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THE EXCLUSION CLAUSES -- A NOTE ON THEIR APPLICABILITY

Introduction

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

2. Events in the last few years have resulted in increasing use of the exclusion clauses by governments and by UNHCR protection officers, and requests for clarification or review of UNHCR's position on exclusion. This Note provides an analysis and review of the exclusion clauses, taking into account the *travaux préparatoires* of the relevant international instruments, UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status (the Handbook)*, the practice of states, UNHCR and other relevant actors, and the opinions of commentators. It is hoped the information provided in this Note will facilitate the determination whether a refugee falls under the exclusion clauses. This Note is obviously not exhaustive in covering all situations which may arise in practice. Each individual case should be considered in light of its own peculiarities, and bearing in mind the information provided below.

The Exclusion Clauses in the International Refugee Instruments

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

In respect of whom there are serious reasons for considering that he

has committed a crime covered by the provisions of treaties of extradition or a crime mentioned in article VI of the London Charter of the International Military Tribunal or by the provisions of article 14, paragraph 2, of the Universal Declaration of Human Rights.

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

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

5. Article 1(5) of the OAU Refugee Convention contains identical language. In addition, it expressly reserves to the country of asylum the right to have "serious reasons for considering" that the individual falls within the exclusion clauses, and excludes from refugee status any person who "has been guilty of acts contrary to the purposes and principles of the Organization of African Unity".

6. The primary purposes of the exclusion clauses are (i) to ensure that perpetrators of serious crimes do not use the protections flowing from refugee status to escape just punishment for their criminal acts, and (ii) to protect the receiving country from criminals who present a danger to the country's security. These purposes must be borne in mind in interpreting the applicability of the exclusion clauses.

7. In principle, the applicability of the exclusion clauses should be made only after a prior determination that the individual involved satisfies the criteria for refugee status. This is, *inter alia*, because the balancing test (explained later in this Note) can only be assessed by officers intimately familiar with the case and the nature of the persecution feared by the applicant. Moreover, the exclusion clauses can never be used to determine the admissibility of a claim to refugee status.

8. The competence to decide whether a refugee claimant falls under the exclusion clauses lies with the state in whose territory the applicant seeks recognition as a refugee. That state need only have "serious reasons for considering" that the applicant is a criminal described in the exclusion clause; there is no requirement that the applicant be formally charged or convicted, or even that his/her criminality be capable of establishment "beyond reasonable doubt" by a judicial procedure. As Robinson points out, it is possible that some countries will regard available information as sufficient for purposes of exclusion, while others will not.¹

9. The applicant's own confession, the credible and un rebutted testimonies of other persons, or other trustworthy and verifiable information may suffice to establish "serious reasons for considering" that the applicant should be excluded. However, ordinary rules of fairness and natural justice require that an applicant be allowed to rebut or refute any accusations against him or her. There is no reason why an applicant who is able to establish innocence should be excluded from refugee status.

10. As with any exceptions to general provisions of law, the exclusion clauses need to be restrictively interpreted. Paragraph 149 of the *Handbook* provides that the interpretation of these exclusion clauses must be restrictive, in view of the serious consequences of exclusion for the applicant. The exclusion clauses should be used with utmost caution because they are, in effect, the most extreme sanction provided for by the relevant international refugee instruments. A final reason for caution in interpreting the exclusion clauses is that the standard of proof required for exclusion is relatively lower than that which governs deportation or expulsion under Article 33(2) of the 1951 Convention. This is discussed under the section on "serious non-political crimes".

11. For ease of reference and discussion, the exclusion clauses will be discussed

¹ Nehemiah Robinson, *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation* 67 (New York, 1953).

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

**ARTICLE 1F(a) -- CRIMES AGAINST PEACE, WAR CRIMES
AND CRIMES AGAINST HUMANITY**

12. Article 1F(a) refers to persons who have committed "a crime against peace, a war crime, or a crime against humanity, as defined in *the international instruments drawn up to make provision in respect of such crimes*". Several such instruments exist today which define or elaborate on the notion of "crimes against peace, war crimes and crimes against humanity". Some of these instruments are listed in Annex VI of the *Handbook*. The most comprehensive is the 1945 Charter of the International Military Tribunal (the London Charter), Article 6 of which is reproduced in the *Handbook*. Other well-known relevant international instruments are:

- * the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide* (the *Genocide Convention*);
- * the four 1949 *Geneva Conventions for the Protection of Victims of War*;
- * the 1973 *International Convention on the Suppression and Punishment of the Crime of Apartheid*;²
- * the 1973 *Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity*;³
- * the 1977 *Additional Protocol to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts* (*Additional Protocol I*);

² While *apartheid* was generally cited and considered as a crime against humanity, the Convention itself had very limited applicability, and is now less significant in light of recent developments in South Africa.

