the level of designation is at the same evidentiary level as a finding of exclusion in the refugee context, that a designation with respect to an organization should be conclusive for refugee decision makers, especially given the involvement of the highest executive functionary. The decision of the European Court of Justice would support such an approach.

Lastly, with respect to terrorism and refugee law, most of the discussion and jurisprudence in this area has taken place as part of exclusion 1F(b) although terrorism has also been considered as part of 1F(c) and will also be examined under that heading.

5.2: National refugee jurisprudence

5.2.1: Australia

All aspects of article 1F(b) have been examined in Australian jurisprudence relating to refugee determinations, both at the court and tribunal level. In terms of interpretation, the Federal Court of Australia was of the view that while the Refugee Convention should not be interpreted narrowly, for exclusion under article 1F(b) it should be borne in mind that in addition to addressing the issue of a fugitive offender, the clause also operates on another level, namely to protect the order and safety of the receiving state. Therefore, a broad interpretation is proper in its view.\(^{1085}\)

With respect to the concept of crimes, the term committed in article 1F(b) does not require a conviction or even a criminal charge to be applicable.\(^{1086}\) However, if a person has been convicted and sentenced in a foreign country, these convictions are binding upon the decision maker if article 1F(b) is applied to the same underlying facts. If the facts regarding the article 1F(b) crimes are not related to the facts of the conviction, the conviction and sentencing can be used as evidence but are not binding.\(^{1087}\) When determining what amounts to a crime, there is no ‘requirement that every element of an identified offence must be able to be identified and particularised before the article may be relied upon’.\(^{1088}\)

What constitutes a crime is not to be determined by the law of the country of origin but rather by the laws of the country of refuge, even if the conduct took place outside that country.\(^{1089}\) The law applicable is the law at the time the acts were committed rather than when the person came to Australia.\(^{1090}\) If a person commits a crime, such as drug trafficking, which begins outside Australia but continues in Australia, article

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\(^{1086}\) YYMT and Anor and FRFJ and Anor [2010] AATA 447 at paragraph 22.

\(^{1087}\) YYMT and Anor and FRFJ and Anor [2010] AATA 447 at paragraph 120.

\(^{1088}\) Ovcharuk v Minister for Immigration and Multicultural Affairs [1998] FCA 1314.

\(^{1089}\) Ovcharuk v Minister for Immigration and Multicultural Affairs [1998] FCA 1314.

IF(b) is still engaged, as it is a continuing crime. The following crimes have been considered to be serious crimes: murder, drug trafficking, people smuggling, extortion and arson and malicious damage to property.

The issue of political crimes has been considered in a number of cases including the High Court of Australia. The case before the High Court was about a person from India who had knowingly and actively participated in the unlawful killing of a police officer and other targets by providing information and intelligence pertaining to the whereabouts and movements of these targets as well as providing weapons for the purpose of the killing of these persons by other members of the Khalistan Liberation Force (KLF). The tribunal had also found that ‘despite the assertions by the applicant that his involvement with the KLF were directed solely at achieving the creation of the independent Sikh state of Khalistan, one particular crime was carried out as an act of revenge or retribution against a particular police officer for the alleged torture of a KLF member.

According to the court, in order for a crime to be political, two requirements need to be fulfilled, namely the existence of a political purpose and proportionality. With respect to the first requirement, it was said that ‘the first is the requirement that political purpose be the only purpose of the crime in question. In the absence of

1091 Dhayakpa v Minister For Immigration and Ethnic Affairs, (1995) 62 FCR 556 and Ovcharuk v Minister for Immigration and Multicultural Affairs [1998] FCA 1314. This approach has been criticized by J. Hathaway and C. Harvey, ‘Framing Refugee Protection in the New World Disorder’, 34 Cornell International Law Journal (2001) 257-320 at 301 and by A. Zimmermann and P. Wennholz, ‘Art. 1 F’ at marginal note 81 but this has not prevented Australian decision makers to continue to find drug trafficking into Australia to be within the parameters of IF(b) (see NADB v Minister for Immigration and Multicultural Affairs [2002] FCA 200; ”WAT” and Minister for Immigration and Multicultural and Indigenous Affairs [2002] AATA 1150).


1094 ”SRBBBB” and Minister for Immigration and Multicultural and Indigenous Affairs [2003 AATA 1066 and SRCCCC and Minister for Immigration and Multicultural and Indigenous Affairs [2004] AATA 315.

1095 SR and Minister for Immigration and Multicultural Affairs [2000] AATA 128.

1096 ”WBA” and Minister for Immigration and Multicultural and Indigenous Affairs [2003] AATA 1250.


1098 At paragraphs 11-12.
anything in the text of the Convention to suggest otherwise, there is no reason why
the political purpose should be the sole or, even, the dominant purpose of the crime,
so long as it is a significant purpose.1099 With respect to the second requirement, the
same judge indicated that:

A crime is unlikely to have a political purpose if it has no relevant connection
with the political aims of those involved in its commission. So, too, as has been
explained in other legal contexts, "proportionality" is a useful indicator of
purpose. The true purpose of actions which are unnecessary or disproportionate
to the end which is said to justify those actions is unlikely to be the achieving of
that end but is likely to be the satisfaction of some other and different purpose.
Actions which are either unnecessary or disproportionate to the political
objectives which are said to justify them are, perhaps, usefully described as
"terrorist" activities. But for the purposes of Art 1F(b), that description is not, of
itself, determinative. The issue is whether the actions in question were
undertaken for a political purpose, in the sense that that purpose was a
significant purpose.1100

In applying the decision of the High Court, the Federal Court of Australia found that
these requirements for political offences were not made out in a case of trafficking of
drugs even though this smuggling was carried out as part of a political struggle
against a government. The court found that an incidental connection to political goal
is not sufficient to make this type of activity a political crime.1101

The High Court decision was rendered in March 2002. Five months earlier, the
Migration Act 1958 had been amended by including a description of political
offences.1102 This new provision read:

(1) for the purposes of the application of this Act and the regulations to a
particular person, Article 1F of the Refugees Convention as amended by the
Refugees Protocol has effect as if the reference in that Article to a non-political
crime were a reference to a crime where the person's motives for committing the
crime were wholly or mainly non-political in nature.
(2) subsection (1) has effect subject to subsection (3).
(3) for the purposes of the application of this Act and the regulations to a
particular person, Article 1F of the Refugees Convention as amended by the
Refugees Protocol has effect as if the reference in that Article to a non-political
crime included a reference to an offence that, under paragraph (a), (b), (c) or (d)

1099 At paragraph 44 (Gaudron, J.)
1100 At paragraphs 46-47 (Gaudron, J.); along the same lines Gleeson, CJ. at paragraphs 20-22 (a
passage with which N. Blake, ‘Exclusion from Refugee Protection: Serious Non-Political Crimes after
9/11’, a European Journal of Migration and Law (2003) at 441 agrees) as well as Kirby J. at paragraphs
120-128 who also points to the difference between extradition law and refugee law (at paragraph 105) and
to the fact that political crimes should not be judged in the context of political processes in countries such
as Australia (at paragraph 106).
1102 See YYMT and Anor and FRFJ and Anor [2010] AATA 447 at paragraph 14.
of the definition of political offence in section 5 of the Extradition Act 1988, is not a political offence in relation to a country for the purposes of that Act.¹¹⁰³

This provision was analyzed in some detail in a recent tribunal decision.¹¹⁰⁴ The term ‘motives’ in the amendment was viewed as being different from intention but referring to the reason for carrying out an act.¹¹⁰⁵ The decision also makes it clear that the political exception has been narrowed compared to the High Court decision by virtue of the words ‘wholly or mainly’ political rather than significant.¹¹⁰⁶

As is the case under article 1F(a), it is not only persons who personally commit article 1F(b) crimes can be excluded from the protections of the Refugee Convention, but also those who are indirectly involved.¹¹⁰⁷ That being said, the jurisprudence has for the most part examined situations where claimants carried out the crimes themselves. Two tribunal decisions found that persons could not be excluded because their activities were too far in the periphery of knowing and personal participation to hold their involvement against them. Both cases involved crewmembers of ships, which were used for people smuggling purposes. A mechanic who occasionally carried out repairs on the ship’s engine¹¹⁰⁸ and a person who caught fish and cooked meals for

¹¹⁰³ Section 91T. The portion of section 5 of the Extradition Act 1988 referred to in section 91T excludes a large number of activities from being political including the ones contained in nine international counter-terrorism conventions as well as the Torture Convention and in addition the following acts:
(b) an offence constituted by conduct that, by an extradition treaty (not being a bilateral treaty) in relation to the country or any country, is required to be treated as an offence for which a person is permitted to be surrendered or tried, being an offence declared by regulations for the purposes of this paragraph not to be a political offence in relation to the country or all countries;
(c) an offence constituted by:
(i) the murder, kidnapping or other attack on the person or liberty; or
(ii) a threat or attempt to commit, or participation as an accomplice in, a murder, kidnapping or other attack on the person or liberty;

of the head of state or head of government of the country or a member of the family of either such person, being an offence declared by regulations for the purposes of this paragraph not to be a political offence in relation to the country; or
(d) an offence constituted by taking or endangering, attempting to take or endanger or participating in the taking or endangering of, the life of a person, being an offence:
(i) committed in circumstances in which such conduct creates a collective danger, whether direct or indirect, to the lives of other persons; and
(ii) declared by regulations for the purposes of this paragraph not to be a political offence in relation to the country.

¹¹⁰⁴ YYMT and Anor and FRFJ and Anor [2010] AATA 447; the tribunal also indicated that the new provision could only apply after an asylum seeker had made an application since the coming of force of this section (at paragraphs 209-210). The new section had been mentioned in two other cases but not applied to the situations at hand, see SRLLL and Minister for Immigration Multicultural and Indigenous Affairs [2002] AATA 795 and “WBA” and Minister for Immigration and Multicultural and Indigenous Affairs [2003] AATA 1250.
¹¹⁰⁶ At paragraphs 223.
¹¹⁰⁷ Minister for Immigration and Multicultural Affairs v Singh [2002] HCA 7, where the indirect involvement was never raised as an issue of concern.
¹¹⁰⁸ “SRBBBB” and Minister for Immigration and Multicultural and Indigenous Affairs [2003] AATA 1066.
the crew a couple of times during a three month voyage were found not to fall within
the parameters of article 1F(b). \(^{1109}\)

In analyzing the developments in Australia in regards to exclusion 1F(b) two aspects
stand out. The first one is that in the area of the political offence exception the Swiss
approach from the area of extradition law has found resonance also in refugee law by
emphasizing the dominant and proportionality approach even though neither
extradition law nor the Swiss approach are specifically mentioned. Secondly, in the
same area of political crime there has been some conflict as to the exact manner of
expressing the test to be applied between the legislator and the courts. Clearly, the
legislator felt that the High Court had watered down this test too much by changing
one part of this test from ‘dominant purpose’ to ‘significant purpose’ and reacted by
imposing an even higher test which read as ‘wholly or mainly non-political’. As well,
the legislator limited the judicial discretion even further by specifically listing what
crimes could not fall within the notion of political crime. This is a long list and
includes most activities considered terrorist in international treaties even though those
treaties themselves not always have excluded the political offence exception. The fact
that this hardened approach took place soon after the 9/11 attacks is probably not a
coincidence.

5.2.2: Belgium

There have been a small number of Belgian cases involving article 1F(b). Some older
cases addressed the issue of political crimes and those tribunals came to the
conclusion without further analysis that the revenge acts by the Turkish Dev-Sol
organization against civilian targets were always non-political crimes and that
participation in a bomb attack against a textile factory and against the police were of a
non-political character even though they might have been politically inspired.
Similarly, a deliberate failure of a member of the LTTE who worked as a security
officer for a bank in Sri Lanka to give warning of a LTTE attack against that bank as
well as his participation in an attack on a train carrying soldiers were deemed to be
article 1F(b) activities. \(^{1110}\)

A member of the Muttadi Quami Movement (MQM) in Pakistan during a time that
this organization was known to have been involved in a large number of violent
activities, such as murder and torture, was excluded pursuant to article 1F(b). This
individual had moved up in the local hierarchy of this organization and carried out
important functions such as working in the office of the president and being a
bodyguard of the president at a particular violent time in Karachi. Combined with the
fact that he had joined the MQM voluntarily while being aware of its strategies, even
though he had not personally committed violent acts, was sufficient to exclude him
from refugee protection. \(^{1111}\)

\(^{1109}\) SRCCCC and Minister for Immigration and Multicultural and Indigenous Affairs [2004] AATA 315.
\(^{1110}\) S. Kapferer, ‘Exclusion Clauses in Europe’ at 201.
\(^{1111}\) CPPR No. 99-0164/W5686, 17 September 1999.
In one more recent case some other aspects of this form of exclusion were explored. A 2008 case involved a Kosovar refugee in Germany who had raped his twelve-year-old niece and was sentenced by a German criminal court to three years incarceration. He had obtained early release on the condition he would go back to Kosovo, but instead came to Belgium as an asylum seeker. The refugee tribunal was of the view that since rape was a serious crime in the Belgium criminal code and that since a partial serving of a sentence might be at most a mitigating circumstance, it did not affect the application of article 1F(b) to this person, who was accordingly excluded.\textsuperscript{1112}

5.2.3: Canada

According to the jurisprudence, the phrase ‘outside the country of refuge prior to his admission’ in article 1F(b), taken literally, means that only persons who entered Canada after having their claim to refugee status recognized by a visa officer overseas, or persons who made their claim for refugee status at a port of entry and were admitted to Canada pending a determination of their claim for refugee protection, could be excluded. It is not necessary to take the phrase literally as the objective of the Convention is furthered by the application of the exclusion at the time of making an application for Convention refugee status, whenever that application is made.\textsuperscript{1113}

For a crime to be considered serious in Canada for the purpose of article 1F(b), it has to be a capital crime or a very grave punishable act. There is a strong presumption that any crime, the equivalent of which carries a maximum penalty of more than ten years in Canadian criminal law, is a serious crime, even though the actual sentence imposed abroad might be much less than the maximum penalty. Factors such as the elements of the crime, the mode of prosecution, the penalty prescribed, the facts and the mitigating and aggravating circumstance underlying the conviction should be considered in that context and could rebut the above presumption. For instance, ‘duress may be a relevant mitigating factor in assessing the seriousness of the crime committed, while the harm caused to the victim or society, the use of a weapon, the fact that the crime is committed by an organized criminal group could also be relevant factors to be considered’.\textsuperscript{1114}

Murder,\textsuperscript{1115} drug trafficking,\textsuperscript{1116} assault,\textsuperscript{1117} sexual assault,\textsuperscript{1118} bombing,\textsuperscript{1119} coup d'états (including activities such as delivering weapons and seizing radio and TV

\textsuperscript{1112} CCE No. 16.779, 30 September 2008.
\textsuperscript{1113} Canada (Citizenship and Immigration) v. Li 2010 FC A 75
\textsuperscript{1114} Chan v. Canada (Citizenship and Immigration, A-294-99; Jayasekara v. Canada (Citizenship and Immigration) 2008 FCA 404; Noha v. Canada (Citizenship and Immigration) 2009 FC 683; Benitez Hidrovo v. Canada (Citizenship and Immigration) 2010 FC 111; Nava Flores v. Canada (Citizenship and Immigration) 2010 FC 1147; Németh v. Canada (Justice), 2010 SCC 56 at paragraph 45.
\textsuperscript{1115} A.C. v. Canada (Minister of Citizenship and Immigration) 2003 FC 1500.
\textsuperscript{1116} Malouf v. Canada (Minister of Citizenship and Immigration, A-19-95; Chan v. Canada (Citizenship and Immigration, A-294-99; Canada (Minister of Citizenship and Immigration) v. Maan 2005 FC 1682;
stations), kidnapping, sabotage, armed robbery, arson, terrorist acts, and child abduction, have all been held to be serious crimes for the purposes of article 1F(b) in Canada. In addition, economic crimes such as embezzlement, smuggling, tax evasion, customs smuggling, taking bribes, offering bribes, usury, fraud and theft involving large amounts of money have been found to be excludable crimes. This is based on the fact that exclusion under article 1F(b) refers to serious crimes in general without making a distinction between violent and purely economic crime. However, shoplifting, even when committed in a habitual fashion, is not a serious crime.

The notion of what is to be considered a serious crime is in relation to the criminal law system of the country of refuge rather than the country of origin, although the
criminal charges and conviction in a foreign country can be considered as evidence of serious reasons for considering that crimes have been committed, albeit with caution.\textsuperscript{1139}

Since both articles 1F(a) and 1F(b) use the term committed, it means that not only persons who committed serious, non-political crimes personally are captured by article 1F(b) but also persons who have been complicit in committing such activities.\textsuperscript{1140} This includes the notion of being a member of an organization with a limited, brutal purpose.\textsuperscript{1141}

With respect to political crimes, the Federal Court of Appeal upheld a tribunal decision to exclude an individual who had been involved five or six times in placing Molotov cocktails in crowded business premises owned by wealthy supporters of the Khomeini government in Iran and by members of local revolutionary committees. The court states that while the political offence exception occurs in both extradition and refugee law, there are substantial differences between the two systems as a result of which, ‘these considerations would seem to me to point to a need for even greater caution in characterizing a crime as political for the purposes of applying Article 1F(b) than for the purpose of denying extradition.’\textsuperscript{1142}

After considering in detail the extradition law of other countries, the court decided that the incidence test from extradition law was also the most appropriate to assess the political offence exception in refugee law. In applying this test to the facts of the case, the court was of the view that there was no objective rational connection between injuring the commercial interests of certain wealthy supporters of the regime, and any realistic goal of forcing the regime itself to fall or change its ways or

\footnotesize{\textsuperscript{1139}Biro v. Canada (Citizenship and Immigration) 2007 FC 776 and Arevalo Pineda v. Canada (Citizenship and Immigration) 2010 FC 454.  
\textsuperscript{1140}Gregorio v. Canada (Minister of Citizenship and Immigration), IMM-1447-98; Zrig v. Canada (Minister of Citizenship and Immigration) 2003 FCA 178 (relying on Australian jurisprudence); Jaouadi v. Canada (Minister of Citizenship and Immigration) 2005 FC 1256; and Rudyak v. Canada (Minister of Citizenship and Immigration) 2006 FC 1141.  
\textsuperscript{1141}Chong v. Canada (Minister of Citizenship and Immigration) 2001 FCT 1335, which stands for the proposition that Hong Kong triads have a single, brutal purpose, namely the commission of crime for financial gain while Zrig v. Canada (Minister of Citizenship and Immigration) 2003 FCA 178 says the same about membership in a terrorist organization.  
politics. This nexus was too tenuous to justify the kind of indiscriminate violence admitted to by the refugee claimant.  

