

## PERSECUTOR OR PERSECUTED: EXCLUSION UNDER ARTICLE 1F(A) AND (B) OF THE REFUGEES CONVENTION

MATTHEW ZAGOR\*

In the 6th century, the Emperor Justinian - anticipating modern asylum laws - limited the privilege [of refuge] to people not guilty of serious crimes.

State of the World's Refugees (1995)

Law-abiding citizens of the United Kingdom might reasonably feel disquiet about a state of affairs which permits international terrorists proved to be a danger to the national security to remain here.<sup>2</sup>

Mr Justice Potts, UK Special Immigration Appeals Commission, dismissing deportation orders against Mukhtiar Singh and Paramjit Singh (31 July 2000)

### I. INTRODUCTION AND HYPOTHETICAL

The international refugee regime provides for states to exclude certain categories of persons who do not deserve protection. This article explores the object and purpose of the two most used provisions in the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees ("Refugees Convention")<sup>3</sup> and their implementation in light of developments in international humanitarian and human rights law.

The drafters of the exclusion clauses were influenced by the need to safeguard state sovereignty, uphold humanitarian obligations, and bolster the development of a post-War international morality. This article looks at how the tensions between these policy objectives have been exploited by states in several common law jurisdictions, jeopardizing the precarious balance struck by the drafters. At one level, the thesis presented here falls squarely within the well-established

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\* BA (Hons) (London) LLB (UNSW). This article is based on a paper which was awarded the 1999 NSW Red Cross International Humanitarian Law prize. The author would like to thank the anonymous reviewers of the UNSWLJ for their insightful comments, and Rosemary Rayfuse for her encouragement and direction, noting that the opinions presented are his own alone.

1 UNHCR, *State of the World's Refugees*, Oxford University Press (1995).

2 Judgment of the UK Special Immigration Appeals Commission, as reported in *The Guardian*, 1 August 2000.

3 Convention Relating to the Status of Refugees (1951), 189 UNTS 150, as amended by the Protocol Relating to the Status of Refugees (1967), 606 UNTS 267.

argument that state sovereignty is overwhelming the interpretation of various aspects of the Refugees Convention.<sup>4</sup> From this perspective, the exclusion clauses present a particularly apposite opportunity for states to appeal to the rhetoric of protecting the security of the nation – a fundamental sovereign activity.<sup>5</sup> At another level, however, the provisions increasingly touch upon dynamic developments in international humanitarian and criminal law, and extradition law, and thus allow for a unique examination in these contexts.

The following hypothetical will be referred to in the subsequent analysis to illustrate the challenges involved in the decision-making process.

### A. Hypothetical

Alag is a member of the Begonia Liberation Front (“BLF”), a separatist organization dedicated to achieving self-determination for the Begoni people in a province within the country of Polonia. The BLF profess a vaguely Marxist, anti-Western political ideology. While Polonia is nominally a democratic state, it has exercised direct military rule over the troubled province since independence 35 years ago, and has attempted to ‘integrate’ Begonia by establishing settlements of non-Begonis in the province.

Polonia refuses to recognize the situation in Begonia as one of ‘armed conflict,’ despite the BLF’s effective military and administrative control over parts of the province. The wider international community is largely ignorant of or indifferent to the Begoni cause – a situation exacerbated by Polonia’s successful isolation of the province from public scrutiny. International observers have been denied permission to enter the province, and media coverage is virtually non-existent.

The Polonia government has declared the BLF a ‘terrorist’ organization and criminalised membership or public support for its secessionist views. In turn, the organisation insists it only attacks ‘legitimate targets’ and accuses the government of genocidal policies. There are credible reports of civilians being targeted by both sides. The BLF were implicated in the massacre in a non-Begoni village in the province in late 1999. Alag fled Polonia shortly after this incident following the issuing of a warrant for his arrest for publicly inciting the violence which led to the massacre.

Arriving in Australia, which has supported Polonia militarily over the years, Alag applies for refugee status, fearing torture and extrajudicial execution on return. He insists that while he was a senior figure in the BLF, he was only ever involved in the propaganda unit. He was aware that abuses had been committed by the BLF’s armed wing, and knew in advance of the attack on the village, but claims it was meant to be a military encounter.

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4 See generally, JC Hathaway (ed), *Reconceiving International Refugee Law*, M Nijhoff (1997).

5 In *Canada (Attorney General) v Ward* [1993] 2 SCR 689 at 726, La Forest J noted that “[s]ecurity of nationals is, after all, the essence of sovereignty”.

## II. THE REFUGEES CONVENTION AND THE EXCLUSION CLAUSES

### A. The Legal Framework: The ‘Object and Purpose’ of Exclusion

The 1951 Convention Relating to the Status of Refugees prohibits signatories from returning a ‘refugee’ to a country where they would face persecution.<sup>6</sup> The Convention also includes grounds for excluding a person from the protection of refugee status. Article 1F states:<sup>7</sup>

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.

The United Nations High Commissioner for Refugees’ (“UNHCR”) *Handbook on Procedures and Criteria for Determining Refugee Status* (“*UNHCR Handbook*”) notes the intent of the drafters of the provisions:

Memory of the trials of major war criminals was still very much alive, and there was agreement on the part of States that war criminals should not be protected. There was also a desire on the part of States to deny admission to their territories of criminals who would present a danger to security and public order.

In relation to Article 1F(b), the drafters emphasised the need to strike a balance “between a potential threat to the community of refuge and the interest of the individual who has a well-founded fear of persecution”.<sup>10</sup> The UNHCR has

6 Article 1A(2) of the Convention defines ‘refugee’ for the purposes of the Convention. Article 33(1) establishes the obligation of *non-refoulement*.

7 Regional agreements contain very similar clauses. See for example the *Principles and Criteria for the Protection of and Assistance to Central American Refugees, Returnees, and Displaced Persons in Latin America*, drafted by the International Conference on Central American Refugees (“CIREFCA”) in May 1989, UN Doc A/43/874 (1988).

8 Note 3 *supra*. The different possible interpretations of the vaguely worded Article 1F(c) are summarised by JC Hathaway, *The Law of Refugee Status*, Butterworths (1991) p 226-9. This article does not examine Article 1F(c) in depth: it has been the least utilised provision, and is usually read as applying to persons in positions of power, and thus is inapplicable to the posed hypothetical. I note, however, that this view has been repeatedly challenged (see discussion in *Pushpanathan v Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982), and may yet lead to more jurisprudence concerning its applicability to non-state actors.