³ G.A. Res. 3074 (XXVIII), 3 Dec. 1973.

* the 1984 *Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (the Convention Against Torture)*;

* the 1985 *Inter-American Convention to Prevent and Punish Torture*;
and

* the 1987 *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*.

13. Other relevant documents are the 1950 *Report of the International Law Commission (the ILC) to the General Assembly*, and the 1954 *ILC Draft Code of Offenses against the Peace and Security of Mankind*. In 1987, this latter document was renamed the Draft Code of Crimes against the Peace and Security of Mankind, and adopted by the ILC in 1991. At its most recent session, the ILC was unable to conclude whether the Code should be expressed in the form of a Declaration or a Convention.⁴ In any event, although it has not yet been adopted by the world community, it is already widely cited as a reliable codification of the subject.

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

* The Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (the Statute of the International Criminal Tribunal for former Yugoslavia);

* The Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 (the Statute of the International Criminal Tribunal for Rwanda); and

* The ILC's Draft Statute for an International Criminal Court.

⁴ *Report of the International Law Commission on the work of its forty-seventh session 2 May-21 July 1995* (GAOR, Supp. No. 10, Doc. A/50/10) (New York, 1995).

15. It should be recalled that some of these instruments are precatory General Assembly resolutions; others are ILC reports or ILC projects, none of which have *per se* legally binding effect; still others are regional conventions binding only on the signatory states, while others are international conventions binding on their respective signatories, and which also may be binding on non-signatory states as part of customary international law or *jus cogens*.

Crimes Against Peace

16. This category is defined by the London Charter to include "planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements, or assurances or participation in a common plan or conspiracy for any of the foregoing." It includes acts of aggression, the threat of aggression and forcible means of intervention.

17. Crimes against peace are a very clearly-defined category. The definition makes it clear that such crimes only relate to the planning or waging of wars or armed conflicts. Armed conflicts are only waged by states or other organized groups in the normal course of events. Thus, individual applicants excluded under this provision would likely have to be a representative or instrumentality of a state or other organized group, with some responsibility for the formulation or execution of policy.

18. There are hardly any precedents for exclusion of individuals under this category, and there is very little, if any, jurisprudence dealing with crimes against peace as an exclusionary provision. As discussed later in this Note, a crime against peace almost invariably would fall under the category of an act "contrary to the purposes and principles of the United Nations" (Article 1F(c)).

War Crimes

19. A war crime involves the violation of international humanitarian law or the

laws of war. Article 6(b) of the London Charter includes within this group murder or ill-treatment of civilian populations, murder or ill-treatment of prisoners of war, the killing of hostages, or any wanton destruction of cities, towns or villages or devastation that is not justified by military necessity.

20. Other acts identified as war crimes are the "grave breaches" specified in the *1949 Geneva Conventions and Additional Protocol I*, namely wilful killing, torture or other inhuman treatment (including biological experiments), and wilfully causing great suffering or serious injury to body or health.⁵

21. War crimes were originally defined only in the context of an international armed conflict. Thus, it was widely assumed that they were committed only in an international, but not an internal, armed conflict. However, it is now generally accepted that war crimes may be committed in internal, as well as in international, armed conflicts. In the current case of *Dusko Tadic*, the defence argued, *inter alia*, that the accused could not be tried for violations of the laws or customs of war under the Statute of the International Criminal Tribunal for former Yugoslavia because such violations could only be committed in the context of an international conflict.

22. The Tribunal held, however, that the laws or customs of war, commonly referred to as war crimes, include prohibitions of acts committed both in

⁵ Article 22 of the ILC's Draft Code of Crimes against the Peace and Security of Mankind lists "serious war crimes" as any of the following acts: (a) acts of inhumanity, cruelty or barbarity directed against the life, dignity or physical or mental integrity of persons; (b) establishment of settlers in an occupied territory and changes to the demographic composition of an occupied territory; (c) use of unlawful weapons; (d) employing methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment; (e) large-scale destruction of civil property; and (f) wilful attacks on property of exceptional religious, historical or cultural value.