Furthermore, the means employed by the person concerned were such as to deny his crimes from any claim to be political in nature, not because of the fact that innocent bystanders were killed, but because of the circumstance that the attacks were not carried out against armed adversaries and were bound to injure the innocent. ‘Violence of a sort where deadly force is directed against unarmed civilian commercial targets in circumstances where serious or death to innocent bystanders is simply inevitable, is wholly disproportionate to any legitimate objective, even if such bystanders are the family of the president of a repressive regime’.  

With respect to expiation, the Supreme Court of Canada had stated in obiter that exclusion under article 1F(b) would not apply in a situation where a person has already been convicted of the crimes under consideration and has already served his sentence. This statement became eroded over time until the Federal Court of

\[1143\] Gil v. Canada (Minister of Employment and Immigration) (C.A.), [1995] 1 F.C. 508. No claimant has been able to convince a court so far that his criminal activities fit the political offence exception, primarily by already failing this first part of the test, which was said not to apply in Gregorio v. Canada (Minister of Citizenship and Immigration), IMM-1447-98 during a coup d’etat in Venezuela nor the kidnapping of a terrorist for the FBI in exchange for 2 million dollars and U.S. citizenship (Taleb v. Canada (Minister of Citizenship and Immigration), IMM-1449-98) nor armed robbery and acts of sabotage against the Chilean government as a member of the communist party (Vergara c. Canada (Minister of Citizenship and Immigration) 2001 FCT 474). The same conclusion was reached in a situation was involved in armed robberies in Nepal as a member of the communist party (Sharma v. Canada (Minister of Citizenship and Immigration) 2003 FCT 289); where a person had committed arson as part of the political goal of establishing a fundamentalist government in Tunisia (Zrig v. Canada (Minister of Citizenship and Immigration) 2001 FCT 1043); and where person had committed economic crimes such as fraud, smuggling and tax evasion in China (Lai v. Canada (Minister of Citizenship and Immigration) 2005 FCA 125).  

\[1144\] Ward v. Canada (Minister of Employment & Immigration) [1993] 2 S.C.R. 689, followed by Chan v. Canada (Citizenship and Immigration), A-294-99; Vergara v. Canada (Minister of Citizenship and Immigration) 2001 FCT 474 (which did apply the exclusion clause for crimes the claimant had not been convicted); Canada (Minister of Citizenship and Immigration) v. Nyari 2002 FCT 979 (where exclusion was applied because the claimant had escaped from prison and had not served his complete sentence); Garcia Médina v. Canada (Minister of Citizenship and Immigration) 2006 FC 62, Al Husin v. Canada (Minister of Citizenship and Immigration) 2006 FC 1451 and Garcia Rodriguez v. Canada (Citizenship and Immigration) 2007 FC 462 (where the person had not served his sentence because he breached his probation upon release).  

\[1145\] Zrig v. Canada (Minister of Citizenship and Immigration) 2003 FCA 178 at paragraph 129 in obiter indicating that ‘it follows that under Article 1F(b) it is possible to exclude both the perpetrators of serious non-political crimes seeking to use the Convention to elude local justice and the perpetrators of serious non-political crimes that a State feels should not be allowed to enter its territory, whether or not they are fleeing local justice, whether or not they have been prosecuted for their crimes, whether or
Appeal recently came explicitly to a different conclusion than the Supreme Court. The reasoning of the court was premised on the underlying purposes of exclusion under article 1F in general and article 1F(b) in particular:

- ensuring that the perpetrators of international crimes or acts contrary to certain international standards will be unable to claim the right of asylum;
- ensuring that the perpetrators of ordinary crimes committed for fundamentally political purposes can find refuge in a foreign country;
- ensuring that the right of asylum is not used by the perpetrators of serious ordinary crimes in order to escape the ordinary course of local justice; and
- ensuring that the country of refuge can protect its own people by closing its borders to criminals whom it regards as undesirable because of the seriousness of the ordinary crimes which it suspects such criminals of having committed. It is this fourth purpose which is really at issue in this case. … These purposes are complementary. The fourth indicates that while the signatories were prepared to sacrifice their sovereignty, even their security, in the case of the perpetrators of political crimes, they wished on the contrary to preserve them for reasons of security and social peace in the case of the perpetrators of serious ordinary crimes. This fourth purpose also indicates that the signatories wanted to ensure that the Convention would be accepted by the people of the country of refuge, who might be in danger of having to live with especially dangerous individuals under the cover of a right of asylum.  

Based on the purposes of article 1F(b) and the various factors to be considered in deciding whether a crime is to be considered serious as discussed above, the court came to the conclusion that a conviction and sentence served is one of the factors to be considered and that such an event does not bar the application of exclusion under article 1F(b). This approach is now being followed at the tribunal and Federal Court level.

In comparing international law with national refugee law, the Federal Court of Appeal, while pointing out that refugee law has different purposes than extradition law, still undertook a detailed comparative analysis of the extradition law as applied in a number of other countries in the area of the political exception and came to the conclusion that the combination of a dominance and proportionality assessment as used in international extradition law was also the most appropriate in exclusion law. As well, the jurisprudence has taken the view that all aspects of complicity as used for exclusion 1F(a) purposes can also be applied to exclusion 1F(b) including the notion of membership.

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1147 Jayasekara v. Canada (Minister of Citizenship and Immigration), 2008 FCA 404 at paragraph 28; the words are actually from the same court in the Zvig case but this decision places more emphasis on the fourth purpose of 1F(b). The court also refers to Australian jurisprudence in paragraph 29 for support of this fourth element.

1148 Noha v. Canada (Citizenship and Immigration) 2009 FC 683 and Nava Flores v. Canada (Citizenship and Immigration) 2010 FC 1147.
5.2.4: France

Traditionally, the notion of serious crime had not been connected to specific crimes as set out in the Criminal Code but the Code was used as a source to exclude a person for a crime, which had a lengthy maximum attached to it. More recently even this connection to the legislation has been abandoned in favour of setting out in the abstract what conduct amounts to a serious crime.\textsuperscript{1149}

The majority of French jurisprudence since 1950 deals with the determination of factual situations, which can demonstrate the commission of serious crimes. A wide variety of criminal behaviour has been brought within this notion of serious crime including collective crimes committed during armed conflicts, offences by terrorist organizations, and single crimes carried by individuals in isolated instances.

Killing or attempted killing connected to inter-ethnic violence or as part of armed conflicts,\textsuperscript{1150} such as in Senegal as committed by the Mouvement Démocratique de la Casamance (MFDC),\textsuperscript{1151} in Ivory Coast by the Mouvement Patriotique de Côte d’Ivoire (MPCI) (later Forces Nouvelles)\textsuperscript{1152} or by Charles Taylor’s forces in Liberia,\textsuperscript{1153} and guerrilla operations carried out by the Front Patriotique Rolingya (RPF) and the Organizafion de Solidarité Rolingya (RSO) in Burma\textsuperscript{1154} have all been considered to fall within the framework of article 1F(b) of the Convention. The same result was reached in situations of killings of Albanians by Serb police forces,\textsuperscript{1155} murder, kidnapping and theft by the Georgian army during the civil war in Abkhazia,\textsuperscript{1156} during the civil war in Chechnya\textsuperscript{1157} or in Colombia, in connection with torture,\textsuperscript{1158} as well as killings by armed militia groups in Haiti.\textsuperscript{1159}

Along the same lines, torture and extortion carried out between 1979 and 1996 on behalf of the Lebanese Forces during the civil war in Lebanon were considered to be serious crimes,\textsuperscript{1160} as was pillage of the civilian population by government armed forces (SARM and DSP) under the Mobutu regime in the Democratic Republic of the

\textsuperscript{1151} CRR, 18 April 1997, 291084, Danso.
\textsuperscript{1152} CNDA, 12 February 2009, 598383, K.
\textsuperscript{1153} CRR, 8 December 1997, 316623, Brown.
\textsuperscript{1154} CRR, 7 July 1997, 272114, Hamid Husain; this case was considered on appeal by the Council of State in 2000 and sent back for redetermination because the decision maker had failed to address the exclusion question, see CE, 15 May 2000, 190059, Hamid.
\textsuperscript{1155} CRR, 18 May 2006, 548090, Kurta.
\textsuperscript{1156} CRR, 20 October 2005, 537046, T.
\textsuperscript{1157} CNDA, 15 December 2009, 637456/08017677, S.
\textsuperscript{1158} CNDA, 15 January 2009, 594649, R.
\textsuperscript{1159} CRR, 3 May 2007, 586579, J.
\textsuperscript{1160} CRR, 22 December 2000, 346184, Hatem.
Pillage, rape and killing of civilians by rebel groups (the MLC, RCD and the Lendu) at a later time in the Democratic Republic of the Congo, acts of sabotage against public infrastructure institutions by the Mouvement Congolais pour de Démocratie et le Développement Intégral (MCDDI) and the Ninja Militia, again in the Democratic Republic of the Congo and acts of violence and pillage in Kosovo by local Serb militias or Serb police were given the same treatment.

A coup d’état attempt resulting in numerous deaths in Azerbaijan and murder as part of another coup d’état in the Comores also led to exclusion from refugee protection. An assassination attempt in Pakistan by the Ismanai Student Organization against the leader of a political movement, a bomb attack against the headquarters of the militia in Georgia, an attempt to carry out an attack by the Peruvian terrorist organization MRTA, the killing of civilians and police officers in Nigeria by the Congres of the People of Odua (OPC), using terrorist methods such as attacks against the civilian population in Turkey and other countries by the PKK or attacks on banks and assassinations by the TKP/ML-TIKKO, also in Turkey, terrorist attacks in Algeria by the Front Islamique du Salut (FIS) and the Groupe Islamique Armé (GIA) were also viewed as article 1F(b) crimes.

Crimes such as drug trafficking and procuring have also been held to be serious crimes as have been burglary and the commission of violent acts by street gangs in Haiti. Aggressive behaviour during a public discourse is not a serious crime even if the person had received a conviction for these acts in the country of origin.

With respect to the notion of political crimes, the Council of State has made it clear that the political objectives of the persons carrying out serious crime must be
balanced against the degree of the legitimacy of the violence employed. Applying this standard, it has been said that terrorist methods such as attacks against a civilian population in furtherance of political goal as used by the PKK does not bring a criminal act within the rubric of a political crime. The same result was achieved in a situation where a person was involved in a coup d'état in Azerbaijan in order to obtain democracy but which caused a large number of fatalities.

On the other hand, this balance was achieved in a situation where a person had joined a unit of combatants in Chechnya after his village had been destroyed by Russian bombardments during the first civil war. He participated in actions against Russian armed forces in defence of the Chechnyan people and his own family but did not violate the rules of war while engaged in such actions.

Complicity for purposes of article 1F(b) is present when people participate directly or indirectly in the planning, preparation and commission of serious non-political crimes. Direct participation has been found in situations such as participation in acts of violence against civilian targets as well in armed attacks against military forces of a country, such as combat and the transport of weapons for the LTTE. A combination of being an instructor in a rebel group in Senegal with direct participation in armed confrontations against government forces resulting in dozens of deaths constitutes excludable behaviour, as does being a political instructor for PKK combatants. Organizing and financing a bomb attack against the headquarters of the militia in Georgia has been also found to amount to complicity.

Indirect participation may lead to exclusion in situations such as hostage taking to extract money for the LTTE, stealing ammunition and grenades from an army depot for the FIS in Algeria, attempted extortion of funds for the PKK in Turkey and providing financial logistical support for the OPC in Nigeria. Being a watchman during an assassination by the TKP/ML-TIKKO in Turkey, providing information to Russian security forces resulting in the death of several Chechnyan independence fighters and transporting prisoners and dead bodies for Serb police forces during

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1180 CE, 28 February 2001, 195356, S. For cases before 2001, see S. Kapferer, ‘Exclusion Clauses in Europe’ at 199-200 indicating that 1F(b) was applied to the crimes of murder and attempted murder irregardless of the political motive especially in situations involving armed opposition movements.
1181 CRR, 9 January 2003, 362645, Altun; see also CRR, 11 May 2006, 523285, Ucar.
1183 CRR, 25 January 2007, 552944, S.
1184 S. Kapferer, ‘Exclusion Clauses in Europe’ at 200.
1185 CRR, 18 April 1997, 291084, Danso.
1188 S. Kapferer, ‘Exclusion Clauses in Europe’ at 200.
1189 CRR, 28 February 2001, 195356, S. For cases before 2001, see S. Kapferer, ‘Exclusion Clauses in Europe’ at 199-200 indicating that 1F(b) was applied to the crimes of murder and attempted murder irregardless of the political motive especially in situations involving armed opposition movements.
1190 CNDA, 31 January 2008, 536076, C.
1191 CNDA, 15 December 2009, 637456/08017677, S.; the tribunal states this proposition in general but is of the view that the facts in this specific case would not lead to exclusion.
the ethnic cleansing of Kosovo also fall within the parameters of this type of participation.

However, providing food and medicine for armed movements falls below the complicity threshold. As well, a person who was pressed into becoming a member of the LTTE while in a vulnerable situation while participating in an action against the Sri Lankan army and who left the LTTE, while on leave, after having requested to be dismissed on several occasions, cannot be considered to have committed 1F(b) activities.

A combination of having being forcibly recruited by the FARC in Colombia at a young age, being in a situation of particular vulnerability, being only marginally involved by carrying out surveillance of his neighbourhood on behalf of the FARC and disassociating himself from the organization whose methods he did not support by fleeing to France, was sufficient to excuse a person from complicity in serious crimes. A child soldier who had been forcibly recruited by the RUF in Sierra Leone after several members of his family had been killed by this rebel force, who had participated under threats against his life in attacks against civilians and pillage and who had left the RUF two months after having been enrolled was also found not to be excludable.

On the other hand, mitigating circumstances did not go as far to absolve an adult who had been forcibly recruited by the rebel group Lendus in the Democratic Republic of the Congo and who personally participated in murder, attacks on civilians and pillage under orders of his superiors and while under the influence or alcohol and drugs was found to be complicit in article 1F(b) crimes. Similarly, a young person in Colombia who joined a paramilitary group voluntarily in order to revenge the killings of his entire family by criminal gangs and personally murdered and tortured members of the FARC as well the members of the gang responsible for the killing of his family was excluded in spite of his young age and his the traumatic experiences.

The jurisprudence with respect to the meaning of outside the country of refugee has fluctuated in that at times the commission of an offence in France was not seen as an impediment to apply article 1F(b). It appeared that this issue was laid to rest by the Council of State in 1998 when it made clear that offences committed in the country of refugee could be used to apply the refoulement provision of the Refugee

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1192 CRR, 2 April 2007, 547636, C.
1193 S. Kapferer, ‘Exclusion Clauses in Europe’ at 200.
1194 CRR, 13 September 2005, 509227, Mlle T.
1195 CRR, 26 May 2005, 459358, V.
1196 CRR, 28 January 2005, 448119, C.
1197 CRR, 4 April 2005, 487639, N.
1198 CNDA, 15 January 2009, 594649, R.
1199 F. Tiberghien at 103 and 468-469 and CRR, 14 November 1997, 290466, Can.
Convention but not exclusion under article 1F(b). However, in a more recent decision, article 1F(b) was applied to a member of the FIS and GIA, considered terrorist organizations in Algeria, who had been convicted by a French criminal court of a number of offences in France, such as transporting weapons, vehicles and forged documents, as well as supporting terrorism. It would appear that the distinction was found (as it had in the past when article 1F(b) was applied to offences committed in France), that the provision was not applicable for regular offences wholly committed within French territory but that it could if its parameters could reach situations involving support functions for terrorist organizations, which operated primarily outside France.

Lastly, expiation has not found any traction in the tribunal jurisprudence where convictions in foreign countries or even in France have not prevented the application of article 1F(b).

In assessing the jurisprudence of the French tribunals in relation to international law two aspects need to be considered, namely the fact that in France article 1F(b) has been primarily used to address war crimes in non-international armed conflicts while more recently also terrorist activities have been brought within its parameters. Complicity principles have been applied to both types of activities. No reference to international criminal law jurisprudence has been used to explain the conclusions reached in respect to the notion of civil war or the specific war crimes, such as murder, torture or pillage. The same comment can be made in respect to extended liability for the use of article 1F(b) for war crimes or acts or terrorism although the French case-law is consistent on this point with the notions of extended liability in exclusion 1F(a) by the same tribunals. However, even though such references are missing, the instances where civil war, terrorism and complicity in these activities were virtually always of such a nature that an application of the principles set out in either international criminal law or the international terrorist conventions would have resulted in the same outcomes.

What has just been said in regards to international criminal law and international terrorist conventions also holds true for the use of international extradition law when providing the contours of the political offence exception in that, like in other countries, the dominant and proportionality principles have been given due attention in the exclusion 1F(b) context. Given the use of this provision for war crimes in non-international armed conflicts French found itself in the unique position of examining political offence exception claims in such situations but found no difficulty in determining whether proportionality was present on these occasions.

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1200 CE, 25 September 1998, 165525, Rajkumar (see also implicitly CRR, 22 January 1999, 322914, Tat). J. Hathaway and C. Harvey, at 300 take umbrage with the position of the CRR but do not seem to be aware of the fact that the Council of State overturned the tribunal decision.
1201 CRR, 26 October 2005, 399706, K.
1202 F. Tiberghien at 468 and CRR, 14 November 1997, 290466, Can.
5.2.5: Germany

In Germany, the notion of serious crime was originally given a broad meaning by making any offence in Germany with a penalty of at least one year serious. This approach has been modified more recently by the highest administrative court, which held that the crime ‘must be a capital crime or a punishable act that is categorised as especially grave in most legal systems and prosecuted accordingly in criminal law.’

The court went on to indicate that a crime is non-political if ‘it is committed predominantly for other motives (such as personal reasons or gain). Where no clear link exists between the crime and its alleged political objective or when the act in question is disproportionate to the alleged political objective, non-political motives are predominant’. A person in Chechnya who killed two soldiers and took another hostage in order to free his brother from Russian captivity was not engaged in a political crime, since this act was carried out for a personal motive. In this context, particularly cruel actions may be classified as serious non-political crimes according to the Qualification Directive, which is apt in the terrorism context according to the jurisprudence.