9 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (“*UNHCR Handbook*”), (Geneva, January 1992) at para 148 HCR/1P/4/Eng/REV.2. See also paragraph 3 of the 1997 UNHCR Executive Committee *Note on the Exclusion Clauses*, UN Doc EC/47/SC/CRP.29.

10 GS Goodwin-Gill, *The Refugee in International Law*, Clarendon (2<sup>nd</sup> ed, 1996) p 108. See also *UNHCR Handbook*, *ibid* at para 151. The provision must be seen in parallel with Article 33(2), which permits the return of a refugee if there are reasonable grounds for regarding them as a danger to the security of the country. The two are sometimes confused. See JC Hathaway, note 4 *supra*, p 225.

continued to advocate this balancing approach to the provision. In its *1997 Note on the Exclusion Clauses*, the UNHCR notes (at paragraph 16):

The intention of this Article [1F(b)] is to reconcile the aims of rendering due justice to a refugee, even if he or she has committed a crime, and to protect the community in the country of asylum from the danger posed by criminal elements fleeing justice.<sup>11</sup>

Commenting on the *travaux préparatoires* (preparatory work) generally, Hathaway summarises the mind-set of the drafters:

The decision to exclude such persons, even if they are genuinely at risk of persecution... is rooted in both a commitment to the promotion of an international morality and a pragmatic recognition that states are unlikely to agree to be bound by a regime which requires them to protect undesirable refugees.<sup>12</sup>

Three interlocking themes, or policy objectives, are thus apparent in the deliberations of the drafters:

- The promotion of a nascent ‘international morality,’ fostered by the post-War trials, under which the protection of perpetrators of atrocities was considered repugnant.<sup>13</sup> This ethical ideal lay dormant for several decades after Nuremberg and Tokyo before its revival with the establishment of the *ad hoc* war crimes tribunals and the decision in the *Pinochet* case.
- The humanitarian objective of only protecting ‘deserving’ refugees. According to the UNHCR, this objective reflects “the intrinsic links between ideas of humanity, equity, and the concept of refuge”.<sup>14</sup> In other words, the concept of a ‘refugee’ contains within it an equitable principle which excludes the possibility of a persecutor enjoying the legal status of a refugee.<sup>15</sup>
- The practical necessity of making concessions to state sovereignty in matters pertaining to ‘national’ security. While sovereignty is a notoriously unwieldy concept, it is deeply infused with the concept of a state’s prerogative to secure the integrity and safety of its people, values and borders.

These three themes, however, must be seen against the background of the overarching object and purpose of the Convention which, as Hathaway has

11 UNHCR Executive Committee, note 9 *supra*.

12 See JC Hathaway, note 4 *supra*, p 214.

13 This rhetoric did not, however, hinder the widespread practice of providing sanctuary to ‘useful’ Nazi war criminals.

14 1997 UNHCR Executive Committee, note 9 *supra* at para 3. In a rather reductionist reasoning, the Supreme Court of Canada examined the *travaux* in *Pushpanathan v Canada*, note 8 *supra*, and declared that “the general purpose of Article 1F is not the protection of the society of refuge from dangerous refugees. ...Rather, it is to exclude *ab initio* those who are not *bona fide* refugees at the time of their claim for refugee status.”

15 As the Canadian Supreme Court has asserted in its examination of the context, object and purpose of the exclusion clauses, “those who are responsible for the persecution which creates refugees should not enjoy the benefits of a Convention designed to protect those refugees”: *Pushpanathan v Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982 at para 63, per Bastarache J; also see *Sivakumar v Canada (Minister of Employment and Immigration)* [1994] 1 FC 433 at 445. Interestingly, the Supreme Court saw this principle as arising out of the fundamental human rights character of the Convention.

argued, is “to concern itself with actions which deny human dignity in any key way”.<sup>16</sup> As the central human rights concern of the Convention is the protection of those with a well-founded fear of persecution, an inevitable tension exists within the very definition of a refugee between these sometimes competing objectives. This tension provides the setting for an understanding of the implementation and interpretation of the exclusion clauses in state practice.

## B. Standard of Proof: How Serious is ‘Serious’?

The expression ‘serious reasons for considering’ establishes a vague standard for determining whether someone will be excluded from the Refugees Convention’s protection. The *UNHCR Handbook* gives little guidance for interpreting this phrase except to urge that interpretation “must be restrictive”.<sup>17</sup>

The UNHCR’s minimal guidance in regards to standards of proof, however, has failed to protect the balance created by the drafters between the humanitarian need of the asylum-seeker and what in Australia has been called the “order and safety of the receiving state”.<sup>18</sup> Not surprisingly, several states have exploited the vague standard of proof, disregarding the UNHCR’s call for restrictive application of the clause. In the US, the standard has been equated with the low threshold set in probable cause hearings.<sup>19</sup> In Canada, Australia, the UK and New Zealand, the standard has been declared by the Courts to be below even the civil ‘balance of probabilities’.<sup>20</sup>

In 1997, the UNHCR reiterated its call for a restrictive approach. Concerned at indications that the exclusion clauses would “become another avenue by which deserving cases are denied access to international protection”, the Executive Committee asserted that there should be “*substantially demonstrable ground*” for exclusion, and that the clause should only be used as “an extreme measure...[and interpreted] in a manner which does not undermine the integrity of international protection”.<sup>21</sup> In light of the little weight given to *UNHCR Executive Committee*

16 JC Hathaway, note 8 *supra*, p 108. The Canadian Supreme Court also came to this conclusion after an examination of the *travaux* and the text itself, notably the Preamble. See *Canada (Attorney General) v Ward* [1993] 2 SCR 689 at 733, per La Forest J; and *Pushpanathan v Canada*, *ibid*. Contrast this with the *obiter* of McHugh J of the High Court of Australia in *Ibrahim v Minister for Immigration and Multicultural Affairs* [2000] HCA 55 (26 October 2000) at para 139, who asserts that the drafters “had no commitment to basing the Convention in the international promotion of human rights”.

17 *UNHCR Handbook*, note 9 *supra* at para 149.

18 *Tenzin Dhayakpa v Minister for Immigration and Ethnic Affairs* (1995) 62 FCR 556, per French J. This remains the leading case on Article 1F(b).

19 *Ofosu v McElroy*, 933 FSupp 237 (SDNY, 1995).