Following discussions at the ILC's last session, this category may be changed from "serious war crimes" to the more commonly used "war crimes."

international and internal armed conflicts.⁶ This ruling confirms the recent views of commentators that war crimes are not limited or defined by the nature of the conflict in which they occur. It also should be recalled that war crimes may be committed against military as well as civilian persons.

Crimes against humanity

23. Crimes against humanity are distinct from war crimes, although in time of international armed conflict a single act could constitute both. While there is no universally accepted definition of crimes against humanity, they generally refer to any fundamentally inhumane treatment of persons, often grounded in political, racial, religious or other bias. They include specific acts of murder, extermination, enslavement, deportation and population transfer, imprisonment, torture and rape.

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

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

25. Isolated offenses, such as extra-judicial executions or other common crimes punishable under municipal law, do not by themselves qualify as crimes against humanity. The acts in question must be part of a policy of persecution or discrimination, targeted against the civilian population, and carried out in a systematic fashion or by means of mass action. However, the acts need not always be mass attacks. Thus, an inhuman act committed against an individual

⁶ See *Dusko Tadic*, Case No. IT-94-I-T (Dec. of 10 Aug. 1995 on the Jurisdiction of the International Criminal Tribunal for former Yugoslavia).

may constitute a crime against humanity if it is part of a coherent system or a series of systematic and repeated acts with the same political, racial, religious or cultural motive. Crimes against humanity may be identified from the nature of the acts in question, the extent of their effects, the motive of the perpetrator(s), or any combination of the above.

26. While they are defined in the London Charter as acts committed "before or during [a] war", crimes against humanity also could be committed in peacetime or in a non-war context; they are not necessarily linked to armed conflict or to war crimes. Crimes against humanity are not confined to situations of international conflict--they also apply to all other conflicts, including civil wars and ordinary insurrections or internal disturbances. They are prohibited, regardless of whether they are committed in peacetime, in an internal or in an international conflict.

27. Crimes against humanity could be perpetrated by individuals without any connection to a state, as well as by persons acting on behalf of a state. In particular, individuals involved in paramilitary or armed revolutionary movements are capable of falling under the Article 1F(a) exception.

28. It is evident from the nature of the crimes that *mens rea* or some form of intent is required to commit a crime against peace, a war crime or a crime against humanity. This suggests that an applicant may be able to invoke a defense which negates *mens rea*.

ARTICLE 1F(b)--SERIOUS NON-POLITICAL CRIMES

29. Article 1F(b) provides for exclusion of persons who have committed a "serious non-political crime" outside the country of refuge prior to being admitted to that country as a refugee. The issues for determination here are what constitutes a crime, and whether the crime in question is of a *serious* and *non-political* nature. State practice on what constitutes a "serious non-political crime" for purposes of the exclusion clauses has not always been transparent or consistent.

30. The term "crime" obviously has different connotations in different legal systems. In ordinary parlance, a crime is an act committed, or a failure to act, in violation of a law. The ILC refers to a crime under international law as the breach of "a norm of international law accepted and recognized by the international community of states as a whole as being of such a fundamental character that its violation attracts the criminal responsibility of individuals."

31. For purposes of exclusion, the standard should be a generally accepted international one, derived from various treaty and customary law provisions. In addition to those already mentioned, the following treaties also govern certain crimes under international law:

- * the 1970 *Convention for the Suppression of Unlawful Seizure of Aircraft*;

- * the 1971 *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*;

- * the 1973 *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents*;

- * the 1979 *International Convention against the Taking of Hostages*;
and

- * the 1988 *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*;

32. These instruments were not drafted in the context of refugee law. Thus, they do not indicate whether the offenses are classified as a serious non-political crime. In assessing the seriousness of any of the international crimes in question, regard should be had to their magnitude, the continuing reality of their occurrence or their inevitable international consequences.

33. The fact that such acts are defined as international crimes does not necessarily imply that refugees should be extradited to a country in which they

might face persecution or even prosecution for refugee-related reasons. As Hathaway points out, in situations where prosecution is likely to be politically manipulated, the "refugee claim should not be dismissed as raising a simple issue of 'fear of prosecution or punishment', but should instead be examined on its merits."⁷ This is consistent with Executive Committee Conclusion No. 17 (XXXI), which considers that cases in which the extradition of a refugee is requested may give rise to special problems, and recognizes that "refugees should be protected in regard to extradition to a country where they have well-founded reasons to fear persecution ..."⁸ This does not prejudice the need for States to ensure that such individuals are tried and punished for serious crimes.