According to the court, while there is no international definition for terrorism, some indicia to give this rather vague concept some useful parameters can be found in a number of sources, such as the Council of the European Union Common Position of 27 December 2001 on the Application of Specific Measures to Combat Terrorism. This position makes it clear that:

- certain intentional acts (such as attacks on a person’s life or physical integrity) become ‘terrorist acts’ if – first – given their nature or context, they may seriously damage a country or an international organisation, and are defined as an offence under national law, and if – second – they

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1205 Bundesverwaltungsgericht (Federal Administrative Court), BverwG 10 C 7.09, 10 February 2010 at paragraph 47; see also Bundesverwaltungsgericht (Federal Administrative Court), BverwG 10 C 24.08, 24 November 2009 at paragraph 41 and Bundesverwaltungsgericht (Federal Administrative Court), BverwG 10 C 48.07, 14 October 2008 at paragraph 19 (which refers to the UNHCR 2003 Exclusion Guidelines rather than the UNHCR Handbook); these decisions also indicated in the same paragraphs, again following UNHCR views, that the notion of crimes had to be determined by international standards and not national ones.
1206 Bundesverwaltungsgericht (Federal Administrative Court), BverwG 10 C 48.07, 14 October 2008 at paragraph 20; Bundesverwaltungsgericht (Federal Administrative Court), BverwG 10 C 7.09, 10 February 2010 at paragraph 48; Bundesverwaltungsgericht (Federal Administrative Court), BverwG 10 C 24.08, 24 November 2009 at paragraph 42. This is also based on the UNHCR Handbook and 2003 Exclusion Guidelines.
1207 Bundesverwaltungsgericht (Federal Administrative Court), BverwG 10 C 7.09, 10 February 2010 at paragraph 49.
1208 Bundesverwaltungsgericht (Federal Administrative Court), BverwG 10 C 48.07, 14 October 2008 at paragraph 20.
are committed with the aim of seriously intimidating a population, or unduly compelling a government or an international organisation to perform or abstain from performing any act, or of seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or international organisation.\textsuperscript{1209}

In addition, according to German case law, the use of weapons dangerous to public safety and attacks on the lives of non-participants in an armed conflict in order to achieve political goals are be considered as terrorist acts.\textsuperscript{1210}

The jurisprudence from Germany has also addressed the issue of complicity in respect to article 1F(b) specifically in relation to terrorist organizations. It is said that a person making a substantial contribution to criminal acts, in the knowledge that his or her act or omission would facilitate the criminal conduct would be responsible for an article 1F(b) crime. This would also include persons who perform advance acts in support of terrorist activities\textsuperscript{1211} or who actively support the armed struggle of a terrorist organisation.\textsuperscript{1212} The fact that an organization, such as the Dev Sol in Turkey, has been placed on a prohibited list does not absolve the government from the obligation to show that a member supported such an organization, implying that membership alone is not sufficient to attract article 1F(b) liability.\textsuperscript{1213} There is no requirement in article 1F(b) that the person continues to be a danger to the country where he or she is residing. This is a requirement for the application of the exception to the \textit{refoulement} provision of the Refugee Convention, but not for exclusion.\textsuperscript{1214}

\textsuperscript{1209} Bundesverwaltungsgericht (Federal Administrative Court), BverwG 10 C 48.07, 14 October 2008 at paragraph 20.
\textsuperscript{1210} Bundesverwaltungsgericht (Federal Administrative Court), BverwG 10 C 48.07, 14 October 2008 at paragraph 20; see also Bundesverwaltungsgericht (Federal Administrative Court), BverwG 10 C 46.07, 25 November 2008 at paragraph 23.
\textsuperscript{1211} Bundesverwaltungsgericht (Federal Administrative Court), BverwG 10 C 48.07, 14 October 2008 at paragraph 21; along the same lines, in the context of immigration, Bundesverwaltungsgericht (Federal Administrative Court), BverwG 1 C 19.09, 26 October 2010 at paragraph 23.
\textsuperscript{1212} Bundesverwaltungsgericht (Federal Administrative Court), BverwG 10 C 48.07, 14 October 2008 at paragraph 22. In an earlier case this court expressed this as involvement going beyond membership but that it needed to involve participation in the activities of the organization or financial support. It also indicated that objectionable involvement in a terrorist organization could depend on factors such as the violent nature of the organization and whether any supported activities of the person resulted in a danger to the security of the country, see Bundesverwaltungsgericht (Federal Administrative Court), BverwG 9 C 31.98, 30 March 1999 at 13-14.
\textsuperscript{1213} Bundesverwaltungsgericht (Federal Administrative Court), BverwG 10 C 48.07, 14 October 2008 at paragraphs 17-18. This part of the decision was upheld by the European Court of Justice, from which a preliminary ruling had been requested by the Federal Administrative Court, in the case of \textit{Bundesrepublik Deutschland v. B and D}, C-57/09 and C-101/09, European Court of Justice, 9 November 2010 at paragraphs 87-99. The decision of the Federal Administrative Court overruled government practice and lower court decisions, which had allowed this broader form of exclusion, see UNHCR, \textit{Asylum in the European Union} at 15-16.
\textsuperscript{1214} Bundesverwaltungsgericht (Federal Administrative Court), BverwG 10 C 48.07, 14 October 2008 at paragraphs 27-30. This was also upheld by the European Court of Justice in case of \textit{Bundesrepublik Deutschland v. B and D}, C-57/09 and C-101/09, European Court of Justice, 9 November 2010 at paragraphs 100-105.
German court decisions have shed some light on some aspects of the relationship between international law and refugee law. In defining terrorism reliance was placed on a December 2001 European document, which description of terrorism looked already similar to the later definition in the draft Comprehensive Convention on International Terrorism while the notion of political crime also echoed the dominance theory from extradition law. As well, like in France, German courts had no difficulty in applying the test for political offences to armed conflict situations. Lastly, the description of the term committed in exclusion 1F(b) was defined along the same lines as in exclusion 1F(a) for one aspect of extended liability, namely aiding and abetting, where the substantial contribution with knowledge was seen as essential elements for this form of complicity. These, as seen in the previous chapter, are the same parameters as set out in international criminal law.

5.2.6: Netherlands

The Dutch Aliens Manual sets out in general that exclusion under article 1F(b) applies to persons who are not worthy of protection because of the seriousness of the crime committed and the impact of the consequences of such acts. It then provides in detail the parameters of the notion of non-political crime. The starting point for assessing whether a crime is political is the application of the dominance test in terms of whether crimes, such as assault, drug trafficking, armed robberies or arson are subsidiary and proportional to the political purpose. Such relative political crimes can be considered to fall within the political exception if:

- there is a direct connection between the crime and the political purpose;
- the crime is an effective means to accomplish the political purpose;
- there was no peaceful means available;
- there is reasonable connection between the crime and the political purpose.

The Manual goes on to say that certain crimes are by definition non-political (so that there is no need for a dominant purpose assessment) even if a political purpose is invoked, namely:

- murder, killing or terrorist activities as described in the European Convention for the Suppression of Terrorism of 1977;
- participating and/or supporting terrorist activities as described in United Nations Security Council Resolutions 1269 and 1373;
- war crimes, crimes against humanity, rape, torture (including female genital mutilation), genocide, slavery and trafficking in persons;
- crimes, which fall within description of any international instrument, which excludes the political offence exception or the status of refugee.

According to the Manual, there are also the purely political offences, which are directed at the state. Such offences do not require a dominant purpose assessment and

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1215 Vreemdelingencirculaire 2000 (C), article C4/3.11.3.2.
they will not lead to exclusion. Examples of such offences are high treason and interference with elections. But if such offences are excluded in international instruments as not being political or not leading to refugee status, their character will change from absolute political offences to non-political offences. Such instruments are the Genocide Convention, the European Convention for the Suppression of Terrorism and the United Nations Security Council Resolutions 1269 and 1373.

In applying the above principles regarding political offences, a district court overruled a decision of the minister responsible for immigration to exclude a person from Iraq who belonged to the Al Da’wa party, which had as purpose the overthrow of the Saddam Hussein regime. The asylum seeker gathered information about the members of the Mukhabarat, one of the secret services in Iraq, and of members of the Ba’ath party. This information resulted in the attacks on two men who were killed. The court was of the view that in this situation the requirements of a direct connection between the crime and the political purpose was met as was the fact that providing information was an effective manner of accomplishing change. There was also no doubt that since peaceful means could not be used in Iraq at that time while, given the repressive character of the Saddam Hussein regime, the crime was also proportional. The opposite conclusion was reached with respect to a person who had carried out activities for the Dev Sol organization in Turkey and a person who as a member of a Maoist group in Nepal who had participated in attacks on police stations and banks. This was because there were more peaceful means available in Turkey and Nepal to affect change.

Exclusion under article 1F(b) has also been found to be applicable in situations where a person had been involved in activities which have been deemed to be non-political according to international instruments, namely terrorist activities in the European Convention as carried out by the PFLP in Lebanon and the Abu Nidal Organization in the Palestine territories, or torture as defined by the Torture Convention as was the case for a member of the Armenian police. With respect to serious economic crimes, embezzlement and accepting bribes have been found to fall within the parameters of article 1F(b). This was especially the case since the crimes were carried out over a lengthy period of time, involved very large amounts of money and because corruption is also seen internationally as a serious crime.

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1216 The Manual also gives as examples some offences set out in the Dutch Criminal Code.
1218 Rb, The Hague, Awb 04/40384, 24 May 2005. In the context of extradition, the Supreme Court of the Netherlands was of the view that the attacks carried out in Turkey by the PKK did not fall within the parameters of a political offence, see HR, 02853/02U, 7 May 2004 at 3.4.12; this case has been mentioned by the ICTY in the context of internal armed conflict in Judgment, Brdanin (IT-99-36), Trial Chamber, 1 September 2004, § 179.
1221 Rb, The Hague, Awb 01/8334, 2 June 2003, which also added the two UN resolutions mentioned in the Manual.
1223 AbRS 30 December 2009, nr. 200902983/1.
A person who was the president of the political wing of the Al Jihad Al Ismani in the Palestine territories at a time that the military wing carried out attacks against military and civilians targets in Israel was found to be excluded for complicity under article 1F(b).\footnote{1224} A claimant who had been convicted of attempted murder in Germany and who pleaded that there was no danger of recidivism was entitled to have this plea considered for exclusion purposes.\footnote{1225}

As in Australia, the legislator in the Netherlands also decided to provide guidance to the courts in determining what amounts to a political crime but in the Netherlands it appears to be less of a reaction to a undesirable development in the jurisprudence but rather a more general approach to set out the governments understanding of various principles in the three exclusion clauses or even in refugee law as a whole. A Dutch manual circumscribes the tenets of the political offence exception in terms in accordance with international extradition law, namely the predominance and proportionality test, and then goes on to provide a listing of specific crimes, which by definition are not political. As in Australia, past of this listing in connected to international terrorism conventions while in addition also specific serious crimes in the Dutch criminal code as mentioned. Subsequent jurisprudence has provided an interpretation of the terms used in the manual.

5.2.7: New Zealand

The New Zealand Court of Appeal has stated that the notion of crime should take the criminal law of the country of refuge as a starting point, in which both the maximum penalty set out by law as well as the likely sentence to be imposed in the circumstances of the case, are important.\footnote{1226} This approach has resulted in a decision where crimes, such as wounding, assault with a weapon or conspiracy to commit serious crimes were found to be within the range of the maximum penalty imposed but because of the personal factors related to the asylum claimant it was found that the person would not receive more than between 18 months or two years in imprisonment. This was considered not to be at the upper end of the scale leading to imprisonment for an appreciable period of years and as such would not be considered a serious crime.\footnote{1227} Murder,\footnote{1228} torture,\footnote{1229} cannibalism,\footnote{1230} extortion,\footnote{1231} aggravated robbery\footnote{1232} and the scuttling of a vessel\footnote{1233} have all been considered to be serious crimes.

\footnote{1224} Rb, The Hague, Awb 02/71646, 2 November 2004. \footnote{1225} Rb, The Hague, Awb 05/54643, 15 September 2006; the court came to this conclusion as this procedure of whether the person’s criminal character still predominated is set out in the UNHCR Handbook, on which the decision maker relied for another purpose. \footnote{1226} S v Refugee Status Appeals Authority [1998] 2 NZLR 291 at 296-297. \footnote{1227} RSAA Appeal No. 76157, 26 June 2008 at paragraphs 196-200. \footnote{1228} RSAA Appeal No. 70447, 30 June 1997; RSAA Appeal No. 70432, 7 May 1998; RSAA Appeal No. 71398, 10 February 2000; RSAA Appeal No. 74273, 10 May 2006. \footnote{1229} RSAA Appeal No. 74273, 10 May 2006. \footnote{1230} RSAA Appeal No. 70432, 7 May 1998. \footnote{1231} RSAA Appeal No. 71398, 10 February 2000. \footnote{1232} RSAA Appeal No. 71398, 10 February 2000; RSAA Appeal No. 70001, 30 April 1997.
The Supreme Court of New Zealand discussed the concept of political crimes in a situation of a chief engineer of a ship involved in transporting weapons to support the LTTE in its conflict against the Sri Lankan government. Before discussing the parameters of this notion the court considered the purpose of exclusion to be twofold, namely ‘to ensure those who commit serious non-political crimes do not avoid legitimate prosecution by availing themselves of Convention protection’ as well as ‘to protect the security of states in which refuge is sought by providing an exception from Convention obligations in respect of those with a propensity to commit serious non-political crimes’. It then enunciated the predominance test, relying on academic writing and an important case of the UK House of Lords, as the appropriate vehicle to determine whether a crime was political, taking into account the situation of the country of origin. The motivation of the person in question was seen as clearly political as he used his skills as an engineer to support the political purposes of the LTTE.

At the tribunal level, the political exception has been applied on a number of occasions, applying the same predominance test even before the decision of the Supreme Court. On that basis it was felt that the killing and torture by Indian government security forces of Sikh militants was deemed to be ‘wholly disproportionate’ to any legitimate political objective of combating terrorists who wanted to overthrow a democratically elected government. The same conclusion was reached for a member of the LTTE as this organization was involved in a ‘full-scale war accompanied by gross human rights abuses aimed at innocent civilians and wide-scale terrorist activities’. Again, a person who participated in South Africa in an attack against ANC supporters out of revenge for the murder of his father by the ANC was seen as devoid of any political motives.

Exclusion was also the result for a soldier of the Armed Forced of Liberia, which was engaged in an armed conflict with the National Patriotic Front of Liberia of Charles Taylor. The claim that he was part of an armed force defending the structure of the state was rejected, as there was no meaningful causal link between that purpose and the killing of civilians and acts of cannibalism. Furthermore, these actions had no effect on the conflict in Liberia. A member of the Janatha Vimukthi Peramuna (JVP) in Sri Lanka who was involved under threat of violence in a large number of robberies of shop keepers and who used the proceeds of those crimes for personal use, such as buying drugs was found not to fall within the parameters of the political

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1233 The Attorney-General (Minister of Immigration) v Tamil X and the RSAA, [2010] NZSC 107 at paragraphs 81, 84; this decision has already been discussed in the previous chapter in respect to article 1F(a).
1234 At paragraph 82.
1235 At paragraphs 88-91.
1236 At paragraphs 95-96.
1237 RSAA Appeal No. 74273, 10 May 2006 at paragraph 69.
1238 RSAA Appeal No. 71335, 12 September 2000 at paragraphs 24, 29.
1239 RSAA Appeal No. 70447, 30 June 1997.
1240 RSAA Appeal No. 71398, 10 February 2000.
exception even though the JVP had a political purpose. A person connected to the All India Sikh Students Federation (AISSF), which had as political objective the establishment of an independent Khalistan, was found excluded as there was no causal link between the killing of Hindu traders and the political goal while in addition such means employed in a democratic society such as India were disproportionate to that goal.

On the other hand, the political defence was accepted in a situation of a member of the Oromo Liberation Front in Ethiopia, which strived for independence for the Oromo people. As a member of this organization he had been involved in the transporting of small boxes, which he suspected contained small arms. The tribunal was of the view that even if such activities amounted to a serious crime they would have been proportionate to the political purpose of the OLF.

Exclusion under article 1F(b) has also been applied to persons who have not only committed the serious political crime themselves but also who have been complicit. The parameters of complicity for this exclusion ground are the same as for article 1F(a) in New Zealand and in the cases where this notion was applied, it usually involved aiding and abetting, although one particular category of persons is excluded by law, namely a member of a terrorist entity designated under the Terrorism Suppression Act 2002.

The concept of political crime has been the subject of the majority of the case-law in New Zealand and like in other countries in this study the extradition test of predominance and proportionality was the one chosen as the most appropriate for refugee purposes, including in armed conflicts. Another link to international law can be found in the fact that extended liability was seen as having the same parameters in exclusion grounds 1F(a) and 1F(b), including membership.

5.2.8: United Kingdom

The government’s Asylum Policy Instructions on Exclusion have a number of observations in respect to exclusion under article 1F(b). It considers a serious crime ‘any crime for which a custodial sentence of two years upon conviction might be expected if that crime was tried in the United Kingdom’. Furthermore, this manual

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1241 RSAA Appeal No. 70001, 30 April 1997.
1242 RSAA Appeal No. 70432, 7 May 1998; see also RSAA Appeal No. 29/91, 17 February 1992.
1243 RSAA Appeal No. 71150, 4 March 1999.
1244 RSAA Appeal No. 74273, 10 May 2006; RSAA Appeal No. 71335, 12 September 2000; RSAA Appeal No. 71398, 10 February 2000, restraining victims while they were being killed in Liberia; RSAA Appeal No. 70001, 30 April 1997, being part of group carrying out robberies in Sri Lanka.
1245 Section 16(1)(b) of the Immigration Act 2009.
1246 Paragraph 2.3.1; this assessment is based on a comparison with the notion of a particularly serious crime, which is defined in section 72 of the Nationality, Immigration and Asylum 2002 and which considers such a crime for purposes of article 33.2 of the Refugee Convention any conviction for which a sentence of at least two years has been imposed.
states that 'irrespective of the actual length of sentence, or the length of sentence, which might be expected if the crime were tried in the United Kingdom’, a serious crime is also a crime if it is mentioned in a regulation under the Nationality, Immigration and Asylum Act 2002.  

A political crime is defined in the Instructions by reference to the seminal House of Lord case in this area as:

(1) it is committed for a political purpose, that is to say with the object of overthrowing or subverting or changing the government of a state or inducing it to change its policy; and
(2) there is a sufficiently close and direct link between the crime and the alleged political purpose.

In determining whether such a link exists, the court will bear in mind the means used to achieve the political end, and will have particular regard to whether the crime was aimed at a military or governmental target, on the one hand, or a civilian target on the other, and in either event whether it was likely to involve the indiscriminate killing or injuring of members of the public.