20 For Canada, *Ramirez v Canada (Minister of Employment and Immigration)* (1992) 89 DLR (4th) 173. For New Zealand, see *Refugee Appeal No 1248/93 Re TP* (31/7/95), affirmed in *S v Refugee Status Appeals Authority* [1998] 2 NZLR 291. For Australia, see *Re Hapugoda and Minister for Immigration and Multicultural Affairs* (1997) 25 AAR 1 in which the Tribunal followed the Canadian case of *Ramirez*. I note, however, that in *Tenzin*, note 18 *supra* at 563, French J called for ‘strong evidence’ of the commission of the crime, even if the evidence is not conclusive. In the UK, the Court of Appeal in *The Secretary of State for the Home Department v Shafiq Ur Rehman* [2000] 3 AllER 778 rejected the Special Immigration Appeals Commission’s advocacy of a ‘high civil balance of probabilities’ test in relation to cases with national security implications.

21 See UNHCR Executive Committee, note 9 *supra* at paras 21 and 4 respectively.

*Conclusions* and *Notes* in most jurisdictions, it is unsurprising that their plea has been ineffective.

Legitimate concern about the trend of lowering the standard of proof has been expressed by a leading member of the Australian judiciary. Noting “the extreme consequences which can flow from an affirmative finding”, Justice Mathews has warned that “[t]o re-state this test in terms of a standard of proof is unnecessary and may in some cases lead to confusion and error”.<sup>22</sup> While this is a welcome caveat, Justice Mathews’ call for ‘substantial content’ to be given to the clear words of the text has equally failed to add clarity to the debate.

The ambiguity surrounding the standard of proof, and the related issue of the treatment of evidence, is exacerbated by the unique role played by administrative decision-makers in the determination procedure. As the Convention drafters pointed out, they are usually in the anomalous position of having discretionary powers to make what are essentially judicial decisions regarding the likelihood of criminal guilt. Indeed, Lord MacDonald, the United Kingdom delegate at the drafters’ convention warned that “it is dangerous to entrust such a power to the executive organs of a government”.<sup>23</sup>

Given the seriousness of the consequences of a decision to exclude, and the low standard of proof set in most common law jurisdictions, judicial scrutiny of the fairness of the administrative process and the treatment of evidence can provide some protection against the danger of cursory administrative decision-making which threatens to undermine the balance between humanitarian and sovereignty objectives. This safeguard was recognised by the European Court of Human Rights in *Chahal v UK*, which found that an appeal of a judicial nature is an entitlement which an asylum seeker facing potential deportation must be afforded.<sup>24</sup>

The crucial supervisory role which can be played by the judiciary is illustrated by the recent decision of the full Federal Court of Australia in *Singh v Minister for Immigration and Multicultural Affairs*.<sup>25</sup> In that case, the Administrative Appeals Tribunal (“AAT”) had decided on the likelihood of Singh’s criminal guilt as a result of his membership of a Sikh armed group without having given proper consideration to reliable information about the group and its activities, the nature of the crimes in which he was allegedly involved, or whether civilians were targeted as opposed to ‘political’ targets. In remitting the matter to the AAT, the Court admonished the Tribunal for its ‘laconic’ reasoning. Judicial oversight in this case ensured that the relaxed evidentiary requirements at the administrative decision-making level, and the practical irrelevancy of applying the Convention ‘standard’ of proof, did not result in an unjust outcome.

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22 *W97/164 and Minister for Immigration and Multicultural Affairs* AAT No 12974 [1998] AATA 618 (10 June 1998) at 41-3, per Mathews J. Justice Mathews follows an earlier, pre-*Ramirez*, Canadian line of authority. See *Moreno v Canada* (Minister of Employment and Immigration) (1993) 107 DLR (4th) 424, and *Re Jolly and Minister of Manpower and Immigration* (1975) 54 DLR (3d) 277.

23 5 UNHRAOR (325th mtg) at 670, December 14, 1950. Cited by JC Hathaway, note 4 *supra*, p 215.

24 *Chahal v UK*, 1996 Eur Ct HR, Reports of Judgments and Decision 1831, 23 Eur Hum Rts Rep 413 (1997).

25 [2000] FCA 1125.

Ultimately, however, judicial review should not be relied upon as a panacea for defects at the administrative level: as we shall see below, judicial deference to the Executive in matters relating to ‘national sovereignty’ has made the determination system more susceptible to political imperatives.

### III. ARTICLE 1F(A)

#### A. Identifying the Correct Exclusion Category

##### (i) Which Instruments?

Article 1F(a) provides that war crimes, crimes against humanity, and crimes against peace are to be identified by reference to their definition in ‘international instruments’. This allows a decision-maker to consult the fast-growing and often confusing area of international criminal law; Goodwin-Gill, for instance, has suggested the 1945 Charter of the International Military Tribunal (the “IMT” or “Nuremberg Charter”), the Geneva Conventions and Additional Protocols, and the Statutes of the Tribunals on Former Yugoslavia and Rwanda are protocols to which reference might be made.<sup>26</sup> These are now complemented by the Rome Statute for the International Criminal Court.<sup>27</sup>

The use of the word ‘instruments’ in Article 1F(a) instead of ‘treaty’ or ‘agreement’ may be used to extend the scope of the applicable sources to case law and even custom.<sup>28</sup> In particular, decision-makers in several countries have referred to the International Law Commission’s (“ILC”) *Draft Code of Crimes against the Peace and Security of Mankind* (“Draft Code”) for guidance<sup>29</sup> as well as the UNHCR and even eminent ‘publicists’ such as Hathaway. Decisions of the *ad hoc* war crimes tribunals will also become increasingly relevant and are already being cited in Australia.<sup>30</sup>

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26 GS Goodwin-Gill, note 10 *supra*, p 99. I note that Goodwin-Gill only refers to Rwandan Tribunal in reference to crimes against humanity, not war crimes, presumably because it was an ‘internal conflict’.

27 Rome Statute of the International Criminal Court, UN Doc A/CONF.183/9.

28 This was argued by J Rikhof, “War Crimes, Crimes against Humanity and Immigration Law” (1995) 19 *Imm L R* (2<sup>nd</sup>) 18 at 53.