34. The *Handbook* specifies that a "serious" crime must be a capital crime or a very grave punishable act. Examples would include homicide, rape, arson and armed robbery. Minor crimes, such as petty theft, possession and use of light drugs or embezzlement should not be grounds for exclusion under Article 1F(b), because they do not reach a high enough threshold to be regarded as serious. On the other hand, relatively minor offenses could be deemed serious if they are accompanied with the use of deadly weapons, serious injury to persons, evidence of habitual criminal conduct and other similar factors.

35. The seriousness of the crime can be deduced from several factors, including the nature of the act, the extent of its effects, and the motive of the perpetrator. The overriding consideration should be the aim of withholding protection only from persons who clearly do not deserve any protection on account of their criminal acts.

36. The primary question in determinations under Article 1F(b) is whether the criminal character of the refugee outweighs his/her need for international protection

⁷ James Hathaway, *The Law of Refugee Status* 172 (1991).

⁸ *Problems of Extradition Affecting Refugees*, EXCOM Conclusion No. 17 (XXXI)(1980).

or character as a *bona fide* refugee. As stated in the *Handbook*, it is important to strike a judicious balance between the nature of the crime in question, and the degree of persecution feared by the applicant. Thus, if the applicant had reason to fear severe persecution, a crime must be very serious in order to exclude the applicant.

37. In assessing the nature and purpose of the offense, the factors to be taken into account include: whether the means used were the most reasonable or logical, or there were other and better alternative means of achieving the ultimate goal; whether the gravity or atrocity of the offence was proportional to the political goal; and whether there was a close and direct link between the offence and its alleged political objective.

38. While the import of "serious non-political crimes" seems clear, this is not always reflected in state legislation. In the United States, for example, proposed legislation would have the effect of expanding the category of crimes for which individuals would be deemed excludable. Specifically, the proposed legislation⁹ would exclude aliens who have been convicted of an "aggravated felony"¹⁰ on grounds that they had committed a serious crime.

39. Such proposed legislation contradicts the case-law. For example, in one of the few U.S. refugee cases to deal with the question, the court stated the test as

⁹ See H.R. 2202, the Immigration in the National Interest Act of 1995. This Bill was introduced in the House of Representatives, and has already been revised in the House Judiciary Subcommittee on Immigration. The full House Judiciary Committee is currently discussing the Bill.

¹⁰ The term "aggravated felony" includes: murder; illicit trafficking in a controlled substance; illicit trafficking in firearms, destructive devices or explosive materials; laundering of monetary instruments; a crime of violence, a theft or a burglary for which the term of imprisonment imposed is at least 5 years; offenses relating to the owning, controlling, managing or supervising of a prostitution business; offenses relating to child pornography; and offenses relating to racketeer influenced corrupt organizations for which a sentence of 5 five years' imprisonment or more may be imposed. See *The Basic Law Manual* 57-58 (U.S. INS, November 1994).

follows:

Under this standard, a "serious non-political crime" is a crime that was not committed out of "genuine political motives," was not directed toward the "modification of the political organization or ... structure of the state," and in which there is no direct, "causal link between the crime committed and its alleged political purpose and object." In addition, even if the preceding standards are met, a crime should be considered a serious non-political crime if the act is disproportionate to the objective, or if it is "of an atrocious or barbarous nature."¹¹

40. It is evident that the drafters of the Refugee Convention did not intend to exclude individuals simply for committing non-capital crimes or non-grave punishable acts. Thus, non-violent crimes such as gambling, prostitution, counterfeiting, forgery and perjury should not warrant the automatic denial of protection to a refugee applicant.

41. The exclusion clauses also require that the offence must have been committed "outside the country of refuge prior to his [or her] admission to that country as a refugee." While "admission" may include mere physical presence without the need for formal recognition of refugee status or even lawful presence in the country, the reference is to "the" country of refuge, rather than to "a" country of refuge. Thus, where there has been more than one country of refuge, "the" country of refuge must be the country of refuge at the time the application of the exclusion clauses is being considered.

42. A few domestic courts have interpreted Article 1F(b) of the 1951 Convention to mean that any serious non-political crime committed *before the formal recognition as a refugee* would lead automatically to the application of Article 1F(b). In Austria, for example, the translation of the 1951 Convention incorporated into national law does not explicitly require that a serious non-political crime be committed *outside* the country of asylum.¹² Under this interpretation, an applicant

¹¹ *McMullen v. I.N.S.*, 788 F. 2d 591 (9th Cir. 1986).