The document adds that crimes such as ‘murder, rape and serious assault, or other violent acts which result in indiscriminate harm or death to the public, will usually fail to establish a sufficient link to the achievement to a political’ but that such a link ‘may be established if such methods are used against specific targets that are political in nature (e.g. government representatives etc) and are committed for political motives’. With respect to the crime being committed outside the country of refuge prior to his admission as a refugee means up ‘to and including the day on which a residence permit is issued’. Lastly, the Instructions indicate that a conviction or a sentence does not prevent the exclusion clause from being applicable.

The jurisprudence of the courts and tribunals have indicated that crimes such as attacks on military barracks, bomb attacks, threat of serious violence, indiscriminate killing and injury of members of the public, smuggling guns, undertaking armed attacks missions and preparing for a suicide mission, malicious wounding, and torture are article 1F(b) crimes.

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1247 The regulation is the Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004, which contains primarily terrorist offences, proceeds of crime offences and serious drug offences; however, this regulation was declared ultra vires by the Court of Appeal in EN (Serbia) & KC (South Africa) v Home Secretary, [2009] EWCA Civ 630 at paragraph 83.
1248 Paragraph 2.3.2. The quote is from T. and Immigration Officer [1996] AC 742, Lord Lloyd of Berwick, at 786-787, which refers also to the Canadian case of Gil.
1249 Paragraph 2.3.2.
1250 Paragraph 2.3.2.
1251 Paragraph 2.1.10; see along the same lines AA (Exclusion clause) Palestine [2005] UKIAT 00104, at paragraph 40.
1253 Gurung v Secretary of State for the Home Department, [2002] UKIAT 04860 at paragraph 135.
1255 AA (Exclusion clause) Palestine [2005] UKIAT 00104, at paragraph 46, which adds in paragraph 66 that in the UNHCR Handbook 'paragraph 155 elevates the gravity of a "serious non-political
With respect to terrorism as a crime it has been said at the tribunal level that:

it remains crucial not to equate Art 1F with a simple anti-terrorism clause. Regular use of the concept of terrorism as a tool for identifying crimes contrary to Art 1F must await definitive codification by the international community. … At the same time, it may be obvious in a particular case that active involvement in crimes which have been or can properly be described as acts of terrorism will be serious enough to fall within Art 1F(b).\textsuperscript{1258}

This stands in some contrast to the views of the House of Lords some six years earlier to the effect that:

once it is made clear that terrorism is not simply a label for violent conduct of which the speaker deeply disapproves, the term is capable of definition and objective application. I quote again from the League of Nations Convention of 1937: "'Acts' of terrorism mean criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public." The Convention never came into force, but the definition is serviceable, and I am content to adopt it.\textsuperscript{1259}

In applying the political offence test, the House of Lords was of the view that a member of the FIS in Algeria had not fit the requirements of its test when involved in bomb attacks and attacks on military barracks,\textsuperscript{1260} while an Islamic Jihad armed militant in Gaza was considered to be falling within the parameters of article 1F(b) in which one factor appeared to be that this organization was placed on a UK terrorist organization list.\textsuperscript{1261} A senior commander of the PKK was excluded as the activities of his organization involved the indiscriminate killing of civilians thereby nullifying the political purpose. On the other hand, a political purpose was found the present and the means not disproportionate in a situation of attacks against military personnel by the LTTE and the attempt to poison the wife of former Zairean president Mobutu.\textsuperscript{1262}

\textsuperscript{1256} Boroumand, R (on the application of) v Secretary of State for the Home Department [2010] EWHC 225 (Admin), at paragraphs 56-57.
\textsuperscript{1257} A (Iraq) v Secretary of State for the Home Department [2005] EWCA Civ 1438, at paragraph 11-12.
\textsuperscript{1258} Gurung v Secretary of State for the Home Department, [2002] UKIAT 04860 at paragraphs 100-101.
\textsuperscript{1259} T. and Immigration Officer [1996] AC 742, Lord Mustill at 758; see also D. Bonner and R. Cholewinski, 'The Response of the UK Legal and Constitutional Orders to the 1991 Gulf War and Post-9/11 'War' on Terrorism', in A. Baldacchini and E. Guild (eds), \textit{Terrorism and the Foreigner: A Decade of Tension around the Rule of Law in Europe} (Leiden/Boston, Martinus Nijhoff Publishers, 2007) at 139-140.
\textsuperscript{1260} T. and Immigration Officer [1996] AC 742.
\textsuperscript{1261} AA (Exclusion clause) Palestine [2005] UKIAT 00104, at 49; the listing instrument mentioned is the Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2000.
\textsuperscript{1262} All three cases were at the tribunal level after the House of Lords decision, see S. Kapferer, 'Exclusion Clauses in Europe: A Comparative Overview of State Practice in France, Belgium and the
In conclusion, a government manual has applied the combination of the dominance and proportionality test as hall-marks for the notion of political crime while the inspiration for the definition of terrorism was found by the House of Lords in 1996 in a pre-Second World War draft international terrorism instrument, which incidentally bears a close resemblance to contemporary efforts to provide a comprehensive definition of the notion of terrorism.

5.2.9: United States

While the text of article 1F(b) has been incorporated in the Immigration and Nationality Act, this legislation has in addition to this exclusionary provision four other criminal bars to asylum, of which the terrorism bar will be the subject of this section as well.

With respect to the concept of serious non-political crimes, the methodology employed in general to determine whether a crime is serious depends on such factors the nature of the crime according to U.S. precedents, the value of any property involved, the length of sentence imposed and served, and the usual punishments imposed for comparable offences in the U.S. Murder, arson, armed robbery, random acts of violence against civilians, possession with intent to distribute

\[\text{United Kingdom},\ 12\ \text{International Journal of Refugee Law} \ 12,\ \text{Special Supplementary Issue} \ (2000) \ 195–221 \text{ at 204.} \]

\[\text{Section 208(b)(2)(A)(iii).} \]

\[\text{Section 208(b)(2)(A) contains the following six bars:} \]

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

(ii) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

(iii) there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States;

(iv) there are reasonable grounds for believing that the alien as a danger to the security of the United States;

(v) the alien is described in subclause (I), (II), (III), (IV), or (VI) of section 212(a)(3)(B)(i) or section 237(a)(4)(B) (relating to terrorist activity), unless, in the case only of an alien described in subclause (IV) of section 212(a)(3)(B)(i) , the Attorney General determines, in the Attorney General's discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States; or

(vi) the alien was firmly resettled in another country prior to arriving in the United States.

The last one is not criminal and will not be discussed; the first one has been examined in the previous chapter while categories ii and iv are related to refoulement as the wording is the same as in section 33.2 of the Refugee Convention and as such fall outside the parameters of this study. For the interplay of these provisions and the view of the court that category v is not in violation of the Refugee Convention and Protocol, see Khan v. Holder, 584 F.3d 773 (9th Circuit, 2009).


McMullen v. INS, 788 F.2d 591 (9th Circuit 1986); Khouzam v. Ashcroft, 361 F. 3d 161 (2d Circuit, 2004).

McMullen v. INS, 788 F.2d 591 (9th Circuit 1986).
heroin, embezzlement, selling organs for profit on the black market and theft for which a sentence of 15 years was imposed are serious crimes while, on the other hand, participation in resistance activities and supporting a coup against a military government were found not to be serious non-political crimes.

Both the Federal Court of Appeals and Supreme Court have considered the notion of political crimes. The Federal Court in the McMullen case, involving a member of the Provisional Irish Republican Army, which was involved in terrorist attacks against civilians, said the following about such crimes:

A balancing approach including consideration of the offense's "proportionality" to its objective and its degree of atrocity makes good sense. … Moreover, this approach better recognizes the type of crime involved in this and most such cases. There is a distinction between "pure" political crimes, such as sedition, treason, and espionage, and "relative" political crimes, crimes that have both common law criminal aspects and political aspects. … An approach that considers the proportionality and atrocity of a particular course of conduct is better suited to the analysis of "relative" political offenses under the Convention and Protocol.

It was also of the view that ‘motivation is not itself determinative of the political character of any given act’ but the critical issue is ‘whether there is a close and direct causal link between the crime committed and its alleged political purpose and object.’ As a result not every criminal act that in some sense contributes to the political goal amounts to a political offence. The terrorist methods of the PIRA, namely ‘indiscriminate bombing campaigns, murder, torture, and maiming of innocent civilians who disagreed with the PIRA’ were not justified by its political goal to establish an independent Ireland.

The Supreme Court confirmed the ruling of the Federal Court of Appeals in McMullen but clarified a number of aspects of the pre-dominance theory by saying:

Our decision takes into account that the BIA’s test identifies a general standard (whether the political aspect of an offense outweighs its common-law character) and then provides two more specific inquiries that may be used in applying the rule: whether there is a gross disproportion between means and ends, and whether atrocious acts are involved.  

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1268 Mahini v. INS, 779 F.2d 1419 (9th Circuit, 1986).
1269 Arauz v. Rivkind, 834 F.2d 979 (11th Circuit, 1987).
1273 R. Germain at 110.
1274 McMullen v. INS, 788 F.2d 591 (9th Circuit 1986).
1275 McMullen v. INS, 788 F.2d 591 (9th Circuit 1986).
The situation in question involved a student in Guatemala who protested with fellow students against various government policies and actions by burning buses, assaulting passengers who refuse to leave those buses, and vandalizing and destroying private property, which the tribunal had found to be a serious political crime. This had been overruled by the Federal Court of Appeals, which was of the view that the McMullen test for political crimes had been met in this case. The Supreme Court disagreed with the reasoning of the lower court.

This test was applied in a situation where a person had been part of a demonstration in Nigeria against the military government, which refused to install the legally elected president. During this demonstration the police beat participants including the claimant who then left the demonstration to get a knife with which he killed a police officer. The court felt that this was not a political crime as the killing was disproportionate to the objective of the demonstration. As well, the self-defence argument was also rejected, as he had not been in any immediate danger. Similarly, criminal acts of burning buses, breaking windows and fighting with the police outweighed the political motive of protesting important political and social issues.

In contrast, a case where a person who had thrown rocks during political rallies in Ethiopia and had been excluded for a non-political crime but had also claimed that these acts were never directed at civilians but was done in self-defence against the violence of the police was sent back to the tribunal for re-consideration to assess this defence. A foreign conviction for a serious crime is not be taken at face value as at times a criminal prosecution might have commenced for political reasons as had been the case for an Ukrainian claimant who had been subjected to a groundless prosecution for rape because of his outspoken political beliefs.

The other exclusionary portion in Article 208 of the Immigration and Nationality Act, which has similarities with serious non-political crimes and which has been given legislative treatment, deals with terrorist activities. While the notion of terrorism was known in the U.S. before the attacks of September 11, 2001 and while persons involved in terrorist activities had already been excluded for such activities by virtue of Article 1F(b), both criminal and immigration legislation was substantially altered since that date, primarily by the USA Patriot Act of 2001 and the REAL ID Act of 2005. As a result of the amendments introduced by these two acts, the

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1277 Efe v. Ashcroft, 293 F.3d 899 (5th Circuit, 2002). It was also applied and rejected in the context of terrorist activities carried out in Northern Ireland in the case of McAllister v. AG of the United States, 444 F.3d 178 (3d Circuit, 2006).
1278 Chay-Velasquez v. Ashcroft, 367 F.3d 751 (8th Cir. 2004).
1279 Berhane v. Holder, Docket No. 09-3153 (6th Cir. 2010).
1280 Abramov v. Ashcroft, Docket No. 03-71856 (9th Circuit, 2004).
1281 Section 208(b)(2)(A)(v).
1282 The official name is the ‘Uniting and Strengthening America By Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001’.
Immigration and Nationality Act has expanded definitions for concepts related to terrorism including the meaning of terrorist activity, as well having bars for asylum seekers who have engaged or are likely to engage in terrorist activities, have incited terrorist activity with the intention to cause death or serious bodily harm, are a representative of a foreign terrorist organization or a political or social group that endorses or espouses terrorist activity, or are a member of a terrorist organization.\textsuperscript{1284}

The definition of terrorist activity includes:

- the hijacking or sabotage of any conveyance, including an aircraft, vessel, or vehicle; the seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person, including a governmental organization to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained; a violent attack upon an internationally protected or upon the liberty of such a person; assassination; the use of any biological agent, chemical agent, or nuclear weapon or device, or explosive, firearm, or other weapon or dangerous device, other than for mere personal monetary gain, with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property; or the threat, attempt, or conspiracy to do any of the foregoing.\textsuperscript{1285}

Engaging in terrorist activity in an individual capacity or as a member of an organization has been defined in detail, including concepts such as committing, preparing gathering information, soliciting funds or an individual or providing material support for terrorist activity.\textsuperscript{1286}

The Secretary of State can designate an organization as a terrorist organization if such an entity has engaged in terrorist activities,\textsuperscript{1287} although a group can also be

\textsuperscript{1284} Section 212(a)(3)(B)(i)(I), (II), (III), (IV) and (VI) as a result of the reference in section 208(b)(2)(A)(v).

\textsuperscript{1285} Section 212(a)(3)(B)(iii) as a result of the reference in section 208(b)(2)(A)(v). This definition is broader than the criminal definition contained in section 2331 of the U.S. Code, Title 18, in that the element of compelling a person or organization to do or refrain from doing something is a general one in the criminal context but only applies to one aspect of the immigration definition.

\textsuperscript{1286} Section 212(a)(3)(B)(iv). The criminal statute contains prohibitions for harbouring or concealing terrorist (section 2339), providing material support to terrorists (sections 2339A) or to terrorist organizations (section 2339B), in respect to terrorism financing (section 2339C) and receiving military type training from a foreign terrorist organization (section 2339D). Section 2339B was deemed to be constitutional by the Supreme Court in the case of Holder v. Humanitarian Law Project, 130 S.Ct. 2705 (2010).

\textsuperscript{1287} Section 212(a)(3)(B)(vi)(I) and (II). There are two tiers of designation. The most cumbersome is set out subparagraph I and refers to the procedure set out in section 219 of the INA, which is based on the factors that the entity is threatening the security of U.S. nationals or the national security of the United States and includes the fact that the designation stays in effect until revoked. As of 24 November 2010 there were 47 entities listed as Tier I terrorist organizations according to the Foreign Terrorist Organization list of the Office of the Coordinator for Counterterrorism of the Department of State. The second tier, set out in subparagraph II can be done by the Secretary of State in consultation...
considered to be engaged in terrorist activities without such a designation if such a
group has ‘two or more individuals, whether organized or not, which engages in, or
has a subgroup which engages in, terrorist activities’.\(^{1288}\)

Because of the broad application of the terrorist organization provisions, the
Immigration and Nationality Act contains a waiver provision, which allows the
Secretary of State or the Secretary of Homeland Security to exempt certain groups of the
application of the latter, undesignated, category. Those Secretaries have applied this
exemption to 16 named groups.\(^{1289}\) As well, the Secretary of the Department of
Homeland Security exercised another waiver authority in 2007\(^{1290}\) to determine that
this exclusion would not apply to individuals who had provided material support

with or upon the request of the Attorney General or the Secretary of Homeland Security after finding
that any organization engages in terrorist activity. Some earlier judicial challenges to the designation
process were unsuccessful; see People's Mojahedin Organization of Iran v. Albright 182 F.3d 17 (D.C.
Circuit, 1999); see also M. Fullerton, ‘Terrorism, Torture, and Refugee Protection in the United

\(^{1288}\) Section 212(a)(3)(B)(vi)(III); this is called a Tier III terrorist organization. The Federal Court of
Appeals in the cases of Singh-Kaur v. Ashcroft, 385 F.3d 293 (3d Circuit, 2004) and McAllister v. AG
of the United States, 444 F.3d 178 (3d Circuit, 2006) has indicated that the lack of designation of a
particular organization is not conclusive for exclusion purposes as a person can fall within the
parameters of the terrorist bar when involved in either a terrorist activity or a terrorist organization; in
2010 the Refugee Protection Act was introduced to eliminate the Tier III designation but this law never
became law (S. 3113, 111th Congress (2010, sedction 4(4(c)).

\(^{1289}\) This waiver is set out in section 212(d)(3)(B)(i) of the INA, which was the result of an amendment
691(b) of this Act names the following ten groups: Karen National Union/Karen Liberation Army
(KNU/KLNA); Chin National Front/Chin National Army (CNF/CNA); Chin National League for
Democracy (CNLD); Kayan New Land Party (KNLP); Arakan Liberation Party (ALP); Tibetan
Mustangs; Cuban Alzados; Karenni National Progressive Party (KNPP); appropriate groups affiliated
with the Hmong; and appropriate groups affiliated with the Montagnards. The notion of ‘appropriate
groups’ for the last two groups is explained in a Memorandum from USCIS Acting Deputy Director
Michael L. Aytes, ‘Implementation of section 691 of Division J of the Consolidated Appropriations
Act, 2008, and Updated Processing Requirements for Discretionary Exemptions to Terrorist Activity
Inadmissibility Grounds’, 28 July 2008, at 5. On 1 July 2008 the Consolidated Appropriations Act,
2008 was amended by Public Law 110-257, which added the African National Congress (ANC) to this
list while on 21 September 2009 three groups in Iraq were exempted, namely the INC, KDP and PUK
(see USCIS Memorandum from Lauren Kielsmeier, Acting Deputy Director ‘Implementation of New
Discretionary Exemption under INA Section 212(d)(3)(B)(i) for Activities Related to the INC, KDP
and PUK’, 23 January 2010), followed on 18 October 2010 by another waiver, this time for the All
India Sikh Students Federation-Bittu Faction (AISSF-Bittu) (see USCIC Policy Memorandum
‘Implementation of New Discretionary Exemption Under INA Section 212(d)(3)(B)(i) for Material
Support to the All India Sikh Students Federation-Bittu Faction (AISSF-Bittu)’, PM-602-0024, 29
December 2010), which was repeated on 16 December 2010 for the All Burma Students’ Democratic
Front (ABSDF) (see USCIC Policy Memorandum ‘Implementation of New Discretionary Exemption
Under INA Section 212(d)(3)(B)(i) for Activities and Associations Relating to the All Burma
Students’ Democratic Front (ABSDF)’, PM-602-0025, 29 December 2010).