29 See Report of the International Law Commission, 43rd Sess, 29 Apr-19 Jul 1991, 46th Sess, Supp (No 10), A/46/10 (1991); and Report of the International Law Commission on the work of its forty-eighth session, 6 May - 26 July 1996, UN Doc A/51/10. The Draft Code was adopted in 1996 by the United Nations International Law Commission. The view of writers such as Rikhof and Hathaway that this Code is a relevant ‘international instrument’ for the purposes of Article 1F has lead to it being referred to by decision-makers in Canada, Australia and New Zealand. The UNHCR refers to it as a relevant ‘legal source’ at paragraph 9 of the 1997 UNHCR Executive Committee, note 9 *supra*. The draft code reaches beyond the traditional Nuremberg and Tokyo Charter categories of crimes. See LS Sunga, *The Emerging System of International Criminal Law: Developments in Codification and Implementation*, Kluwer Law International (1997) p 1.

30 See for instance *N96/1441 and Minister for Immigration and Multicultural Affairs* AAT No 12977 [1998] AATA 619 (11 June 1998). Sunga’s note of caution, however, should be heeded: these judgments cannot but reflect the particularities of the subject matter being adjudicated upon.

(ii) *Which Sub-category of Crime?*

The predicament of our hypothetical asylum-seeker highlights some of the potential difficulties involved in identifying which exclusion sub-category in Article 1F(a) to consider – war crimes, crimes against peace or crimes against humanity.

The first step in determining whether his activities should be considered under the category of ‘war crimes’ depends on the classification of the situation in Begonia as one of ‘armed conflict’, which would bring it within the scope of international humanitarian law. The approach of the Appeals Chamber of the Yugoslav Tribunal in *The Tadic Case* has provided some clarity on this issue, defining ‘armed conflict’ as “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”.<sup>31</sup> This broad definition would appear to cover the case of rebels when they are ‘armed’ and ‘organised’.<sup>32</sup> While Polonia’s insistence that no situation of ‘armed conflict’ exists in Begonia may be an attempt to deflect international scrutiny from the situation rather than a description of the objective reality, the isolation of the province from media and non-governmental monitors could hinder attempts to test this assertion.

If the traditional view is followed, that only ‘grave breaches’ of certain provisions of the Geneva Conventions and Additional Protocol I amount to ‘war crimes’, a decision-maker would also need to determine whether the armed conflict in Begonia is *international in scope*. According to the traditional view, violations of common Article 3 of the Geneva Conventions and Additional Protocol II, which establish the humanitarian law in situations of non-international armed conflict, do not constitute grave breaches and thus do not amount to ‘war crimes’ which would give rise to universal jurisdiction.<sup>33</sup>

This rather arcane and restrictive distinction between conflicts of international and national character has recently been dealt a laudable blow by developments at the international *ad hoc* tribunals. Although the Appeals Chamber in *The Tadic Case* reluctantly found that Article 2 of the Statute of the Yugoslav Tribunal, which provides for the prosecution of ‘grave breaches of the Geneva Conventions’, could only apply in situations of international armed conflicts, it held that Article 3 concerning the violation of the law or customs of war did apply to internal armed conflict, effectively covering the same crimes.<sup>34</sup> More explicitly, the Rwandan Statute “for the first time *criminalises* common Article 3”,<sup>35</sup> a move described by Meron as “the Statute’s greatest innovation”.<sup>36</sup> In

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31 *Judgements of the Appeals Chamber in the case The Prosecutor v Dusko Tadic alias Dule (“the Tadic case”),* IT-94-1-AR72, 2 October 1995 at para 70.

32 See G Robertson, *Crimes Against Humanity: The Struggle for Global Justice*, Penguin (1999) p 272.

33 See T Meron, “Editorial Comments” (1994) 88 *AJIL* 78 at 80. See also N Weisman, “Article 1F(a) of the 1951 Convention Relating to the Status of Refugees in Canadian Law” (1996) 8:1/2 *IJRL* 111 at 117, who argues that “such a narrow approach ... seems unduly restrictive”. Weisman notes that the Canadian Court in *Ramirez* effectively ignored the distinction, referring instead to ‘international crimes’.

34 Note 31 *supra* at 96-137, creatively employing the decision of the International Court of Justice in *Nicaragua v US* (1986) ICJ 4.

35 Report of the UN Secretary-General, UN Doc S/1995/134, para 12 (1995). (Emphasis added).



addition, the new Rome Statute clearly establishes that breaches of common Article 3 amount to war crimes.<sup>37</sup> To borrow the words of the Appeals Chamber in *The Tadic Case*, a ‘human-being-oriented approach’ is gradually undermining the distinction between laws regulating interstate and civil wars.<sup>38</sup>

In the case of the hypothetical asylum-seeker from Polonia, a decision-maker who follows the trend of considering breaches of the laws of war of an ‘internal character’ as war crimes would need to establish that the Begonia Liberation Front was an organized armed group, under responsible command, controlling a part of the territory, and able to carry out sustained and concerted military operations. Crucially, an assessment of the *intensity* of the conflict will also be necessary. If it only involved sporadic incidents of violence, its actions might be considered criminal in nature, in which case Article 1F(b) may be considered more appropriate than 1F(a).

If the ‘armed conflict’ criterion for war crimes cannot be met, our hypothetical asylum-seeker may nonetheless have committed a crime against humanity, for which no armed conflict is necessary – a view confirmed in both *The Tadic Case* and the Rwandan and Rome Statutes.<sup>39</sup> The fact that he was acting independently of a state does not preclude his liability for a crime against humanity, which can be committed by both governments and armed opposition groups.<sup>40</sup> Indeed, the majority of Article 1F(a) cases in Canada and Australia have characterised crimes by non-state actors as crimes against humanity.<sup>41</sup>

Under Article 6(c) of the Nuremberg Charter, crimes against humanity were declared to cover “murder, extermination, enslavement, deportation, and other inhumane acts”. Interpreting the phrase ‘other inhumane acts’, the Canadian Supreme Court in *R v Finta* found that certain acts involving ‘barbarous cruelty’ may also amount to a crime against humanity.<sup>42</sup> Similarly in Australia, Deane J in *Polyukhovich v Commonwealth* used the phrase “heinous conduct in the course of a persecution of civilian groups” to clarify the definition.<sup>43</sup> These descriptions

36 T Meron, “International Criminalization of Internal Atrocities” (1995) 89 *AJIL* 554 at 558.

37 Article 2(c) of the Rome Statute, note 27 *supra*. The UNHCR Executive Committee, note 9 *supra* at para 12 also asserts that war crimes can occur in internal conflicts.

38 *The Prosecutor v Dusko Tadic aka "Dule"*, note 31 *supra* at para 97.