¹² See BGBl 1955/55, and Sec. 2(2) of the 1991 Asylum Law of Austria.

who committed a serious non-political crime *in the country of asylum*, but *before formal recognition as a refugee*, would be excluded.

43. This is an erroneous interpretation of the exclusion clauses. Article 1F(b) clearly states that the crime must have been committed *outside the country of refuge prior to his admission to that country as a refugee*. As the *Handbook* points out in paragraph 153, "outside the country of refuge" would normally be the country of origin, although it also could be another country. However, it can never be the country of refuge where the applicant seeks recognition as a refugee.

44. The "serious non-political crime" standard should not be confused with the standard for expulsion under Article 33(2) of the 1951 Convention. Article 33(2) states that the prohibition against *refoulement* does not apply to any "*refugee* whom there are *reasonable grounds* for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a *particularly serious crime*, constitutes a danger to the community of that country". The qualification of "serious" with the word "particularly" suggests that certain crimes are of an even higher order than those covered by Article 1F(b).

45. Article 1F(b) does not require a high standard of proof (merely "serious reasons for considering"); nor does it require that the applicant actually be convicted or even charged with a crime. It only applies to applicants who are believed to have committed serious non-political crimes before entering the country of asylum. Article 33(2), on the other hand, has a much more stringent standard of proof: it requires conviction by a final judgement of a particularly serious crime, rather than merely "serious reasons for considering" that a person may be a criminal. The crime committed needs to be "particularly serious" and the offender must "constitute a danger to the community."

46. Unlike the exclusion clause in Article 1F(b), Article 33(2) is designed to authorize states to expel or return refugees who are known to be criminals, or whose past record of criminality poses a danger to the country of refuge.

However, Article 32 makes clear that states shall only expel a refugee lawfully in their territory on grounds of national security or public order, and only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee must be allowed to submit exculpatory evidence and to appeal to and be represented before the competent authorities.

47. It is interesting to note that the OAU Refugee Convention does not provide for the expulsion or *refoulement* of refugees under any circumstances.

**ARTICLE 1F(c)--ACTS CONTRARY TO THE PURPOSES AND PRINCIPLES OF
THE UNITED NATIONS**

48. Article 1F(c) excludes from protection as refugees persons who have been "guilty of acts contrary to the purposes and principles of the United Nations." By definition, any crimes against peace, war crimes or crimes against humanity also will qualify as acts contrary to the purposes and principles of the United Nations.

49. The purposes and principles of the United Nations are spelt out in Articles 1 and 2 of the UN Charter.¹³ However, they do not offer much guidance on the types of acts which would deprive a person of the benefits of refugee status. The *travaux préparatoires* suggest that, by their nature, these purposes and principles can only be offended by persons who have been in a position of power in their countries or in state-like organizations.

¹³ The purposes of the United Nations are: to maintain international peace and security; to develop friendly relations among nations; to achieve international co-operation in solving socio-economic and cultural problems, and in promoting respect for human rights; and to serve as a center for harmonizing the actions of nations.

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

50. Hathaway argues that "it is clear that [Article 1F(c)] speaks essentially to governments".¹⁴ The *Handbook* also suggests in paragraph 163 that "an individual, in order to have committed an act contrary to these principles, must have been in a position of power in a member State and instrumental to his State's infringing these principles." Present day emphasis on individual responsibility and a corresponding de-emphasis on a state-centric system however suggest that individuals who are not affiliated or associated with any government are also capable of performing acts contrary to the purposes and principles of the United Nations. A possible example of a crime in this category would be an individual who enlisted as a mercenary to help overthrow governments in return for money, and not out of political motivation. While such action would not be a crime against peace, a war crime, a crime against humanity or a serious non-political crime, it arguably would be an act contrary to the purposes and principles of the United Nations.

51. In actual practice, the utility of Article 1F(c) of the 1951 Convention seems quite limited. As indicated earlier, individuals are more likely to be excluded under paragraphs (a) and/or (b), than under the more generally-worded paragraph (c) of Article 1F.

CASES OF "GUILT BY ASSOCIATION"

52. The Office has recently received several requests from various governments concerning the issue of "guilt by association". In short, the question is whether certain persons fall under the exclusion clauses just by virtue of their former positions, actions or inactions, or parties and entities with which they were associated in the past. Examples of such categories are: former senior officials of repressive regimes or governments accused of genocide or gross human rights

¹⁴ James Hathaway, *The Law of Refugee Status* 229 (1991).

violations, and persons who are associated with groups which commit crimes or advocate violence.