\(^{1290}\) As set out in documents issued by the Department of Homeland Security, Office of the Secretary,
9958’, 6 March 6 2007 (with respect to the application of material support provision to Tier III
organizations) and ‘Exercise of Authority Under Sec. 212(d)(3)(B)(i) of the Immigration and
Nationality Act 72 Fed. Reg. 26138’, 8 May 2007 (with respect to the application of material support
provision to Tier I and Tier II organizations).
under duress to certain designated terrorist organizations if warranted by the totality of the circumstances.\textsuperscript{1291}

Factors considered in relation to whether duress was present include whether the claimant ‘reasonably could have avoided, or took steps to avoid, providing material support, the severity and type of harm inflicted or threatened, to whom the harm was directed, and, in cases of threats alone, the perceived imminence of the harm threatened and the perceived likelihood that the harm would be inflicted’, while the totality of the circumstances include ‘the amount, type and frequency of material support provided, the nature of the activities committed by the terrorist organization, the alien's awareness of those activities, the length of time since material support was provided, the alien's conduct since that time, and any other relevant factor’.\textsuperscript{1292} This duress for material support waiver has been implemented for three designated organizations, all in Colombia, namely the Revolutionary Armed Forces of Colombia (FARC),\textsuperscript{1293} the National Liberation Army of Columbia (ELN)\textsuperscript{1294} and the United Self-Defense Forces of Colombia (AUC).\textsuperscript{1295}

With respect to the application of the legislation at the individual level, the term representative of a terrorist organization includes ‘an officer, official, or spokesman of an organization, and any person, who directs, counsels, commands, or induces an organization or its members to engage in terrorist activity’.\textsuperscript{1296} The Attorney General can waive the finding of being barred from asylum for this category if there are no reasonable grounds for regarding the person a danger to the security of the United States.\textsuperscript{1297} Membership in a terrorist organization can lead to exclusion but only in the case of a non-designated organization and only when the claimant knew or should reasonably have known, that the organization was a terrorist organization.\textsuperscript{1298}

Most of the United States jurisprudence has dealt with the parameters of material support as part of the definition of engaging in a terrorist activity but a 2005 decision by the Court of Appeals discussed other issues as well. This decision was of the view that the definition of terrorist activity as set in the Immigration and Nationality was not too vague to be found unconstitutional while it was also of the opinion that a distinction between combatants and non-combatants for a situation, which had risen to an armed conflict in the international humanitarian law sense, was not sustainable

\begin{footnotes}
\item[1293] Fact Sheet, ‘USCIS Implements Authority to Exempt Certain Persons Who Provided Material Support under Duress to the Revolutionary Armed Forces of Colombia (FARC)’, 26 September 2007.
\item[1296] Section 212(a)(3)(B)(iv).
\item[1297] Section 208(b)(2)(A)(v).
\item[1298] Section 212(a)(3)(b)(vi) in conjunction with section 208(b)(2)(A)(v).
\end{footnotes}
as this distinction is not set out in the legislation.\textsuperscript{1299} The list of examples in the material support definition is not exhaustive since other activities, such as for instance set out in the longer list in the criminal material support provision, can be included as well; the legislator’s intention was to enact a broad concept of material support in the immigration context.\textsuperscript{1300}

Participation in military activities for the LTTE amounts to material support,\textsuperscript{1301} as does providing food and shelter to militant Sikhs organizations such as the Babbar Khalsa, International Sikh Youth Federation and Khalistan Commando Force combined with membership in these organizations\textsuperscript{1302} and soliciting funds for the Jammu Kashmir Liberation Front (JKLF), even though these funds were for the non-violent, political wing ‘because money donated to an organization's political wing is considered to be support for the militant wing as well’.\textsuperscript{1303} Working for a newspaper under the control of the LTTE would also fall within the parameters of this exclusionary provision.\textsuperscript{1304}

In summarizing the legislation and jurisprudence, the U.S. has the strictest use of article 1F(b) of all countries under consideration especially in the area of terrorism. The U.S. legislation has defined what amounts to terrorism, which includes the emerging international description of this crime but goes considerably further in setting out other activities amounting to terrorism. The law has also provided a broad spectrum of the meaning of being engaged in terrorist activities, including membership (to some discomfort of the courts), and has given the executive wide powers to designate organizations as terrorist. With respect to the latter, the legislation envisages that such designations can be carried out in a sweeping manner with the possibility of exempting particular organizations if it turns out that they should not have been part of a terrorist designation originally. As well, the notion of giving material support to a terrorist organization has also received a wide interpretation, wider than the parameters of complicity given in other countries for exclusion 1F(b) and wider than the notion of participation in the equivalent of exclusion 1F(a) in the U.S. jurisprudence.

On the other hand, like the other countries the concept of political crime has been defined in the U.S. by examining the predominant aspect of a political purpose in relation to the criminal activity carried out to achieve that purpose while also

\textsuperscript{1299} McAllister v. AG of the United States, 444 F.3d 178 (3d Circuit, 2006); the situation in question was Northern Ireland during the time of the Troubles while McAllister was a member of the Irish National Liberation Army (INLA); these points were confirmed in the case of Khan v. Holder, 584 F. 3d 773 (9th Circuit 2009), although the judges expressed some discomfort with such an outcome by saying ‘the INA does not provide an exception for armed resistance against military targets that is permitted under the international law of armed conflict.’

\textsuperscript{1300} Singh-Kaur v. Ashcroft, 385 F.3d 293 (3d Circuit, 2004).

\textsuperscript{1301} Perinpanathan v INS, 310 F.3d 594 (8th Circuit, 2002).

\textsuperscript{1302} Singh-Kaur v. Ashcroft, 385 F.3d 293 (3d Circuit, 2004).

\textsuperscript{1303} Khan v. Holder, 584 F.3d 773 (9th Circuit, 2009), confirming the same position as accepted in the case of Humanitarian Law Project v. Reno, 205 F. 3d 1130 (9th Circuit, 2000).

\textsuperscript{1304} Raghunathan v. Holder, Docket No. 08-2475, 08-3147 (2d Circuit, 2010).
engaging in a proportionality exercise to determine whether the means used to obtain the political purpose outweigh the negative consequences of the criminal activity.

5.3. Conclusion

A comparative analysis of the various aspects of the elements of exclusion under article 1F(b) allows for an assessment of how far the countries in this study have complied with the international norms pertaining to this exclusion provision. Attention will be given to the international law, which has had an impact on the notion of terrorism as well as the concept of political crime which had its genesis in extradition law. Lastly, since complicity liability in article 1F(a) and 1F(b) are described in the same manner, namely committed, the national jurisprudence in relation to concepts of extended liability will also examined, especially in relation to a possible connection to international criminal law.

As to a comparative analysis, while the jurisprudence in the nine countries under consideration show a fairly high level of consistency in the use of article 1F(b) in the abstract, some variations occur in the concrete application of the clause. The judiciary of Australia, Canada and New Zealand were of the view that the notion of what consists of a crime for purposes of this provision, the criminal law of the country of refuge should be the determinative factor although at times some lip service was paid to the fact that a crime has also been addressed at the international level, such as corruption, which is seen as bolstering the reliance on the national law in the country of refuge. In this context, an Australian case made it clear that the crime had to be in existence in the country of refugee at the time of its commission rather than the time of the hearing. Given the absence of any reference to international instruments in exclusion 1F(b) as opposed to exclusion 1F(a) this emphasis on domestic law of the country if refuge is reasonable especially since the methodology used to arrive at a conclusion of what constitutes a crime has not given rise to divergent results in any of the countries. This would dispel a possible concern that an asylum seeker would find itself the subject of different treatment depending on where asylum was sought.

Related to this concept is the role of a foreign conviction is determining whether a crime has been committed. An Australian tribunal would give a great deal of deference to a foreign conviction if the article 1F(b) assessment is made on the same facts while it would be part of the evidence to be considered if the article 1F(b) examination is used for a different fact pattern. Canadian courts have advised caution when using foreign convictions while in the U.S. it was said in one case that such a conviction should not be taken at face value. In France, a tribunal refused to exclude a person who had been convicted in his country of origin of aggressive behaviour during public discourse. The difference in opinion could very well have been the result of the origin of the country where the conviction was imposed in that more deference would be given to legal systems which operate in democracies with a strong an independent judiciary applying rules which are similar to the ones used in the country of refuge.
The concept of serious crime also raises a number of issues. All countries have considered serious common crimes, such as murder, torture, assault, rape, drug trafficking or arson to fall within the parameters of article 1F(b), while some countries such as Canada, the Netherlands and the U.S. have specifically indicated that economic crimes such as embezzlement and large scale theft are also serious crimes. Small scale theft, even if carried out in a habitual fashion, was deemed not to fall within the ambit of article 1F(b) of the Convention, according to a Canadian court.

The reasoning used to arrive at the conclusion that a crime should be considered serious has been different in the various countries. Some countries (Australia, France and Germany) state in general that article 1F(b) applies to capital or grave crimes without utilizing a more detailed methodology, while other countries examine the maximum penalty which could be imposed for a particular crime in the criminal legislation (older Canadian and French cases) or what penalty would likely be imposed if a person would be tried criminally (in New Zealand, where a recent tribunal case came to the conclusion that this sentence should be at a minimum between 18 months and two years and in the UK where a two year minimum is set out in the legislation). A third approach has been a method whereby a number of factors are used to determine whether a crime is serious, namely factors such as a penalty indicated in the criminal legislation, the actual possible sentence as well as possible mitigating and aggravating circumstances, which could affect the presumption regarding penalties. This has been used in Canada and the U.S. Now that there is an international instrument available, which provides some guidance in this matter and can result in a consistent approach among countries of refuge, it would be desirable to take this international development into account by having a minimum of four years set out as the benchmark for serious crimes.

Apart from the general category of serious crimes set out above, it is worth mentioning some specific application of article 1F(b) to criminal behaviour such as the prohibition of people trafficking in some Australian cases, the selling of human organs in the U.S., the scuttling of a ship in New Zealand and child abduction in Canada. In France, article 1F(b) has been used frequently to exclude persons who had been involved in the commission of war crimes in civil wars. None of the methodologies utilized above would have come to a different conclusion for these examples of serious crimes as in general these activities would occupy the higher range of seriousness in any approach taken to protect the physical integrity of persons, a hallmark for setting high penalties in criminal legislation.

One other aspect of article 1F(b), the fact that the activities set out in this exclusion clause have to be committed outside the country of refugee, has been given some

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1305 Which is also the approach at the international level in the International Convention against Transnational Organized Crime, which came into force in 2003; it sets the penalty level for serious crimes as four years in article 2(b).

judicial consideration in Australia and France. In Australia, the courts have had no problem in applying article 1F(b) to crimes which started outside its borders but continued within Australia, specifically drug trafficking. In France this provision has been applied by the tribunal to situations where the conduct occurred in France but were carried in support of organizations, which committed crimes outside France even though the highest administrative court had made it clear that 1F(b) only applied to acts outside the country of refuge. The notion of expiation by reasons of serving a sentence or receiving a pardon or amnesty have been rejected out of hand in Australia, Belgium, Canada, France and the UK.

With respect to serious crimes and international law aspects, all countries have used article 1F(b) to exclude persons who has been involved in terrorist activities. While the issue of terrorism became more prevalent after the 9/11 attacks, this exclusion clause had been used regularly in most countries before that time as well and there had been little difficulty applying article 1F(b) to this type of behaviour even though the courts and tribunals could not rely on an internationally accepted definition. In most cases the approach adopted was along the lines that a very serious crime with a political purpose was called terrorism without any further analysis while in some other instances the label of terrorism was predicated on a particular activity, which had been prohibited in specific international or regional terrorism instruments such as hijacking, hostage taking or bombing. At times reference was made to such an instrument but at other times the connection between a named activity and such an instrument was obscure or absent.

It is expected that with the most recent developments in international law there will be less of an ad hoc approach to activities with have been deemed terrorist. There appears to be an emerging trend at several levels going in the same direction with a similar content in regards to the elements of terrorism. Where the House of Lord felt obliged in 1996 to go back to a pre-Second World War draft convention for a definition of terrorism, more recently there have been signs of a consensus in the description of this phenomenon. At the United Nations level the draft Comprehensive Convention on International Terrorism has provided a definition of terrorism while at the national level a number of countries have passed criminal legislation to combat terrorism which invariably includes a definition as well. In this context it is also worthwhile mentioning that the Special Tribunal for Lebanon has also provided recently a definition of terrorism, for which it found its basis in both conventional and customary international law. All these sources set out two essential elements for a working definition of terrorism, namely the commission of a very serious crime,

1307 See for instance N. Coleman, ‘From Gulf War to Gulf War – Years of Security Concern in Immigration and Asylum Policies at the European Level’, in A. Baldaccini and E. Guild (eds), Terrorism and the Foreigner: A Decade of Tension around the Rule of Law in Europe (Leiden/Boston, Martinus Nijhoff Publishers, 2007) at 59-67 and 84-85 indicating that the drafting of the Qualification Directive was influenced by terrorist concerns while it has been said that there has been an increase in the use of exclusion clauses since 2001 in France (C. Saas, ‘The Changes to Laws and Immigration and Asylum in France’, in A. Baldaccini and E. Guild (eds), Terrorism and the Foreigner: A Decade of Tension around the Rule of Law in Europe (Leiden/Boston, Martinus Nijhoff Publishers, 2007 at 258-259), which is borne out by the analysis regarding that country above.
which affect the integrity of persons or property, including infrastructure; and these
crimes are carried out in order to intimidate a population or force a government or
international organization to do something or refrain from doing something.

An approach by refugee decision makers whereby either the specific international
terrorism conventions are utilized or when an act cannot be brought within the
confines of these instruments the emerging comprehensive description is brought to
bear will provide consistency in asylum proceedings while also ensuring that there is
a diminished risk of describing activities from a particular political perspective. Countries
where legislation or jurisprudence has gone beyond the parameters of this
newly developing norm might need to reconsider their terrorism definition in this
light.

Often the use of article 1F(b) to terrorism activities brought into play the issue of
political crimes. All countries examined have applied the predominance and
proportionality test. This test was already enunciated by the House of Lords in 1996
and this decision has been used by the highest courts in Australia (although the
legislator clarified that the first part of the test would apply only to dominant
purposes of the crimes carried out while the High Court had required a lower standard
in this regard, namely a significant purpose), Canada, New Zealand and the U.S while
in Europe the same test was set out in tribunal and court decisions. This test is very
similar to the test developed in international extradition law and some courts have
relied on extradition law to apply this approach to refugee law while noting that the
refugee context is slightly different.

While the abstract test was the same in all countries, its application to the cases at
hand at times differed. For instance, when the political purpose for the commission of
crimes was raised by an asylum seeker, this argument was rejected each time in
Belgium, Canada, Germany and the U.S. It was rejected in the majority of cases in
the other five countries but was accepted on some occasions in slightly different
situations. In Australia, the High Court was of the view that the political views of a
person who committed very serious crimes including murder for the independence of
Kkalistan in India were not sufficiently considered and sent the case back for a
rehearing. In France, the political purpose was accepted for a Chechnyan freedom
fighter in the civil war against Russia because he carried out his activities within the
confines of the rules of war while defending his country and family. Similarly, in the
UK the political defence was accepted in the poisoning of the wife of president
Mobutu of Zaire and being involved in attacks on behalf of the LTTE against military
targets while in New Zealand the same result was achieved in a situation where a
person was fighting for the liberation of Oromo in Ethiopia and in a situation of a
ship’s engineer involved in the transportation of arms on behalf of the LTTE in Sri
Lanka. In the Netherlands, a person who provided information to a party opposed to
the Saddam Hussein regime resulting in the murder of two members of the security
apparatus was found to have acted for a political purpose while adhering to the
proportionality principle.
While in most cases, with the exception of France, article 1F(b) was applied to persons personally involved in serious crimes, there has been little hesitation by the judiciary to extend the reach of this clause also to persons who carried out such activities in an indirect fashion. The contours of complicity were specifically addressed in Australia, Belgium, Canada, the Netherlands and New Zealand, in some instances by stating that the same principles, which apply to article 1F(a), should be used for article 1F(b) as well. Germany employed the words substantial contribution to describe the level of involvement required for article 1F(b) activities and a tribunal in France in one case relied on a number of factors, such as duration and the intensity of the association with a nefarious group and the manner of disassociation from it to determine complicity. At the lower end of indirect involvement providing food and shelter to the armed groups, such as the LTTE was seen as complicity in the U.S. but not in France. In Australia peripheral support functions by crews of ships involved in people smuggling were found not to amount to be complicity. An association with a hybrid organization with both a peaceful and a militant faction was considered close enough to lead to exclusion in the Netherlands and the U.S. even in both situations the association was with the peaceful element of the organization.

In this context, the issue of whether membership can be a form of complicity was was resolved positively in general in Canada, in the negative in general in France and Germany while in New Zealand and the U.S. membership in terrorist organizations is prohibited by legislation (in the U.S. in general, in New Zealand if these organizations have been designated).

This interplay between articles 1F(a) and 1F(b) regarding extended liability poses a conceptual dilemma. On one hand the same word is used in both provisions but on the other hand exclusion 1F(a) has a specific reference to international instruments, which, as noted in the previous chapter, means international criminal law at the moment. Added to this dilemma is the fact, as seen above, that in other areas of exclusion 1F(b) a number of countries apply domestic criminal law, which invariably have a concept of indirect liability, often also expressed by the term committed. In general terms there does not seem to have been much reluctance to equating the complicity principles developed by the national courts and tribunals for exclusion 1F(a) with the ones applicable to 1F(b). However, this was usually applied to one form of extended liability, aiding and abetting, and in virtually all cases before the decisions at the highest level in the UK and New Zealand in 2010 where a closer connection with international criminal law was sought.

In the previous chapter it was explained that a number of international criminal law concepts find their origin in national criminal law. Aiding and abetting is universally known in domestic criminal law while extended liability concepts such as common intention is used on a regular basis in common law countries while co-perpetration at times in civil law countries. In that sense seeking a connection between domestic criminal law and refugee law for article 1F(b) would not be problematic apart from the fact that some inconsistency could ensue if decision makers decide to venture outside the present familiar territory of aiding and abetting. However, an issue of
concern will rise when international criminal law has taken national criminal concepts and have provided a new interpretation in order to make them more useful for the situations the international institutions are called upon to adjudicate, namely for perpetrators of collective crimes. Joint criminal enterprise comes to mind in this context. Lastly, there is the form of extended liability which was only known in international criminal law until very recently, command responsibility.

As a result of the fact that article 1F(b) fulfills a different role than 1F(a) in that it is primarily concerned with individual crimes for which traditional forms of extended liability were envisaged, which is apparent from lack of reference to international instruments, caution should be exercised in applying forms of liability developed in international criminal law. A better source for forms of liability lies with transnational law, especially the most recent terrorism conventions, such as the International Convention for the Suppression of Terrorist Bombings and the International Convention for the Suppression of the Financing of Terrorism as well as the already mentioned International Convention against Transnational Organized Crime. These conventions have a large number of ratifications and represent the consensus of large number of states when negotiating the extended liability concepts set out in these treaties. For instance, the most recent treaty dealing with organized crime has the following types of liability: organizing, directing, aiding, abetting, facilitating, counseling and common purpose.