39 The Appeals Chamber in *The Prosecutor v Dusko Tadic*, *ibid* noted at para 78 that “customary international law no longer requires any nexus between crimes against humanity and armed conflict”. See also Article 7 of the Rome Statute, and paragraph 11 of the UNHCR Executive Committee, note 9 *supra*. It should be noted that a war crime can also be a crime against humanity.

40 See N Weisman, note 33 *supra* at 127-8 for the liability of private individuals, reflected in the decisions at Nuremberg, and in Article 21 of the 1991 ILC *Draft Code and Commentary*.

41 See N Weisman, *ibid* at 126 for an overview of Canadian jurisprudence. She notes that, in light of *Ramirez*, note 20 *supra* and *R v Finta* [1994] 1 SCR 701; (1994) 112 DLR (4th) 513 at 597, these cases could also have been decided on the basis of war crimes. A full analysis of Australian case law has yet to be done. The conclusion is based on my own research.

42 As one of the few decisions on domestic war crime legislation, the reasoning of the Court in *R v Finta* note 41 *supra* has had international significance. *Finta* was applied in the context of Article 1F in *Equizabal v Canada (Minister of Employment and Immigration)* (1994) 24 *Imm LR* (2d) 277; and in Australia in *N96/1441 and Minister for Immigration and Multicultural Affairs*, note 30 *supra*.

43 *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 596, per Deane J. *Polyukhovich* related to the validity of the *War Crimes Act 1945* (Cth), and not Article 1F.

have influenced identification of such crimes in exclusion clause cases in both jurisdictions.<sup>44</sup>

An assessment of whether alleged acts were crimes against humanity, however, also involves deciding whether offences were committed in a widespread or systematic manner.<sup>45</sup> According to the *ILC Draft Code and Commentary*, 'systematic' means "pursuant to a preconceived plan or policy. The implementation of this plan or policy could result in the repeated or continuous commission of inhumane acts."<sup>46</sup> Whether 'policy' includes policies of toleration, acquiescence and implicit approval as well as actions of encouragement or promotion of such conduct is one of the on-going debates in this dynamic area of the law.<sup>47</sup> Controversy also exists as to "whether crimes against humanity should be confined solely to those based on racial, religious or political considerations".<sup>48</sup> While such a narrow view derives from the Nuremberg Charter and was retained in the Rwandan Statute, the Rome Statute has no such restrictions. Arguments have also been made, especially in the context of armed insurrection, that the targets of crimes against humanity must be civilians.<sup>49</sup>

### (iii) *Spreading the Net: Extending the Definition of Crimes Against Humanity*

The 'crimes against humanity' sub-category arguably covers a growing range of offences. In particular, the ambiguous content of the term 'other inhumane acts' which appears in Article 6(c) of the Nuremberg Charter, provides an opportunity to expand its content. The uncertainty of the phrase has been commented upon in the recent judgment of the Yugoslav Tribunal in *Prosecutor v Kupreskic* as "too general to provide a safe yardstick ... and hence ... is contrary to the principle of the specificity of criminal law".<sup>50</sup> Such a loophole could also tempt a decision-maker to treat the exclusion clause provision expansively.

44 As one of the few decisions on domestic war crime legislation, the reasoning of the Court has international significance. *Finta* was applied in the context of Article 1F in *Equizabal v Canada*, note 42 *supra*; and in Australia in *N96/1441 and Minister for Immigration and Multicultural Affairs*, note 42 *supra*.

45 See the *chapeau* of article 7 of the Rome Statute. The International Criminal Tribunal for Rwanda clarified these terms in *The Prosecutor v Akayesu*, Case No ICTR-96-4-T, Sept 2 1998: "The concept of 'widespread' may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims. The concept of 'systematic' may be defined as thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources".

46 Report of the International Law Commission on the work of its forty-eighth session, note 29 *supra* as per Article 18.

47 These issues were debated in June 2000 at the 5th Preparatory Commission Meeting for the International Criminal Court which was dedicated to the elaboration of the elements of crimes and Rules of Procedure and evidence. For arguments in favour of a broad interpretation of 'policy', see Human Rights Watch's Commentary to the 5th Preparatory Commission Meeting for the ICC (June 2000) at <<http://www.igc.org/hrw/campaigns/icc/prepcom-0600.html>>.

48 N Weisman, note 33 *supra* discusses this issue in relation to Article 1F.

49 See discussion in *W97/164 and Minister for Immigration and Multicultural Affairs*, note 22 *supra* at 60-69, per Mathews J.

50 *Prosecutor v Kupreskic*, Case No: IT-95-16-T, Jan 14th 2000, as cited by V Sautnet, *E Law - Murdoch University Electronic Journal of Law* 7(1) (March 2000).

A decision-maker referring to the ILC's 1991 *Draft Code*, for instance, will find a list of crimes against humanity that incorporates drug trafficking, recruiting and financing mercenaries, international terrorism, the massive destruction of property and severe damage to the environment.<sup>51</sup> Each of these offences has received international attention in the form of treaties and declarations, presenting a decision-maker with an abundance of offences under the category, each with its own definitional constructs.

Our hypothetical asylum-seeker – who fled after a warrant for his arrest had been issued – was charged under domestic legislation with broadly defined ‘terrorist’ offences, raising the issue of how such an offence may lead to exclusion. A decision-maker who refers to the ILC's 1991 *Draft Code* will find a particularly un-enlightened definition of ‘terrorism’:

[U]ndertaking, organizing, assisting, financing, encouraging or tolerating acts against another State directed at persons or property and of such a nature as to create a state of terror in the minds of public figures, groups of persons or the general public.<sup>52</sup>

As the Australian delegation to the ILC conference noted, this definition conceivably encompasses mere propaganda.<sup>53</sup> It also applies exclusively to acts which involve the crossing of national borders – something which was condemned by all states which commented on the draft Code.<sup>54</sup> The definition (amongst many others) was dropped in the truncated 1996 version of the Code. Nonetheless, ‘terrorism’ may still be considered a crime against humanity or even a crime against the peace or the purposes of the United Nations, and one of many varied and largely unhelpful definitions may be applied. As Beres has pointed out:

[D]efinitions [of terrorism]... offer no operational benefit for scholars or practitioners - the term has become so broad and so imprecise that it embraces even the most discrepant activities.<sup>55</sup>

The fact that ‘terrorism’ has largely defied international definition hinders the decision-maker, and creates a legal void into which domestic political considerations are more likely to flow during the determination process. As we shall see, this danger has started to be realised in state practice.