The Case of Former Senior Officials of Repressive Regimes

53. Governments' rationale behind such exclusion is that, by virtue of their high position, the officials in question bear collective responsibility for their government's actions. Such persons would be excluded on an automatic basis, even if they were not personally involved in the prohibited acts in question, and irrespective of the availability of any evidence indicating wrongdoing on their part.

54. Some states have already enacted or are considering legislation giving effect to the concept of "guilt by association". For example, Canada recently passed a law which had the effect of excluding, *ipso facto*, all former senior officials of repressive regimes.¹⁵ The officials affected by this legislation include senior diplomats, cabinet ministers, heads of state and their advisers, senior bureaucrats and military officers as well as members of the judiciary. So far, the Canadian Government has singled out four regimes as gross human rights abusers: the former Siad Barre dictatorship in Somalia; the Bosnian Serb authorities in Bosnia and Herzegovina; the former Duvalier dictatorship and subsequent military regimes in Haiti; and the former Marxist Government in Afghanistan. Canada appears to be the only country with such legislation.

55. The exclusion clauses do not envisage the automatic exclusion of persons on the basis of their title only. Individuals are rightly excluded because there are serious reasons to believe that they have committed one or more of the crimes specified in the exclusion clauses. However, the mere fact of a former position in a repressive regime does not constitute the "serious reasons" required for exclusion. To conclude otherwise is to judge people based on their title, rather than their actions or activities. The Canadian legislation also eliminates the

¹⁵ See Bill C-86 of 1993 and Bill C-44 of 1994.

opportunity to recognize those who defected from repressive regimes. The consequences flowing from exclusion are so grave that ordinary principles of fairness, natural justice and due process of law require a prior investigation of the actual role played by these officials before passing judgement on their responsibility for grave human rights violations or other criminal acts.

56. As stated earlier on, UNHCR takes the position that the issue of inclusion should be determined before deciding whether to exclude individuals. This enables the state involved to strike a balance between the risk of persecution, on the one hand, and the seriousness and the nature of the crime in question, on the other hand. However, an automatic exclusion of individuals based on their prior titles would have the effect of excluding such individuals from access to immigration officers, thus denying the individuals an assessment of their claim for refugee status. At the very least, such individuals' claims to refugee status should be examined by government officials trained in refugee law, under a special (expedited or accelerated) procedure. This would ensure that the refugee claims of the individuals are examined prior to any decisions on exclusion, removal or deportation.

57. A proper application of the exclusion clauses would entail making individual determinations of exclusion for the officials in question. In order to fall under the exclusion clauses, an individual need not personally have committed the crime(s) in question. It is, however, sufficient grounds for exclusion if the individual had personal knowledge of the crimes but did not take any measures to prevent or help stop them. The same would apply to an individual who did not disengage him/herself from the government at the earliest opportunity. An individual examination is required precisely in order to ascertain whether the applicant tried to stop, or opposed the acts, and/or deliberately removed him/herself through defection from the government. Persons who are found to have performed, engaged in, participated in orchestrating, planning and/or implementing, or merely condoned or acquiesced in the carrying out of any specified criminal acts, should rightly be excluded.

Possible Mitigating Factors

58. There may be factors that either explain the prior actions of the individual applicant or, while not absolving the individual of guilt, may simply be considered in mitigation of the punishment meted out.

59. The most commonly invoked defence is that of "superior orders" or coercion from higher governmental authorities. However, it is an established principle of law that the defence of superior orders does not absolve individuals of blame. For example, Article 7(4) of the Statute of the International Criminal Tribunal for former Yugoslavia provides in relevant part: "the fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility." In any event, in their position as senior government and political functionaries, such officials would be hard-pressed to argue that they were taking orders from a superior.

60. The defence of superior orders, if applicable, is at best considered in mitigation of punishment, and not to absolve individuals of responsibility for their actions.

61. There are several questions that could be posed to help determine the extent of involvement of the applicant. For example:

- * Were the acts involved official government policy of which the official was aware?

- * Was the official in a position to influence this policy one way or the other?

- * To what extent would the official's life have been endangered if (s)he had refused to be associated with or involved in the perpetration of the crime(s)?

- * Was any attempt made to do so, or to resign from the government?

62. These are all questions that have played a part in exclusion determinations.

For example, in one Canadian case,¹⁶ the applicant, who had been forcibly conscripted into the Salvadorean army, deserted at the first possible opportunity after finding out that the army used torture. The court considered this a relevant factor in concluding that the applicant was not guilty of the commission of war crimes or crimes against humanity.