While some of these modes of liability are known in international criminal law and guidance could be derived from the international jurisprudence, it is more likely that transnational legal concepts will be interpreted by national criminal courts since the provisions of transnational treaties are typically implemented in national legislation. Where a concept, such as common purpose, which found its genesis in the International Convention for the Suppression of Terrorist Bombings and was then adopted for international criminal law purposes in the ICC Statute, will be given an authoritative interpretation by an international institution it will have an effect at the national level including national decision makers but this will an exceptional case.

As a last comment with respect to the relationship between international law and refugee law, the three areas discussed in this chapter all have a different level of interplay at the moment and in the future. The connection between international extradition law and refugee law in the area of political exception was and should remain close while international terrorism law has not been relied on a great deal so far in refugee law but should be given more attention as a consensus is emerging with respect to the definition of terrorism. International criminal law should play a limited role in setting out the modes of extended liability in article 1F(b).

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1308 Article 6.1(b) of International Convention for the Protection of All Persons from Enforced Disappearance, which only came into force in December 2010, for the first time extends this concept outside the realm of international humanitarian and criminal law.

1309 Article 5.1.
Chapter 6

Exclusion from refugee protection for acts contrary to the purposes and principles of the United Nations (article 1F(c))

6.1: Introduction

Article 1F(c) has been the most difficult article to infuse with some independent meaning. While it has the oldest pedigree in that its almost exact formulation as an exclusionary clause was already set out in the Universal Declaration of Human Rights, the drafters of the 1951 Refugee Convention were not able to provide a great deal of specific contents to the words contained in this article, apart from some general and rather vague examples, such as a reference to subversion, which would provide guidance as to what activities which could conceivably fall within its parameters.

While the jurisprudence in respect to articles 1F(a) and 1F(b) show that courts have not found it difficult to make a connection to either international or domestic criminal law concepts for the substantive crimes or the modes of liability, the search for an approach in regards to article 1F(c), which would set it apart from the parameters of the other two articles has been problematic in the national jurisprudence especially because of the lack of connection to a discernable body of international or domestic law. Likely for that reason there is no case-law on this article in New Zealand or the United States, while the Netherlands only recently began exploring the provision after initial indications of not having any interest in using the article.

6.2: National refugee jurisprudence

6.2.1: Australia

There have only been three cases in Australia, all at the tribunal level, which have discussed article 1F(c), two of which addressed the issue of this exclusion ground in conjunction with the two other clauses in article 1F of the Refugee Convention. In an early tribunal case, the killing of civilians by a soldier of the NPFL, a rebel group operating in Liberia during a civil war, was considered a crime against humanity, a serious non-political crimes as well as an act contrary to the purposes and principles of the United Nations. The latter concept was seen as including human rights violations.\textsuperscript{1310}

In another case, a person was excluded on all three grounds, with article 1F(c) used to cover involvement in terrorist activities as a member of the Bhindrawale Tiger Force (BTF) in the Punjab in India. The tribunal relied on Security Council Resolution

\textsuperscript{1310} N96/12101 [1996] RRTA 3349.
1373, which had made the connection between terrorism and article 1F(c). The third case, dealing with a person who had been involved in the hostage taking of United States embassy personnel in Tehran, was also found to fall within the parameters of article 1F(c) by the tribunal.

6.2.2: Belgium

Originally, a refugee tribunal in Belgium had indicated that article 1F(c) did not add a new element to its parameters compared to article 1F(a) and exclusion based on article 1F(c) could only be used in conjunction with the two other clauses. Genocide had been held to fall within both article 1F(a) and (c) while large scale attacks and abuses by the FIS and other violent organizations in Algeria were covered by all three clauses.

In more recent cases, article 1F(c) has been used as a separate ground of exclusion in a situation where a person was involved with the religious police of the Taliban in Afghanistan as well employed in a training camp of Al Qaeda based on the fact that support functions for terrorism have been declared as article 1F(c) activities by the United Nations. This was the same reasoning applied to a high ranking member who had substantially contributed to terrorist activities of the Groupe Islamique Combattant Marocain (GIMC) and who had already received an eight year prison sentence by a Belgium court. The fact that this group was not on any terrorist listing was irrelevant, as the group had carried out activities set out as terrorist offences internationally and domestically.

Similarly, a person who participated in a terrorist training camp of the PKK in Turkey was excluded for under article 1F(c) with the source of this connection between article 1F(c) and terrorism this time being the European Union Qualification Directive. The same reasoning was used for a person from Tunisian background who had been involved in planning very serious terrorist attacks in Belgium on behalf of Al Qaeda for which he had been convicted by a Belgian criminal court to ten years imprisonment.

1312 G.S. Goodwin-Gill and J. McAdam at 188-189.
1313 S. Kapferer, ‘Exclusion Clauses in Europe’ at 198-199 and 205; see also CE No. 39.015 (Bennai c. Etat Belge), 17 March 1992 and CPRR No. 95/1917/F390, 28 March 1995. The UNHCR has stated that the jurisprudence in Belgium in the case of ‘XXX v Commissaire général aux réfugiés et aux apatrides, CCE, N. 24.173 (4 March 2009) … required a leadership role in order to trigger the application of the exclusion clause of Article 1F(c). The court did not elaborate on the nature or seniority of the required leadership role.’ (UNHCR Statement on Article 1F of the 1951 Convention, issued in the context of the preliminary ruling references to the Court of Justice of the European Communities from the German Federal Administrative Court regarding the interpretation of Articles 12(2)(b) and (c) of the Qualification Directive, July 2009 at footnote 146).
1314 CPRR No. 03-3331/W10302, 5 December 2005.
1315 CCE No. 18.307, 3 November 2008.
1316 Preambular paragraph 22; CPRR No. 02-2607/F2192, 19 October 2005.
1317 CCE No. 27.479, 18 May 2009.
As a result of these recent decisions, article 1F(c) was employed primarily to exclude persons involved in terrorist activities.

6.2.3: Canada

Before 1998, exclusion under article 1F(c) ground had been for the most part used to exclude persons who had been convicted of drug trafficking offences after having been admitted to Canada. The judgments became progressively more sophisticated concerning the type of drug trafficking which should result in exclusion, and in respect to the justification why drug trafficking should come under article 1F(c). This approach changed with the Supreme Court decision in Pushpanathan. After having conducted an examination of the travaux préparatoires of the Refugee Convention and having paid particular attention to the statements made by the French and Canadian delegates during the Social Committee debates in 1950, the majority of the court came to the conclusion that the drafters felt that article 1F(c) acts were non-war-related crimes against humanity. This in turn lead to the conclusion that:

in light of the general purposes of the Convention (...) and the indications in the travaux préparatoires as to the relative ambit of article 1F(a) and F(c), the purpose of article 1F(c) can be characterised in the following terms: to exclude those individuals responsible for serious, sustained or systematic violations of fundamental human rights which amount to persecution in a non-war setting.

The court declined to provide an exhaustive list of activities which could be part of article 1F(c) but instead set out as the general principle for such activities that ‘where there is consensus in international law that particular acts constitute sufficiently serious and sustained violations of fundamental human rights as to amount to persecution, or are explicitly recognized as contrary to the purposes and principles of the United Nations, then article 1F(c) will be applicable.

The Supreme Court goes on to identify two categories within this general principle. The first category is where a widely accepted international agreement or a United Nations resolution explicitly declares that the commission of certain acts is contrary to the purposes and the principles of the United Nations, or where other sources of international law such as decisions of the International Court of Justice have made such a determination, then there is a strong indication that those acts will fall within article 1F(c). Forced disappearance, torture, terrorist acts, hostage taking and apartheid would fall into this category. The second category is those acts, which a court can determine for itself that they are serious, sustained and systematic violations of human rights constituting persecution. The majority concluded that drug trafficking does not fall within either of these categories and until the international community makes it clear

1319 Ibidem, paragraph 60.
1320 Ibidem, paragraph 64.
1321 Ibidem, paragraph 65.
1322 Ibidem, paragraphs 66-67
1323 Ibidem, paragraphs 70-71
that such activities amount to a serious violation of fundamental rights amounting to persecution, there is no reason to bring it within the confines of article 1F(c). Reliance on the concept of crimes of international concern was rejected as it was considered as setting the bar too low.

The Supreme Court did not specifically address the question of acts committed in the country of refuge or the relevance of a conviction. It would appear that the following quote could provide an answer to the first issue:

> the parties sought to ensure that common criminals should not be able to avoid extradition and prosecution by claiming refugee status. Given the precisely drawn scope of Article 1F(b), limited as it is to ‘serious’ ‘non-political crimes’ committed outside the country of refuge, the unavoidable inference is that serious non-political crimes are not included in the general, unqualified language of Article 1F(c).

With respect to the second issue, the reference by the majority to the Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, which contains a specific reference to conviction in its article 3, would appear to support the notion that convictions are not a bar to using article 1F(c) to exclude persons. The majority of the Supreme Court was less equivocal in answering the question as to whether article 1F(c) only applies to persons in authority or to private individuals as well by saying ‘although it may be more difficult for a non-state actor to perpetrate human rights violations on a scale amounting to persecution without the state thereby implicitly adopting those acts, the possibility should not be excluded a priori.’

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1324 Ibidem, paragraphs 69, 72 and 74
1325 Ibidem, paragraph 72. The Canadian government had sought to connect the purposes and principles of the United Nations as set out in its Charter, which is addressed to States and not to individuals, to activities which have been committed by individuals and which have been deemed by the international community so reprehensible that steps had been undertaken by the United Nations to curtail such activities. This connection was found by linking 1F(c) with that portion of international law originating in the United Nations. A distinction was made between two types of crimes, namely crimes under international law and crimes of international concern, and it was asserted that both types of crimes, in so far as they had not been subsumed within exclusion ground 1F(a), were contrary to the purposes and principles of the United Nations. Crimes under international law (or true international crimes) were crimes, which had been declared criminal under international law and were subject to universal jurisdiction, such as piracy, war crimes, crimes against humanity, crimes against peace and genocide, while crimes of international concern were crimes, which have an international aspect, are regulated by multinational conventions by which States have undertaken to take action to combat such crimes by criminalizing the conduct in question, by prosecuting or by extraditing an offender of such conduct. Ten types of crimes were identified to fall within the latter category, namely unlawful use of chemical weapons; incitement of hate based on racial discrimination; slavery; torture; terrorism; drug trafficking on a large scale or with an international dimension; severe pollution of coastlines; interference with submarine cables; mercenarism; and acts against the safety of United Nations associated personnel.
1326 Ibidem, paragraph 73.
1329 Ibidem, paragraph 68.
Since the decision of the Supreme Court, article 1F(c) has been used in the Canadian province of Quebec in conjunction with article 1F(a) to exclude persons involved in crimes against humanity while as a separate heading more sparingly in relation to both allegations of terrorism and human rights violations. At the Federal Court of Appeal level, article 1F(c) issues have been addressed on two occasions but both in combination with another ground for exclusion, namely article 1F(a) in the Harb case and article 1F(b) in the Zrig case. In Harb, the court was of the view that there is no difference between the concepts of complicity as developed in article 1F(a) and the parameters of personal liability for article 1F(c).

The Federal Court repeated this latter preposition with specific reference to the approach where a number of factors were assessed to determine a common purpose in a situation of a person who was involved with the Awami League in Bangladesh, which had engaged in serious human rights violations. Similarly, a claimant who had been a member of the Kataeb or the Phalangist militia within the Lebanese Forces, which had carried out inhumane acts, was excluded on this ground while the court relied on the complicity jurisprudence developed in the article 1F(a) context. In applying these complicity concepts another Federal Court judge held that distributing leaflets and writing slogans over a period of 18 months for the Mujahadin (MEK) in Iran did not meet the threshold of excludable behaviour for this clause.

6.2.4: France

Article 1F(c) has been traditionally applied in France to situations of violations of human rights within the territory of one country not reaching the threshold of a civil war. Originally only high government functionaries, such as heads of state or other senior officials who committed, tried to cover up, tolerated or encouraged such activities were excluded under this heading. That being said the parameters of this ground for exclusion would not reach as far to be applicable to the wife of a senior official of the Afghani government, which had been involved in human rights abuses or to an important functionary of this government without inquiring whether this person, an ambassador, had been personally guilty of acts contrary to the purposes and principles of the United Nations.

However, the jurisprudence gradually expanded the scope of its application to lower ranking persons without positions of power but who committed such crimes in a personal capacity under orders from superiors. Examples of such cases involve a

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1330 Harb v. Canada (Minister of Citizenship and Immigration) 2003 FCA 39.
1331 Zrig v. Canada (Minister of Citizenship and Immigration) 2003 FCA 178.
1332 Harb v. Canada (Minister of Citizenship and Immigration) 2003 FCA 39 at paragraph 17.
1333 Islam v. Canada (Citizenship and Immigration) 2010 FC 71.
1334 El Hayek v. Canada (Citizenship and Immigration) 2005 FC 835.
1335 Bitaraf v. Canada (Minister of Citizenship and Immigration) 2004 FC 898.
1336 F. Tiberghien at 108 and N. Michel at 297.
1337 CRR, 20 February 1998, 3000572, Delshad.
person working for an Algerian anti-terrorist unit, the secret service of the Iraqi military, the Hutu militia during the genocide and a member of the Punjabi police. This was followed by a trend in the late nineties where the link between article 1F(c) and state involvement in crimes was severed by applying the clause to situations of a member of an Islamist youth movement in Morocco who had been involved in a coup attempt and a participant in a failed coup attempt in Georgia.

Cases since 2000 have continued the above trends. The exclusion of high officials involved in human rights abuses was applied in situations where a person was the second in command of the security detail of president Mobutu in Zaire, as well as a senior officer in the army responsible for political education and a battalion commander in the Garde Civile in the same regime. Similarly, a senior provincial official of a repressive government in Madagascar was excluded on this basis, as was a senior officer in the security services in Iraq during the Saddam Hussein period.

A number of persons, who occupied senior positions during the time of political repression following a coup d’état on the island of Anjouan in the Comores, were also excluded from refugee protection. Amongst those were its president and the head of security at the airport, while persons with lower level positions but still essential to the security of the president and his regime met the same fate, such as a member of the presidential security guard, and a member of the police involved in arresting political opponents of the president.

While membership by itself will not lead to exclusion, other complicity principles were applied to lower level operatives in governments involved in human rights violations primarily in a number of cases where the providing of information lead to the arrest and subsequent torture or imprisonment of political opponents in the Democratic Republic of the Congo, Cameroon, Iraq and Turkey. The

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1340 CRR, 21 February 1996, 293625, Singh.
1341 E. Kwakwa at 90; see also F. Tiberghien at 104-108 and 470; N. Michel at 295-296; S. Kapferer, 'Exclusion Clauses in Europe' at 205; G.S. Goodwin-Gill and J. McAdam at 187-188.
1342 CRR, 5 June 2000, 338011, Dembe Nyobanga.
1343 CRR, 2 November 2000, 336285, Matumba.
1345 CRR, 18 December 2006, 540733, Mme Souline.
1346 CRR, 23 May 2007, 577110, A.
1347 CNDA, 3 December 2008, 629222, B.
1348 CNDA, 13 February 2009, 629208, A.
1349 CNDA, 13 February 2009, 629207, C.
1350 CNDA, 7 July 2009, 643451/09002255, D.
1351 CRR, 14 December 2000, 336795, Bolinga for membership in the SARM and DSP in the Democratic Republic of the Congo.
1353 CRR, 11 September 2000, 345978, Ouza.
trend to hold responsible under this heading of exclusion people who were not connected to a state was also further developed in relation to both organizations with some state-like trappings and other groups, including terrorist organizations.

With respect to the first type of entities, the rebel group RUF, which operated in Sierra Leone, was considered to be worthy of attention for article 1F(c) purposes, resulting in the exclusion of a soldier who had voluntarily joined this organization, which was known for its particular cruel methods, and in which he carried out logistical tasks. As well, a person who carried out assassinations of suspected collaborators with Israel on behalf of the Fatah organization in the Palestinian territories in 1991 was excluded. This provision was applied to a member of a neo-Nazi paramilitary movement for which he carried out criminal activities in Russia, as well to a member of an opposition party involved in deadly violence in Haiti.

The tribunals have applied article 1F(c) to terrorist activities, usually relying on Security Council Resolution 1373 for that purpose and as a result a person was excluded from refugee protection for providing logistical support, such as providing false papers and visas in Tunisia to persons involved in the assassination of commander Massoud in Afghanistan in September 2001. The same happened to a person of Algerian background who had participated in preparatory terrorist acts in France on behalf of Al Qaeda, for which he had already been sentenced to six years imprisonment.

France has made a connection between article 1F(c) and international human rights law in the sense that serious human rights violations without a connection to an armed conflict would fall within the parameters all this exclusion provision. This approach has been continued even though the jurisprudence developed in international criminal law has expanded the reach of crimes against humanity to times of peace thereby placing these types of activities within the framework of exclusion 1F(a). However, because of the traditional approach used by the French tribunals to article 1F(c) and possibly the lack of knowledge of the recent developments in

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1354 CRR, 17 October 2005, 482761, Z.
1355 CRR, 29 April 2005, 511158, C.
1356 CRR, 18 October 2000, 360046, Faye Bach; see also CRR, 24 October 2003, 410614, Dansocko.
1357 CNDA, 4 December 2007, 443995, A.
1358 CRR, 13 October 2000, 360574, Sapoval.
1359 CRR, 9 January 2006, 548153, Lacoste.
1360 CRR, 7 October 2006, 585731, Tebourski.
1361 CNDA, 27 June 2008, 611731, M.
1362 CNDA, 27 June 2008, 611731, M.
international criminal law, the tribunals continue to use article 1F(c) for the same type of activities although more recently augmented by also finding persons connected to terrorism excludable under this heading.

6.2.5: Germany

German courts have applied this exclusion clause to two types of activities, namely terrorist acts and the systematic commission of war crimes and crimes against humanity, the latter in a complementary fashion to article 1F(a). The position with respect to the question as to whether article 1F(c) activities can only be committed by persons connected to a state has fluctuated. In cases up to 1975, judicial authorities were of the view that since terrorist attacks fell within the parameters of this clause and since individuals commit most terrorist attacks without being part of state entities, any individual can be involved in such activities. This was held in a 1972 case dealing with bomb and terrorist attacks as well as in a decision a year later related to terrorist and sabotage attacks on Israel from Lebanese territory. However, since 1975 the courts have been of the view that since articles 1 and 2 of the Charter of the United Nations were concerned with international and not individual relations, this provision could only be used if situations between states were involved.