## B. Individual Liability under Article 1F(a)

Individual liability was clearly established as a principle of international humanitarian law at the Nuremberg and Tokyo trials. The principle and its

51 1991 *ILC Draft Code*, note 29 *supra* at 238; See GS Goodwin-Gill, note 10 *supra*, who notes that the 1973 General Assembly declared apartheid as a crime against humanity.

52 1991 *ILC Draft Code*, *ibid*.

53 See LS Sunga, note 29 *supra*, p 202.

54 The US *Commentaries* were particularly critical of the fact that the definition excluded acts committed by non-state actors.

55 LR Beres, “The Meaning of Terrorism: Jurisprudential and Definitional Clarifications” (1995) 28(2) *Vanderbilt Journal of Transnational Law* 239. See also LS Sunga, note 29 *supra* at Chapter III for an explanation of the different definitions.

exceptions – such as lack of required mental state, self-defence, duress/coercion – have been applied by states in the interpretation of Article 1F(a).<sup>56</sup>

In establishing individual liability, the degree of participation in the crimes is a relevant consideration. Article 6(c) of the Nuremberg Charter still provides an excellent starting point for this aspect:

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

Our hypothetical asylum seeker's proximity to the planning of the 1999 massacre of non-Begonis, and his level of involvement in the Begoni Liberation Front, are therefore key considerations.<sup>57</sup> The degree of proximity required, however, is another area that is currently being clarified in international negotiations and the jurisprudence of the new tribunals. Under one perspective, only direct participation would found liability. For instance, according to the 1996 *ILC Draft Commentary*:

[Article 2(3)(d) of the Code addresses] the responsibility of the planner or the co-conspirator who "participates in planning or conspiring to commit such a crime". This subparagraph provides that an individual who *participates directly in planning or conspiring to commit a crime* incurs responsibility for that crime even when it is actually committed by another individual. The term "*directly*" is used to indicate that the individual must in fact participate in some meaningful way in formulating the criminal plan or policy, including endorsing such a plan or policy proposed by another.<sup>58</sup>

The need to show 'direct' involvement was dropped in the Rome Charter, and criticised in the Yugoslav case of *The Prosecutor v Anto Furundzija* as too restrictive.<sup>59</sup> According to the Trial Chamber, 'assistance' need not be practical, and the *mens rea* need not be the same as the principal perpetrator (ie the positive intention to commit the crime), it may merely be the knowledge that assistance will aid in the crime's commission. For our hypothetical asylum seeker, this distinction might be critical: without further evidence, his admitted advocacy of violence is unlikely to be seen as 'directly' related to the subsequent massacre in a 'meaningful way', even if he knew about it in advance, and knew that his actions would promote its occurrence.

The UNHCR and most writers have asserted that mere membership of an organization known to be responsible for serious human rights violations is not sufficient to establish liability leading to Article 1F exclusion.<sup>60</sup> This view is in keeping with the judgments of Nuremberg, which did not impose strict collective

56 Canadian jurisprudence is particularly advanced. Australian Tribunals have followed Canadian precedents regarding 'accessorial liability' in *W97/164 and Minister for Immigration and Multicultural Affairs*, note 22 *supra*.

57 For a fuller analysis of criminal responsibility see JC Hathaway, note 4 *supra*, p 218.

58 Report of the International Law Commission on the work of its forty-eighth session, note 29 *supra*, commentary on Article 2 of the Draft Code. (Emphasis added).

59 *The Prosecutor v Anto Furundzija – Case No IT-95-17/1-T* (10 December 1998, Trial Chamber II) at paras 192-235 (on actus reus), and 236-249 (on mens rea).

60 See for eg, A Grahl-Madsen, *The Status of Refugees in International Law* vol 1, Sijthoff (1966) p 277. See also UNHCR Executive Committee, note 9 *supra* at paras 12-15.

responsibility.<sup>61</sup> Despite these strong precedents, mere membership has been sufficient to found a rebuttable presumption of accessorial liability in some jurisdictions. In the Canadian case of *Ramirez v Canada (Minister of Employment and Immigration)*, the Supreme Court found that:

[While] mere membership in an organisation which *from time to time* commits international offences is not normally sufficient for exclusion from refugee status... where an organisation is *principally directed to a limited, brutal purpose*... mere membership may by necessity involve personal and knowing participation in persecutorial acts.<sup>62</sup>

Australian tribunals, which have only recently examined issues of accessorial liability in relation to Article 1F, have followed another line of reasoning in Canadian cases (in *Moreno v Canada (Minister of Employment and Immigration)*<sup>63</sup> and *R v Finta*<sup>64</sup>) which, noting the need to determine the existence of a shared common purpose, have stressed that liability must be ‘determined subjectively’.<sup>65</sup> In other words, a finding of complicity in an international crime still requires establishing the requisite mental element, or *mens rea*, of the individual implicated. This is in keeping with the UNHCR’s *Note on the Exclusion Clause*, which recommends that liability be determined by reference to the “knowledge, intention and moral choice on the part of the individual concerned”.<sup>66</sup>

Should the character of an organization of which an asylum seeker is a known member determine his or her liability, the characterisation of the organization will become the key focal point as opposed to the individual’s mental state. This would provide a tempting opportunity for the country of refuge to concentrate on the allegedly ‘terrorist’ organization, and would necessarily detract from an objective review of the individual asylum seeker’s activities and opinions.

For instance, it would be problematic for an asylum seeker who is a member of a ‘terrorist’ organisation as defined under the UK’s Terrorism Bill to overcome the burden of proving that the organisation was not ‘principally directed to a limited, brutal purpose’ (ie the test established in *Ramirez*).<sup>67</sup> This burden is especially acute where membership of a proscribed organization is in itself considered a criminal offence in the host country, as it would be under the new Terrorism Bill. This situation already exists under US legislation, whereby

61 N Weisman, note 33 *supra* at 135.

62 *Ramirez*, note 20 *supra* at 317. Cited in recent Australian cases, eg *SRL and Minister for Immigration and Multicultural Affairs* [2000] AATA 128. A similar line is taken by the UNHCR in *The Exclusion Clauses: Guidelines on their Application* (December 1996) at para 47. See also M Bliss, “‘Serious Reasons for Considering’: Minimum Standards of Procedural Fairness in the Application of the Article 1(F) Exclusion clauses” in *IJRL* (2000, forthcoming).