Membership of, or Association with, a Group which Commits Crimes/Advocates Violence

63. The exclusion clauses refer to crimes actually committed by the applicant; there is no explicit reference to persons who may have contributed to the commission of the crime indirectly. In such a situation, the applicability of the exclusion clauses must be determined in light of all the circumstances of the case.

64. Membership *per se* of an organization which advocates or practices violence is not sufficient to exclude a person from refugee status. The fact of membership does not, in and of itself, amount to sufficient participation to constitute complicity in the commission of war crimes or crimes against humanity. However, it is sufficient for purposes of exclusion if, in addition to membership or association, there are *serious reasons for considering* that the applicant had direct responsibility for, or was actively associated with the commission of any crime specified under the exclusion clauses.

65. UNHCR issued an IOM/FOM in 1988 on *Determination of Refugee Status of Persons Connected With Organizations or Groups Which Advocate and/or Practice Violence*. (UNHCR IOM/FOM/78/71). It stresses that an applicant should not be excluded if (s)he is able to give a plausible explanation that (s)he did not commit, and was not directly or closely associated with, the commission of any crime specified under Article 1F of the 1951 Convention.

¹⁶ Moreno v. Canada (Minister of Employment and Immigration), Action A-746-91 (F.C.A., 14 Sep. 1993).

66. There may be groups, such as terrorist organizations, whose activities and methods are of a very violent and notorious nature. Membership of such a group (with a limited brutal purpose) may by necessity involve or imply personal and knowing participation in acts falling under the exclusion clauses. That may be enough to create a *rebuttable presumption of exclusion* on the ground that the applicant is complicit in the commission of any crimes that may have been committed by that group. For example, some European governments exclude from refugee status any member of such groups as Sendero Luminoso of Peru, the FIS of Algeria and the PKK of Turkey, regardless of whether the members have personally taken part in acts of violence. Governments' rationale behind such exclusion is that the groups in question are not in a position to control acts of violence committed by their militant wings or in the groups' names; therefore, they are regarded as movements carrying out "terrorist" activity, and all their members are deemed to fall under the exclusion clauses.

67. It is important to stress that a *rebuttable presumption* should not automatically result in exclusion; however, the applicant would have to establish his or her innocence. An applicant should be given the opportunity to explain the exact nature of the activities carried out by the applicant within the framework of the organization or the group in question. The presumption may be rebutted if applicant proves that (s)he was not aware that the organization committed atrocities or other serious crimes under the exclusion clauses. A plausible explanation regarding applicant's non-involvement or dissociation from any excludable acts, coupled with an absence of serious evidence from other sources to the contrary, should remove applicant from the scope of the exclusion clauses.

The Case of Persecutors

68. There are circumstances in which evidence comes to light that individuals seeking refugee status were themselves guilty of acts of persecution before fleeing. The issue here is whether the 1951 Convention provides any protection for such persons.

69. Those who had themselves persecuted others were expressly excluded from the protection of the International Refugee Organization.¹⁷ Some countries also have similar exclusion provisions in their legislation. For example, the United States Government excludes "persecutors" from refugee status under the U.S. Immigration and Nationality Act if such persons ordered, incited, assisted or otherwise participated in the persecution of another person on account of race, religion, nationality, membership in a particular social group, or political opinion.¹⁸ Under U.S. case law, Nazis have been barred from asylum as persecutors.¹⁹

70. It is arguable that Article 1F(a) was included in the 1951 Convention so as specifically to exclude persecutors and other criminals from protection as refugees. Such individuals may rightly be excluded if they were themselves involved in the persecutory acts listed above.

The Case of Hijacking

71. The crime of hijacking is covered by the 1970 *Convention for the Suppression of Unlawful Seizure of Aircraft*, and the 1971 *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*. However, neither of these conventions specifically refers to refugees.

72. While hijacking is considered an international crime, an act of hijacking does not automatically exclude the culprits from refugee status. The decision whether to exclude a hijacker should rest on the extent to which the hijacking was

¹⁷ Guy Goodwill-Gill, *The Refugee in International Law* 64 (1983).

¹⁸ U.S. Immigration and Nationality Act, Sec. 101(a)(42)(A) and 243(h)(2)(A); 8 C.F.R. Sec. 208.13(c) and 8 C.F.R. Sec. 208.16(c)(2)(i).