This changed again more recently as is apparent from a 2008 decision of the highest administrative court in Germany, which makes it clear that German law should follow international and European consensus on this point, namely Security Council Resolution 1373 and recital 22 of the preamble of the Qualification Directive. Neither of these makes a distinction between government representatives and other individuals when linking terrorist activities and the purposes and the principles of the United Nations. The European Court of Justice, to which this decision of the Federal Administrative Court was referred for a preliminary ruling, confirmed this position on the same reasoning in 2010.

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1364 A. Zimmermann and P. Wennholz, at marginal note 91.
1365 G.S. Goodwin-Gill and J. McAdam at 186-187.
1366 G.S. Goodwin-Gill and J. McAdam at 187.
1367 Bundesverwaltungsgericht (Federal Administrative Court), BverwG 10 C 48.07, 14 October 2008 at paragraph 26; see also Bundesverwaltungsgericht (Federal Administrative Court), BverwG 10 C 46.07, 25 November 2008 at paragraph 23; and A. Zimmermann and P. Wennholz at footnote 171.
1368 Bundesrepublik Deutschland v. B and D, C-57/09 and C-101/09, European Court of Justice, 9 November 2010 at paragraphs 82-83.
6.2.6: The Netherlands

In the Netherlands, exclusion under article 1F(c) was not applied as an independent ground until 2006 and has only been used on very few occasions. The Aliens Manual indicates that acts against the purposes and principles of the United Nations are activities specifically named as such by the United Nations Security Council or General Assembly, as well as the International Court of Justice. International terrorism falls within the parameters of this concept by virtue of Security Council Resolution 1377. In addition, crimes which have been made punishable by international law and which are subject to universal jurisdiction, such as war crimes, crimes against humanity and crimes against peace are also against the principles and purposes of the United Nations.

The Manual also explains that article 1F(c) should be used for high level functionaries or persons who were responsible for the carrying out of article 1F(c) activities if they were for instance part of security organizations. This means that for persons working for a state entity they had to be active at a level that they were aware of the position their state occupied within the international community or they must have been aware of the purposes and principles of the United Nations because of their personal background. The latter approach is also applicable for non-state actors.

There have been only two cases in which article 1F(c) was applied by the Dutch government after the change in policy in 2006, neither of which was successful. In one case, a district court was of the view that since articles 1 and 2 of the United Nations Charter, containing the purposes and principles of the United Nations, are addressed to states, the government needs to point to concrete activities by the claimant to invoke this exclusion ground rather than relying on generally worded accusations. In a situation where a person violated the rules relating to the Oil-for-Food program, established by the United Nations for Iraq, he could not be excluded under article 1F(c) because this program was addressed to states and not individuals. In addition, this person carried out this violation as an owner of an import and export business and as such was not a state functionary as stipulated by the Aliens Manual.

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1369 See Netherlands’ State Secretary of Justice, ‘Note on Article 1F to Parliament, November 1997’ in P.J. van Krieken (ed), Refugee Law in Context: The Exclusion Clause (The Hague: T.M.C. Asser Press, 1999) at 308. In 2006 a district court was of the view that the government could not proceed with a case based on both 1F(b) and 1F(c) after the 1F(b) allegation had been impossible to prove, based on this policy, Rb, The Hague, Awb 04/58340, 10 April 2006. There had been one case in 2003 where a person who had been employed in the weapon industry in Iraq under Saddam Hussein who had been excluded for 1F(c) together with 1F(a) and 1F(b) grounds.

1370 Vreemdelingencirculaire 2000 (C), article C4/3.11.3.2.


6.2.7: United Kingdom

As with the other exclusion clauses, the rule in article 1F(c) has been given guidance in the Asylum Policy Instructions on Exclusion issued by the UK Border Agency. These Instructions make it clear that private individuals can commit article 1F(c) activities, while also indicating that terrorism falls within the confines of this provision as a result of Resolution 1373 of the Security Council of the United Nations. The definition of terrorism for exclusion purposes in the United Kingdom is derived from the criminal concept of terrorist activities.

With respect to complicity, the Instructions say that membership in a terrorist or prescribed organizations is not sufficient to bring a person within article 1F(c) but that ‘the more active the terrorist group and the more active the participation, the more likely it is that Article 1F(c) will apply’. Legislation adds that ‘acts of committing, preparing or instigating terrorism, (whether or not the acts amount to an actual or inchoate offence), and acts of encouraging or inducing others to commit, prepare or instigate terrorism (whether or not the acts amount to an actual or inchoate offence)’ are also to be included within the concept of acts contrary to the purposes and principles of the United Nations for purposes of article 1F(c). Lastly, the Instructions make it clear that this exclusion clause can be applied no matter where the activities where committed, in contrast with article 1F(b).

While it has been recognized in the jurisprudence that article 1F(c) can apply to both human rights violations as well as specific areas recognized by the United Nations to be contrary to its purposes and principles, this exclusion clause has been almost exclusively utilized in connection to persons involved in terrorism. However, in one recent case it was held that:

fighting against UN mandated forces would appear to be a clear example of action contrary to purposes and principles of the United Nations, acting in

1373 Chapter 2.4.1.
1374 Chapter 2.4.2.
1375 Chapter 2.4.2.; this is also regulated legislatively by section 54(2) of the Immigration, Asylum and Nationality Act 2006.
1376 Chapter 2.4.3; however, this is based on the Gurung case, which has been limited in its application as a result of the decision of the UK Supreme Court in the case of R (on the application of JS) (Sri Lanka) (Respondent) v Secretary of State for the Home Department (Appellant), [2010] UKSC 15.
1377 Immigration, Asylum and Nationality Act 2006, section 54(1).
1378 Chapter 2.4.4. This is confirmed in the cases of MT (Algeria) & Ors v Secretary of State for the Home Department [2007] EWCA Civ 808 at paragraph 80 (while at paragraph 90 it also states that this provision can apply to situation of before and after recognition as a refugee) and RB (Algeria) (FC) and another (Appellants) v Secretary of State for the Home Department (Respondent) OO (Jordan) (Original Respondent and Cross-appellant) v Secretary of State for the Home Department (Original Appellant and Crossrespondent), [2009] UKHL 10 at paragraphs 128-129.
1379 KK (Article 1F(c), Turkey) [2004] UKIAT 00101 at paragraph 76, basing this conclusion on the Canadian case of Pushpanathan and indicating that ‘the fact that an act does not fall within the first category does not prevent it from falling with the second’; see also v Secretary of State for the Home Department [2006] UKSIAC 36/2004 at paragraph 147 for the proposition that terrorism falls within the parameters of 1F(c).
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.  

With respect to terrorism, the Court of Appeal’s definition of terrorism means ‘the use for political ends of fear induced by violence’ but with an international dimension attached to it. As to the other aspects of article 1F(c) this court does not require that the activities mentioned as contrary to the purposes and principles of the United Nations have to be carried out by state authorities.  

As to the words guilty in the provision, this does not incorporate a criminal standard of proof but merely means ‘responsible for’. Forms of complicity which can be used for article 1F(c) include persons ‘who knowingly participate in the planning or financing of a specified crime or act or is otherwise a party to it, as a conspirator or an aider or abettor’ but not a mere member of an organization involved in article 1F(c) activities. Also excluded is a person in a hybrid organization such as the LTTE, which has carried out its political objectives with both military actions as well as terrorist activities, such as 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’. On the basis of the notion of complicity used by the Supreme Court in the JS, an active member of the Libyan Islamic Fighting Group (LIFG) was excluded.  

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1380 Secretary of State for the Home Department Appellant and DD (Afghanistan) [2010] EWCA Civ 1407, at paragraph 65.  
1381 Al-Sirri v. Secretary of State for the Home Department, [2009] EWCA Civ 222, at paragraph 31, while relying on this proposition on a Resolution of the United Nations Security Council (UN Doc. S/RES/1566(2004), which states ‘acts … committed with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organisation to do or abstain from doing any act’.  
1382 Al-Sirri v. Secretary of State for the Home Department, [2009] EWCA Civ 222, at paragraph 32; see also KJ (Sri Lanka) Appellant and The Secretary of State for the Home Department [2009] EWCA Civ 292 at paragraph 36; and SS v SSHD (SC/56/2009)(SIAC), 30 July 2010, the latter of which specifically disagrees with the international dimension aspect at paragraph 21.  
1383 Al-Sirri v. Secretary of State for the Home Department, [2009] EWCA Civ 222, at paragraph 39, relying on the Pushpanathan. This had already been said at the tribunal level in the cases of KK (Article 1F(c), Turkey) [2004] UKIAT 00101; AA (Exclusion clause) Palestine [2005] UKIAT 00104; and BE (Disobedience to orders, landmines) Iran [2007] UKIAT 00035 (12 March 2007).  
1384 Al-Sirri v. Secretary of State for the Home Department, [2009] EWCA Civ 222, at paragraph 35.  
1385 KJ (Sri Lanka) Appellant and The Secretary of State for the Home Department [2009] EWCA Civ 292, at paragraph 35; see also SS v SSHD (SC/56/2009, 30 July 2010)(SIAC) at paragraph 20, mentioning financing, planning and inciting terrorist acts as forms of complicity in addition to the ones set out in the legislation mentioned above.  
1386 At paragraph 38.  
According to tribunal case-law, the doctrine of expiation, either by serving a criminal sentence or obtaining a pardon or amnesty, has no role to play in the application of article 1F(c). Nor do remorse or a change of heart.

Like in other countries, the UK applies exclusion 1F(c) mostly to terrorist activities while it has been recognized that serious human rights violations could also result within its parameters. Unlike other countries, there has been an attempt to expand the reach of this article to other activities, which have a connection to the purposes and principles of the United Nations such as peacekeeping missions.

6.3: Conclusion

In the nine countries under consideration, New Zealand and the U.S. have not used article 1F(c) in any refugee determinations while the Netherlands only began to do so in 2006. All countries, which applied this exclusion clause, have utilized it sparingly (except France) and primarily in relation two types of crimes, namely human rights violations and terrorist activities.

While the UK judiciary and a Dutch manual mentioned the use of article 1F(c) for human rights abuses in passing, Australia, Belgium (specifically mentioning genocide), France and Germany have used this provision in cases before the tribunals and the courts. In Canada, the Supreme Court provided a detailed reasoning setting out in which circumstances article 1F(c) could apply.

The connection between terrorism and article 1F(c) was made in resolution 1373 of the Security Council of the United Nations in 2001 and this instrument provided the major impetus to bring terrorism activities under article 1F(c) in addition to using article 1F(b) for this purpose. All the jurisprudence in the seven countries which use this provision to exclude persons for terrorism activities refer to this resolution, while in Belgium and Germany, the judiciary also mentions European instruments making the same connection, such as the Qualification Directive.

There have been attempts to bring other crimes within the realm of this exclusion clause. The Dutch manual indicates that crimes which are subject to universal jurisdiction are also to be considered article 1F(c) crimes while the Supreme Court of Canada mentioned torture, hostage taking, apartheid and forced disappearance. In the United Kingdom, attacks on United Nations personnel were found to be also included within the parameters of this exclusion. On the other hand, judge have rebuffed the attempts to broaden the range of crimes by their governments, namely for drug trafficking in Canada and for violations of United Nations sanctions in the Netherlands. The approach that article 1F(c) crimes could only be committed by high level state functionaries has been abandoned in the jurisprudence in Belgium, Canada

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1388 KK (Article 1F(c), Turkey) [2004] UKIAT 00101 and AA (Exclusion clause) Palestine [2005] UKIAT 00104.
1389 AA (Exclusion clause) Palestine [2005] UKIAT 00104.
and France while this position is partially maintained in the Dutch manual for the senior aspect for both government and non-government entities.

Although the wording in article 1F(c) with respect to responsibility differs from article 1F(a) and (b) in that it refers to guilty rather than committed, this has had no discernable impact on the application of this clause as all countries have applied it to persons who had indirect involvement. This is made explicitly clear in Canada, France and the UK, in the latter through legislation. In France a naval engineer for the Sea Tigers of the LTTE was caught by article 1F(c) but a person working for the MEK in Iran in which capacity he distributed leaflets and wrote slogans over a period of 18 months was found not to be complicit by a Canadian judge. Previous convictions have been no barrier for the use of this exclusion clause in Belgium, Canada, France and the UK while it has also been applied to crimes committed within the country of refuge in Belgium, Canada and France.

As seen in chapter 2, article 1F(c) was intended by the drafters of the Refugee Convention to be a residual clause in relation to the other two exclusion clauses. While such a role could have been usefully fulfilled in the past, it would appear that with the strong development of international criminal law in the last few years with its effect on article 1F(a), fewer activities identified in the past to be exclusively fall within article 1F(c) still maintain this status. For instance, of the four specific activities, apart from terrorism, mentioned by the Canadian Supreme Court, torture, apartheid, forced disappearance and hostage taking, three are now included in the ICC Statute as crimes against humanity while the fourth one, hostage taking, is a war crime in the same instrument and would likely also fall under the crime against humanity of inhumane acts.

Similarly, the human rights violations carried out in a non-war crimes context, as alluded to in the same judgment while also underlying most of the body of jurisprudence in France can now been seen as crimes against humanity since a connection to an armed conflict is no longer a requirement in international criminal law. The same can be said for the UK decision, which finds attacks against United Nations personnel to be an article 1F(c) activity since such activities are included in the ICC Statute as war crimes applicable in non-international armed conflicts. This connection between international criminal law and article 1F(c) is even stronger with the category of crimes of universal jurisdiction as set out in the Dutch manual.

In addition to the possibility of subsuming article 1F(c) crimes under article 1F(a), all the crimes mentioned could also be article 1F(b) crimes as they meet the seriousness threshold. The judiciary in Canada and the Netherlands has not looked kindly upon the possibility of expanding the number of crimes outside the well-known spectrum of human right violations and terrorism.

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1390 Chapter 2.7.
1391 Article 8.2(e)(ii).
If it is unlikely that new categories of crimes can be carved out for article 1F(c) purposes, it would appear that the main function of the provision could very well be to use this provision where the limitations of the other two clauses would make it impossible to bring crimes within their purview. For instance, it might be difficult for the purpose of article 1F(a) to prove the international elements of war crimes or crimes against humanity, such as the presence of an armed conflict or the existence of systematic or widespread attack on a civilian population. In such cases, given the original intention of the drafters of the Refugee Convention to give article 1F(c) a residual meaning to the concepts contained in the other two exclusion articles where some connection to the concepts set out in these provisions combined with the flexibility in refugee law to adjust to new circumstances, article 1F(c) could be of assistance.

Similarly, if a serious crime was committed on the territory of the country of refuge, article 1F(c) could be utilized instead of article 1F(b). With respect to article 1F(b), governments could see an advantage in using article 1F(c) over article 1F(b), as the political exception has no role for terrorist activities when using the former. Even though the political exception has been severely circumscribed for specific terrorist activities and therefore outside the scope of article 1F(b), there is presently no general political exception prohibition for terrorism. The result is that this argument can be raised in the context of article 1F(b). It is possible that the popularity of article 1F(c) for terrorist activities since 2001 is due to this factor, especially in Belgium and the UK.

The limited scope of the crimes, which have been mentioned at the international level as being contrary to the purposes and principles of the United Nations, also has an impact on the scope of extended liability. As the five activities mentioned in this context, namely hostage taking, torture, apartheid, forced disappearance and terrorism all have been regulated in the transnational sphere, the types of extended liability also need to be found in these sources. The forms of liability used are complicity; commit, participate, abet, encourage or co-operate; participates as an accomplice; committing, participating as an accomplice, organizing or directing or participating in common purpose; and commits, orders, solicits or induces the commission of, is an accomplice to or participates, or had command/superior responsibility.

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1392 See also A. Zimmermann and P. Wennholz at marginal notes 99-100.
1393 Article 4 in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
1395 Article 1.2 of the International Convention against the Taking of Hostages.
1396 Article 5 of the International Convention for the Suppression of the Financing of Terrorism, the most recent international terrorism treaty.
While some of the forms of extended liability are similar as the ones used in international criminal law, the development of the contours of these types of liability will most likely take place in the same manner as noted in the previous chapter in respect to 1F(b) namely at the national criminal level with possibly some guidance derived from the ICC when it will start providing its parameters to the concept of common purpose. The use of transnational law in order to provide meaning to 1F(c) also confirms that the word guilty, which was originally probably included to make only the most senior officials in a state responsible for acts against the United Nations, has lost this special meaning and can now be read in the same manner as committed in the two other exclusion provisions.

In conclusion, it is apparent that the direct connection between 1F(c) to international criminal law is very tenuous and that because of recent developments in other areas of international law it is difficult to carve out an independent meaning for the crimes set out in this article and that for extended liability transnational law provides a better source than international criminal law.
Chapter 7
Conclusion

This final chapter will examine whether exclusion law as it has developed over the last 60 years has been true to the aspirations of the drafters of the Refugee Convention or whether the original intent behind the exclusion clauses have been overtaken by subsequent events resulting in a different interpretation of the meaning ascribed to various terms introduced in these provisions in 1951. As well, this chapter will attempt to address how far the interpretation of the exclusion clause have been influenced by other areas of international law, such as international humanitarian law, international criminal law and international human rights law, both at their inception and in recent times. Lastly, an assessment will be made whether such concepts derived from these other fields of international law should continue to play a role in the application of the exclusion clause. Before addressing these questions, a more general assessment of the role of the exclusion clauses will be provided together with a comparative analysis of some overarching issues in the three exclusion provisions by the nine countries under consideration.

Exclusion represents a small (the number is of exclusion cases compared with the overall refugee flow is most likely less than half of one percent in the countries under consideration) but important aspect of the international refugee law regime in that if persons who do not deserve refugee protection are allowed to benefit from perceived loopholes in the refugee system, the integrity of the entire system will be questioned, more than if persons are denied asylum in error. Because of the high profile of exclusion cases and the concerns raised when it appears that persons who should have been the subject of article 1F(a) treatment had been able to live in their countries of refuge for a number of years, a number of countries have established specialized war crimes units within their immigration departments.