63 (1993) 107 DLR (4th) 424.

64 Note 41 *supra*.

65 *W97/164 and Minister for Immigration and Multicultural Affairs*, note 22 *supra* at 78, per Mathews J, which was the first Australian authority to deal with accessorial liability under Article 1F. This reasoning has been followed in subsequent cases, eg *SRL and Minister for Immigration and Multicultural Affairs*, note 62 *supra*.

66 UNHCR Executive Committee, note 9 *supra* at para 13.

67 The Terrorism Bill as brought from the House of Commons on 20th March 2000 [HL Bill 49].

an asylum seeker may be excluded on the basis of mere membership of a designated 'terrorist' organization.<sup>68</sup> Whether an administrative decision-maker would be able to act contrary to government policy in its findings of fact about the 'seriousness' of the inherent criminality of membership of a proscribed organization – and whether such policies or decisions made by reference to them are susceptible to judicial review – raises interesting questions of administrative law which are beyond the scope of this paper.

How the politically charged language of 'terrorism' has become incorporated into the objective fact-finding process is particularly apparent in developments in the application of the non-political crime sub-category.

#### IV. ARTICLE 1F(B): SERIOUS NON-POLITICAL CRIME

The boundaries between the different heads of exclusion can be somewhat fluid, depending on how an activity is classified and the context in which it occurs. If our hypothetical Begonian's activities are found not to have occurred in an 'armed conflict' and not to have been 'atrocious', 'heinous' or systematic enough to warrant labelling as a crime against humanity, he may nonetheless be caught by the expanding web of Article 1F(b).

##### A. The 'Non-political' Criterion and the 'Terrorism' Test

The *UNHCR Handbook* establishes three tests for determining whether an offence is 'political':

- i) whether it has been committed out of genuine political motives and not merely for personal reasons or gain (the 'nature and purpose of the offence');
- ii) whether a close and direct causal link exists between the crime committed and its alleged political purpose and object.
- iii) whether the political element of the offence outweighs its common-law character. This would not be the case if the acts committed are grossly out of proportion to the alleged objective. The political nature of the offence is also more difficult to accept if it involves acts of an atrocious nature.<sup>69</sup>

These tests can be classified as 'genuine motivation', 'causal proximity' and 'proportionality'. As with Article 1F(a), the tests also necessitate an objective assessment of the nature and activities of an organisation and the nature of an individual's support for it.<sup>70</sup>

Despite the three-test guideline provided by the *UNHCR Handbook*, courts in many jurisdictions have preferred to adopt the 'political offences' exclusion test

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68 See Immigration and Nationality Act (INA) §219(a), 8 USC §1189(a)(1).

69 *UNHCR Handbook*, note 9 *supra* at para 152.

70 The Canadian Courts have mandated such inquiries of decision-makers. See *Ramirez*, note 20 *supra*. For a fuller exposition of the three prong test, see *Gil v Canada (Minister of Employment and Immigration)* [1994] FCJ 1559, which made use of extensive analysis of UK, Canadian and US extradition law.

applied in extradition law to determine whether an act is political.<sup>71</sup> This test focusses almost exclusively on an assessment of the nature and consequences of the act,<sup>72</sup> and is analogous to the UNHCR's proportionality (or 'atrocious offence') test.<sup>73</sup> For Glidewell LJ in the UK's Court of Appeal, for instance, an airport bombing by the Islamic Salvation Front ("FIS") in Algeria, in which the appellant had participated, was "an atrocious act, grossly out of proportion to any genuine political objective".<sup>74</sup> Genuine political motive, in other words, may be 'trumped' or 'negated' by the seriousness of the crime.

This approach is theoretically consistent with the *UNHCR Handbook's* reasoning. And while it is undoubtedly true that an assessment of proportionality (and even proximity) leaves "considerable room for judicial manoeuvre",<sup>75</sup> this danger should be tempered by heeding the UNHCR's call for a restrictive interpretation of the exclusion clause.

The majority in the House of Lords, however, rejected both the proportionality and proximity tests established by Glidewell LJ and the Court of Appeal in *T's Case*, declaring that proximity in particular entailed an unacceptably high level of subjectivity.<sup>76</sup> In the place of the proximity test, Lords Mustill and Slynn instead reasserted the traditional 'incidence' theory in extradition law whereby there must be:

[A] political struggle either in existence or in contemplation between the government and one or more opposing factions within the state where the offence is committed, and that the commission of the offence is an incident of this struggle.<sup>77</sup>

While the incidence theory has a tried and tested history which can be usefully applied to establishing the 'political' nature of an activity, it is the Lords' next step that is cause for concern, and even incredulity. Dismissing the proportionality test as too subjective, the Lords expressed a preference for an assessment whereby an act which amounted to 'terrorism' would not be considered political. This begs the question of what definition of terrorism is being applied in such cases. If, for instance, the definition is that which appears in the Terrorism Bill, which extends to those who have committed 'serious violence against any person *or property*',<sup>78</sup> the breadth of the coverage of the exclusion clause could become immense.

The Lords' reasoning is seemingly based on a trend in extradition law to exclude 'terrorist acts' from the 'political offence' exception. For instance,

71 See *T v Secretary of State for Home Department* [1995] 1 WLR 545, per Glidewell LJ, as well as countless references to extradition law in Australian Tribunal decisions. The US has notably rejected the analogy in *McMullen v INS* 788 F2d 591 (9<sup>th</sup> Circuit, 1986).

72 *T v Secretary of State for Home Department*, note 71 *supra*, per Glidewell LJ.

73 See C Harvey, "Exclusion from Refugee Status and the Interpretation of 'Political Crimes'" (1996) 47(3) *Northern Ireland Legal Quarterly* 314 at 317.

74 See *T's case*, note 71 *supra* at 558-9, per Glidewell LJ.

75 C Harvey, note 73 *supra* at 318.

76 [1996] 2 WLR 766.

77 *Ibid* at 764, per Lord Mustill.

78 For a critique of the UK's Terrorism Bill, in particular its extension to cover crimes against property, see *Memorandum by JUSTICE*, attached to the House of Lords' Select Committee on Delegated Powers and Deregulation – Twelfth Report, HL 57, 14 April 2000.

Article 5 the 1996 Convention Relating to Extradition between Member States of the European Union, should it come into force, would remove the political offence exception in relation to 'terrorist acts', including 'offences of conspiracy or association' to commit such acts.<sup>79</sup> The UNHCR has decried this provision as creating a "blurring of the distinction between a terrorist and other political offenders".<sup>80</sup> A similar criticism could be directed at the decision in *T's Case*.