¹⁹ See, e.g. *Matter of Laipenieks*, 18 I & N Dec. 433 (BIA 1983); *U.S. v. Breyer*, 829 F. Supp. 773 (E.D. Pa 1993). See also *U.S. v. Koreh*, 856 F. Supp. 891 (D.N.J. 1994)(finding that an editor of a Hungarian newspaper that published anti-Semitic propaganda during World War II assisted in persecution).

proportionate to the perceived need to flee for refugee-related reasons.

73. The decision should be based on a balancing test between the gravity or criminal nature of the act and the hijacker's reasons for resorting to the act. Among issues for consideration are the following:

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

74. It is evident that hijacking poses a grave threat to the life and safety of innocent passengers. It is for this reason that there is so much opprobrium attached to acts of hijacking. Thus, the threshold for the proportionality test should be high, and only the most compelling and exceptional circumstances should justify the need to resort to hijacking.

75. While hijacking is illegal under international law, there also is a well-established legal principle to protect refugees and not return them to places where they may face persecution. As Arthur Helton has ably argued, the methods of flight condemned under international law, in the absence of grave or life-threatening action, do not preclude granting asylum to deserving individuals.²⁰

76. In the case of an extradition or other related requests relating to hijacking, execution of an extradition order must be suspended until a final decision on refugee status is made. The applicant should always benefit from the principle of

²⁰ Arthur C. Helton, "The Case of Zhan Zhenai: Reconciling the International Responsibilities of Punishing Air Hijacking and Protecting Refugees", 13 (4) *Loyola L.A. Int'l & Comp. L. J.* 849 (June 1991).

non-refoulement because refugee status is declarative and not constitutive. Only a negative decision after examination of the individual's application may remove the applicant from the protection of the *non-refoulement* principle.

The Special Case of Torture

77. Torture deserves special mention because several of the recent recommendations for exclusion are based on acts of torture. The relevance of torture also lies in the fact that certain provisions of the *Convention against Torture* are directly related to issues of exclusion.

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

79. It is evident from the definition that acts of torture carried out on a systematic scale against an identifiable group of persons constitute crimes against humanity under Article 1F(a). They also could constitute serious non-political crimes under Article 1F(b) if they are carried out without any political motives; and they are contrary to the purposes and principles of the United Nations, thus putting them under Article 1F(c) as well.

80. There is no international instrument which declares torture to be a crime against humanity. However, a considerable number of international conventions proscribe torture on the basis that it concerns the international community as a whole. As an act which is defined as a "denial of the purpose of the UN Charter" and a "violation of basic human rights", torture is a particularly serious crime. Article 4(1) of the *Convention Against Torture* considers it a criminal offence which

cannot be justified on political grounds.

81. The *Convention Against Torture* allows for universal jurisdiction over perpetrators of torture; but Article 3(1) of the Convention also contains a non-derogable provision which prohibits the return of any person at risk of being subjected to torture. The reference to "any person" clearly includes persons who are not refugees and persons who, through the exclusion clause, have been denied the protection of the 1951 Convention.

OTHER PRACTICAL EFFECTS OF EXCLUSION

82. A person falling under the exclusion clauses may, in light of the *non-refoulement* principle, nevertheless deserve protection on human rights grounds. In such a situation, the country of asylum should be encouraged to try the asylum-seeker for the alleged crime. The applicant may, upon release, be eligible again for a new refugee status determination. Alternatively, where it is not possible to try a person, due for example to the fact that the country of asylum is not bound by the relevant legal instrument, concerned governments should be encouraged to accept on an ad-hoc and case-by-case basis the legalized stay of excluded persons, where warranted by humanitarian considerations.

83. Another practical aspect which needs to be considered is the implications of exclusion for family members. Paragraph 185 of the *Handbook* states that the principle of family unity generally operates in favor of dependants, and not against them. However, it also provides in paragraph 188 that "if the dependant of a refugee falls within the terms of one of the exclusion clauses, refugee status should be denied to him." If, however, the dependant is a minor under the age of eighteen, i.e., a juvenile, or a child under the age of twelve, caution should be applied. In such a case, the "best interests of the child" should be the guiding principle as to whether the exclusion clause should apply. The application of the exclusion clause should be put in the context of the favorable development and well-being of the child or juvenile, which presumably would be with the child's

family or society.

84. In cases where the head of a family is granted refugee status, his or her dependants are normally granted refugee status in accordance with the principle of family unity. However, where the head of a family is excluded from refugee status, this should not adversely affect refugee status applications by family members of the head of family. The dependants should be allowed to invoke their own refugee-related reasons to apply for recognition as refugees.