1398 There is no conclusive empirical evidence of this number but it is estimated to be around 0.25% in France (see C. Saas at 258, footnote 90), around 0.4% in the Netherlands (extrapolating from the Letter from the Minister and State Secretary of Justice to the House of Commons, 2007-2008 Session, 31 200 VI, Nr. 160, 9 June 2008, attaching Notitie betreffende de toepassing van artikel 1F Vluchtelingenverdrag at 7, which gives the number of 700 exclusion cases between 2000 and 2008 and the Asylum Procedures: Report on Policies and Practices in IGC Participating States (2009) (Geneva: Intergovernmental Consultations on Migration, Asylum and Refugees, 2009) at 235, which provides the number of about 150,000 refugee claimants in the same time period) and about 0.2% in Canada (extrapolating of an average of 30,000 refugee claimants a years as set out in Asylum Procedures at 77 and almost 600 exclusion cases between 1998 and 2007 according to the Canada’s Program on Crimes against Humanity and War Crimes, Tenth Annual Report, 2006-2007, Appendix 3).

1399 This was done in Canada in 1998 (see Canada’s Program on Crimes against Humanity and War Crimes, Tenth Annual Report, 2006-2007, Introduction); in the Netherlands in 1997 (see Letter from the State Secretary of Justice to the House of Commons, 1997-1998 Session, 19 637, nr. 295, 28 November 1997 at 2; REDRESS/FIDH, ‘Strategies for the Effective Investigation and Prosecution of Serious International Crimes: The Practice of Specialised War Crimes Units’, December 2010 at 14-15; and H. Chergui and H. Oosterom-Staples, ‘The Impact on Immigration and Asylum Law in the Netherlands, in A. Baldaccini and E. Guild (eds), Terrorism and the Foreigner: A Decade of Tension
From a legal perspective, it has been said in the jurisprudence that exclusion fulfills several perspectives, namely:

- ensuring that the perpetrators of international crimes or acts contrary to certain international standards will be unable to claim the right of asylum;
- ensuring that the perpetrators of ordinary crimes committed for fundamentally political purposes can find refuge in a foreign country;
- ensuring that the right of asylum is not used by the perpetrators of serious ordinary crimes in order to escape the ordinary course of local justice; and
- ensuring that the country of refuge can protect its own people by closing its borders to criminals whom it regards as undesirable because of the seriousness of the ordinary crimes which it suspects such criminals of having committed.\textsuperscript{1400}

This balance between the individual right to flee persecution from the country of origin and the collective right of the country of refuge to prevent persons with a criminal background to take advantage of the benefits associated with refugee status has played out against the background of larger international issues confronting countries processing asylum claimants. The flow of refugee seekers cannot be separated from turmoil taking place in other parts of the world or from new forms of crime affecting the refugee population. The fact that civil wars resulting in the commission of war crimes are still a regular occurrence, that the number of repressive governments causing crimes against humanity is not substantially decreasing, that people smuggling, organized crime or other regular criminal activity in most countries have not abated and that politically motivated groups will still resort to violence in order to achieve their goals all have an direct impact on people fleeing those types of situations but also will result in the perpetrators of such crimes being able to ride the refugee wave, either at the same time or, more often, later when it has become more advantageous to avoid justice in their country of origin.

\textsuperscript{1400} Zrig v. Canada (Minister of Citizenship and Immigration) 2003 FCA 178 at paragraph 118-119, which was repeated in Jayasekara v. Canada (Minister of Citizenship and Immigration), 2008 FCA 404 at paragraph 28. In Australia this was echoed in the following words with respect to 1F(b) ‘addition to address the issue of fugitive offender, the exclusion also operates on another level, namely to protect the order and safety of the receiving state’ (in Ovcharuk v Minister for Immigration and Multicultural Affairs [1998] FCA 1314) while the Supreme Court of New Zealand emphasized maintaining of the integrity of the refugee system in The Attorney-General (Minister of Immigration) v Tamil X and the RSAA, [2010] NZSC 107 at paragraph 33.
While the vicissitudes of international events influence refugee movements, they also leave a mark on the appreciation of legal developments. It is almost a truism that new legal concepts or even entire new legal fields find their inspiration in important political or social events. The continuing development of international instruments dealing with issues such as genocide, war crimes, crimes against humanity, organized crime and terrorism as well as refinements in these areas of law can all be connected to traumatic events leading up to calls to adjust the legal means to address such criminal behaviour. This is true in international and domestic areas of criminal law and it is no less true for exclusion as the area of refugee law, which has a close connection to criminal law.

As an overarching comment with respect to exclusion two things can be said. First of all, the various concepts in exclusion, including the conceptual definitions of the crimes set out in article 1F(a), the ancillary notions of complicity in all three clauses, the notion of political crimes in article 1F(b) and the residual function of article 1F(c), all can be traced to parallel legal movements in other areas of law, such as international criminal law, extradition law and domestic criminal law.

Secondly, in keeping pace with such developments, the judiciary in the countries under consideration has recognized the need to stay connected with these areas of law while not shying away from providing their own interpretations regarding emerging legal concepts when necessary. In this context, it also of interest to note that judges do not always appear to exhibit a great deal of sympathy with refugee claimants with a criminal background judging from the vast majority of decisions where the courts or tribunals were in agreement with the government representatives arguing exclusion cases.

This is not to say that exclusion was a guaranteed outcome when such an allegation was made as the judiciary has clearly followed an independent course if it was of the view that the government had overstepped its boundaries as can be seen especially in the application of the outer parameters of complicity and the political offence approach. As a matter of fact, it could be concluded that at times governments felt it opportune to ensure that a particular interpretation of an aspect of the exclusion clauses would be taken out of the hands of the judiciary by providing a legislative gloss on such aspects. This can be seen with the definition of political crime in Australia, the parameters of serious crimes for purposes of article 1F(b) and complicity for purposes of article 1F(c) in the UK, declaring that members of designated terrorist organization fall within article 1F(b) in New Zealand and a number of terrorism related concepts in the U.S.

While the three exclusion clauses are supposed to serve different criminal activities, it is clear from the language employed, the discussions during the travaux préparatoires and the application by the national refugee tribunals and courts that overlap between them is possible. For instance, serious crimes as a category are to be considered under article 1F(b) but when these serious criminal activities exceed a particular threshold as established in international criminal law, they can also become
article 1F(a) activities. Similarly, terrorist activities had traditionally been dealt with under article 1F(b) until 2001, when the United Nations was of the view that they could also be brought under article 1F(c), a position adopted at the national level soon after.

As time went on, the scope of article 1F(a) has been expanded as a result of the fact that the jurisprudence of the two international tribunals established by the Security Council provided more clarity regarding the concepts of war crimes and crimes against humanity while also placing them on a more contemporary footing. The connection between crimes against humanity and armed conflict was abandoned while it also became possible for war crimes to be committed during civil wars. This development was also followed in national refugee case-law where article 1F(a) was applied to more situations than before although in France, where the tribunals had been using a ‘division of labour’ in order to avoid the older legal pitfalls in which article 1F(a) was used for primarily genocide, article 1F(b) also included war crimes committed during civil wars and article 1F(c) was applied to crimes against humanity without an armed conflict nexus, this distinction is still being used.

When comparing the approach taken in the domestic context with the three exclusion clauses, one can detect a great deal of similarities in a number of concepts included in these provisions. The notions of war crimes and crimes against humanity in article 1F(a), both the international aspects as well as the elements of the underlying crimes, have been given very similar treatment, primarily because of the reliance on the decisions of the international criminal law institutions. Along the same lines, the delineations of the seriousness of crimes and the acceptance of the pre-dominance and proportionality theories to determine what amounts to a political crime in 1F(b) as well as the limitation to two types of criminal behaviour in 1F(c) together with the fact that 1F(c) activities can be carried out by both state and non-state agents have not seen any differences of views in the countries under review.

On the other hand, some extended liability concepts has been the subject to different approaches by the judiciaries in the various countries. With respect to notions of complicity, it has already been noted when discussing article 1F(a) that the aiding and abetting type of complicity has not caused any difficulties in interpretation. These observations can be extended to the other two exclusion clauses where it has been said that because of the word committed in both article 1F(a) and (b) the same principles of complicity should apply and where Germany has used the terminology of contribution to connote aiding and abetting for serious non-political crimes. As well, there seems to be a recognition that a general common purpose concept for associations, which are more remote than the aiding and abetting type of complicity, is also useful for extended liability outside article 1F(a). This can be seen especially in Canada for article 1F(b) and in France in article 1F(c) where both countries apply variations of the factor approach. There has been no discussion of joint criminal enterprise in the context of either article 1F(b) or (c) and the same comments in chapter 4 made above for the use of this legal construct in article 1F(a) are apposite here as well, namely that it is hoped that although joint criminal enterprise resembles
the common purpose notion, it will not supplant the less difficult to apply factor approach.

The joint criminal enterprise notion brings in focus another issue with respect to extended liability in that such accountability is framed differently in the three exclusion clauses. Under article 1F(a), extended liability has been developed in step with the jurisprudence at the international level, primarily based on the use of the word committed in conjunction with the reference to international instruments (although it could be argued that the phrase ‘international instruments’ should only apply to the crimes mentioned in article 1F(a) and not the modes of liability) while in article 1F(b) there is no reference to a source for extended liability and while the liability provision in article 1F(c) is couched in different wording altogether, namely guilty.

So far, the courts and tribunals have had no difficulty applying the same principles to all three exclusion clauses but with the much closer nexus established by the Supreme Court of the UK between international and domestic law and its view that article 1F(a) complicity is broader than domestic forms of accountability, a more fundamental discussion of forms of liability will be required if 1F(b) and 1F(c) are going to be used to apply to a broader circle of perpetrators than is presently the case. If, as indicated earlier in this study, some countries, which have other types of liability in their domestic criminal statutes then contained in the ICC Statute, are likely to prefer their domestic law over international law for article 1F(a), this will certainly be the case for article 1F(b) as a result of the lack of an international instruments reference and the fact that already all nine countries view their domestic criminal law as the proper source for article 1F(b) crimes.

One aspect of extended liability needs special mention, namely membership in a criminal organization. As with article 1F(a), membership of an organization involved in article 1F(b) or (c) activities yields different results in the countries examined in this study. Canada uses this type of liability for article 1F(b) crimes but has not had an opportunity to assess it appropriateness for article 1F(c). In New Zealand membership cases have not been discussed in the judiciary outside of article 1F(a) but the legislator has mandated that members of designated terrorist groups fall within the parameters of article 1F(b), while the U.S. has gone a step further by allowing membership for both designated and non-designated terrorist groups. In France and Germany the courts have rejected the notion of membership in article 1F(b) cases, which in the case of the latter raises the possibility of inconsistency between its refugee law and criminal code where membership in organized crime and terrorist groups has been included.

In examining the approach of the nine countries regarding the issue of membership one can see a patchwork approach in that Australia, Germany and the UK have criminal statutes allowing membership in certain organizations but their judiciary has been reluctant to extend this form of liability to refugee law. New Zealand allows membership judicially for article 1F(a) cases in general but only for terrorist
organizations for article 1F(b), the United States judiciary is divided for membership for persecution cases but the same judiciary has found the terrorist organizations provisions constitutional while the same legislation allows membership in such organizations. As said, Canada has used membership in exclusion article 1F(a) and (b) cases while the Netherlands allows membership liability for certain officials in certain designated organizations for article 1F(a) purposes. Only Belgium and France have no membership provisions at all in either their criminal statutes or their refugee law or jurisprudence. While it is unlikely that a global consensus can be found in the application of this form of liability, it is hoped that as a minimum the various countries would be able to use a consistent approach for all three exclusion clauses.

In comparing the jurisprudence of the countries examined in this study it can be seen that in spite some differences between jurisprudence regarding specific exclusion issues, the general trends tend to moving in the same direction and it is hoped that domestic courts and tribunals will continue to use exclusion as a powerful means to ensure that all objectives of the 1951 Refugee Convention are met while at the same time they will develop exclusion concepts with an even more keen eye to the jurisprudence of their judicial counterparts in other countries than has already started to happen in a few instances in recent years.

A helpful tool in achieving this national consistency would be more reliance on international law concepts than has been done so far. As discussed in previous chapters the picture that emerges when examining the use of international law by refugee decision makers is blurry. In some instances international law has been utilized a great deal as inspiration for the interpretation of exclusion concepts while in other areas this approach is in its infancy. This is not always because of a lack of interest on the part of the courts and tribunals in the various countries but also because at times international law has not been helpful in providing guidance.

To begin with article 1F(a), its reference to international instruments in relation to the crimes mentioned, namely crimes against peace, war crimes and crimes against humanity present a clear invitation to use international criminal law as it its source for interpretation. This was already mentioned by the drafters of the Refugee Convention which wanted these this provisions set out as as broadly as possible in order to take into account the jurisprudence developed after the Second World War and the emerging areas of international humanitarian law and international criminal law. This invitation continues unabated and has been accepted without hesitation at the national level when giving meaning to the chapeaux elements of the international crimes as well as the meaning of the specific crimes they had to apply in this exclusion provision. It certainly helped that the international institutions had few if any differences in interpreting the parameters of the crimes of genocide, war crimes and crimes against humanity and the underlying crimes of most importance to the national decisions makers such as torture, inhumane acts, persecution and rape.

In terms of the definition of concepts for article 1F(b) the drafters did not provide any examples of the type of criminality they thought should be included in this provision
and there was even disagreement in how far minor crimes should be part of this exclusion clause while the same lack of resolution can be detected in the relationship between extradition and refugee law. In this aspect the development of international law since 1951 has been more useful than the drafters’ debates, especially in making a connection between international extradition law and exclusion law for choosing the appropriate test for determining whether a crime is political. The predominance and proportionality test, which was developed originally in extradition law has been wholeheartedly accepted by all countries in this study. The same might and certainly should happen with the emerging definition for terrorism where consensus is developing at the international and national level in regards to its two essential elements, namely the commission of very serious crimes against persons or property with the view of intimidating a populations or forcing national or international institutions to do the bidding of groups employing such tactics.

As indicated in chapter 6 the search for a definition for acts against the principles and purposes of the United Nations has been less succesful at the international level. The drafters of the Convention only provided some examples of what could constitute article 1F(c) behaviour and they were in the area of human rights which did not reach the article 1F(a) crimes against humanity threshold or were acts contrary against the maintenance of a just peace. The international community has mentioned five activities since the drafting of the Convention, namely hostage taking, torture, forced disappearance, apartheid and terrorism but only the last one in specific connection with article 1F(c) and then only recently. National refugee makers were left to find their own meaning for this specific exclusion provision but were not be able to escape the same dilemma as had occurred at the international level in that their attempts to give meaning to this article overlapped with the activities already prohibited by the two other exclusion clause. The only advantage of using article 1F(c) as opposed to article 1F(b) for terrorist activities was the fact that article 1F(c) eliminates the need for assesing whether these acts were committed for a political purpose although this possibility had been greatly reduced already for the article 1F(b) approach either by the specific elimination of this exception in a number of terrorism conventions or by finding the exception not applicable on the facts in most cases before the refugee decision makers.

Outside the area of defining criminal concepts in the three exclusion clauses a connection has also been sought with international criminal law when giving meaning to the various form of extended liability but only recently. It is not clear yet in how this trend will continue or whether a wholesale transfer of international criminal law concepts to the refugee sphere is desirable. As explained in chapter 4, all courts applying the exclusion clause in article 1F(a) developed the notions of extended liability separate from the developments in this area by international institutions until 2009. Some of these extended liability concepts as developed in the national jurisprudence have already incorporated the elements as provided in the international jurisprudence, such as the requirement that aiding and abetting must have a substantial contribution with knowledge of the activities of the organization to which the contribution is made.
The requirements of other forms of extended liability such as command responsibility can be fairly easily transferred from the international to the national level but legally complex notions such as joint criminal enterprise or co-perpetration might flounder in the face of the unique type of procedures used for exclusion, which are of much more summary character and require much less evidence than an international or national criminal trial. The more practical national equivalent of joint criminal enterprise developed at the national level, which is based on a number of factors such as career path, duration with an organization, the manner of disassociation and the type of organization might yield the same result in the specific circumstances of a refugee proceeding without sacrificing the connection to international criminal law. The last form of extended liability used by a number of national tribunals and courts, membership is not used anymore at the international level but a credible argument can be made for its continuance at the national refugee level.

While in general the connection in the area of extended liability between article 1F(a) and international criminal law is clearly present and desirable the same cannot be said for article 1F(b). From the drafter’s comments, the language of the provision itself without any international reference and the jurisprudence in the nine countries it is clear that in general the connection was sought in this exclusion article with national criminal law. In order to preserve some influence from international law regarding the interpretation of the types of extended liability to be employed in this article reference to transnational law, especially in the area of terrorism and organized crime, would be useful.

The last observation with respect to article 1F(b) can be made with even more force for article 1F(c) as all the five crimes identified with this exclusion clause have had their source in transnational law with the result that the forms of liability used in the treaties regulating those crimes should be given a great deal of weight in the interpretation of the term guilty.

The above observations as to which norms of other areas of international law should be utilized for the interpretation of the exclusion clause are consistent with the theoretical legal framework developed in respect to the fragmentation of international law by the International Law Commission. This framework in contained in a report containing 42 conclusions of which the ones dealing with the interpretation of norms for special, self-contained regimes are most apposite. Self-contained regimes are ‘a group of rules and principles concerned with a particular subject matter may form a special regime and be applicable as lex specialis. Such special regimes often have their own institutions to administer the relevant rules.’ International refugee law as well as exclusion law within refugee law can be considered such special

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1402 Rule 11.
A special regime has its own unified object and purpose with the consequence that their interpretation should reflect that object and purpose. Other areas of law can be used for interpretation purposes in situations where the special regime has not regulated a matter within its scope but in general specialized regimes should be treated as *lex specialis,* which has priority over general law.

Applying this framework, exclusion law would be the *lex specialis* and the other areas of international law would be the general laws. The other areas of law can be used to provide an interpretation where there is a doubt as to the meaning of certain principles in exclusion keeping in mind its purpose and object. For the most part the areas of law discussed above such as the meaning of the various crimes as set out in international criminal and transnational law will be helpful in furthering the purpose and object of the exclusion clauses but this cannot be said for the complete transformation of the principles of international criminal law in the area of extended liability. This same approach should also be used in the future when new developments in international law are called upon to provide a novel interpretation of aspects of the exclusion clauses.

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1403 According to the Report, Rule 12 ‘sometimes all the rules and principles that regulate a certain problem area are collected together so as to express a “special regime”. Expressions such as “law of the sea”, “humanitarian law”, “human rights law”, “environmental law” and “trade law”, etc. give expression to some such regimes.’

1404 Rule 13.

1405 Rule 15.

1406 Rule 14.

1407 Rule 5.
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308
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310
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312
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316
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