The Lords' establishment of a 'terrorist' test makes a nonsense of their stated intention to eliminate subjective decision-making. As already noted, 'terrorism' has defied international definition, increasing the potential for the intrusion of the values and political ideology of the state of refuge. The danger of converting the politicised language of terrorism into formal legal norms has been recognised by the Australian judiciary. In a polite refusal to adopt the terrorist test established by the Lords in *T's Case*, the Full Court of the Federal Court of Australia in *Singh v Minister for Immigration and Multicultural Affairs* noted that "the illustration or label should not be mistaken for definition".<sup>81</sup> The Court's reasoning points to the danger of attempting to give legal content to such an emotive term: the very act of using the term 'terrorism' indicates that we have prejudged the situation.<sup>82</sup> This judgment is also, clearly, ideologically based:

[W]hether the African National Congress or the Palestinian Liberation Organization were considered legitimate representatives of peoples struggling for self-determination, or on the contrary, as terrorist organizations, depended not so much on the means and methods they may have employed to reach their objectives, but on purely political considerations reflecting particular ideological proclivities and self-interests.<sup>83</sup>

Conceivably, had Nelson Mandela escaped from Robben Island in the 1980s and found his way to the United Kingdom, he would have risked exclusion on the basis of friendly relations between the UK Government and the South African state, and the infamous designation by Margaret Thatcher of the ANC as 'just another terrorist organization' would have weighed heavily against him.

The potential for the determination system to become blatantly politicised through an application of Article 1F(b) and the use of the emotive label of 'terrorist' is illustrated in the US Government's arguments in *INS v Doherty*.<sup>84</sup>

79 Council Act of 27 September 1996 drawing up the Convention Relating to Extradition between the Member States of the European Union, Official Journal C 313, 23/10/1996, p 0011 - 0011. See also the Council of Europe's 1977 *Declaration on Terrorism* which calls on member states not to give refuge to terrorists. See also the self-explanatory European Parliament, *Resolution on Terrorism and Preclusion of Access to Asylum Procedures*, 31 January 1997, para 20.

80 See K Landgren, "Deflecting International Protection by Treaty: Bilateral and Multilateral Accords on Extradition, Readmission and the Inadmissibility of Asylum Requests," Working Paper No 10, *New Issues in Refugee Research* (June 1999, unpublished). Landgren cites C Lewis, *Note on the EU Convention on Extradition*, UNHCR, 17 September 1996 (unpublished), and V Turk, *Note on the EU Draft Convention on Extradition*, UNHCR, 17 July 1996 (unpublished).

81 Note 25 *supra*, paras 25-26. Note that the Federal Court did, however, advocate the use of the 'incidence' theory.

82 See generally RE Rubenstein, *Alchemists of Revolution – Terrorism in the Modern World*, IB Tauris (1987).

83 LS Sunga, note 29 *supra*, p 193, referring to the US characterization of terrorism.

84 112 S Ct 719 (1992). *Doherty* concerned a PIRA escapee from Crumlin Road prison, Belfast, whom the British had requested be extradited. *Doherty* applied for asylum.



The Government submitted that the Attorney General<sup>85</sup> had the right to consider “the Nation’s opposition to terrorism and other foreign policy concerns when exercising his or her discretion to grant or deny asylum to an alien”.<sup>86</sup> Such decisions, being matters of foreign policy, would also be unreviewable. In the eyes of one commentator, the Justice Department’s arguments represented “a frontal attack on the concept of an ideologically and geographically neutral asylum system”,<sup>87</sup> directly contradicting the purpose of the Refugee Act of 1980<sup>88</sup> and the 1967 Protocol which at Article 3 prohibits discrimination based on ‘country of origin’.<sup>89</sup>

The US Supreme Court in *INS v Juan Anibal Aguirre-Aguirre* (“Aguirre”)<sup>90</sup> has now cemented this re-politicization of the determination procedure in relation to Article 1F, and removed any substantive role for judicial supervision. Noting the earlier decision of the Court in *INS v Abudu*,<sup>91</sup> in which it was stated that immigration officials “exercise especially sensitive political functions that implicate questions of foreign relations”, the Court found:

A decision by the Attorney General to deem a certain violent offense committed in another country as political in nature, and to allow the perpetrators to remain in the United States, may affect our relations with that country or its neighbors. The judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions.<sup>92</sup>

This leaves the determination process to be dictated, however subtly, by foreign policy objectives, overriding the sensible balancing tests of proportionality, proximity and general motivation.<sup>93</sup> It is a notable backward step from the 1980 *Refugee Act* which, as noted by the Second Circuit, Congress intended “to insulate the asylum process from the influences of politics and foreign policy” which had so characterised it during the Cold War period.<sup>94</sup>

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85 Under US law, those who meet the definition of refugee may be granted asylum at the discretion of the Attorney General, through his or her delegates, the Immigration and Naturalization Service (INS) and Immigration Judges. In addition, the principle of *non-refoulement* finds its equivalent in the ‘withholding of deportation’ procedure. *McMullen v INS*, note 71 *supra*, is the main authority for the interpretation of the provisions allowing exclusion from these processes.

86 Brief for Petitioner, cited by J Fitzpatrick & R Pauw, “Foreign Policy, Asylum and Discretion” (1992) *Willamette Law Review* 751 at 751-2.

87 *Ibid* at 752.

88 The Refugee Act of 1980, 94 Stat. 102, amended the Immigration and Nationality Act and brought the domestic laws of the United States into conformity with its treaty obligations.

89 The 1967 Protocol removed the geographical and temporal limitations of the 1951 Convention.

90 526 US 415 (1999)

91 485 US 94, 110 (1988).

92 Note 90 *supra* at 6, available at <<http://laws.findlaw.com/us/000/97-1754.html>>. The Supreme Court followed a line of reasoning from *Chevron USA Inc v Natural Resources Defense Council* 467 US 837 (1984) regarding the deference that is due to an agency’s construction of the statute which it administers.

93 The reasoning of the Court begs the question whether the ‘political opinion’ category in the refugee definition will similarly raise foreign policy concerns.

94 The Supreme Court also implied this when it declared that one of Congress’ primary purposes in the 1980 Act was to make US refugee law conform to the UN Protocol and Convention. See *INS v Cardoza-Fonseca* 480 US 421 (1987) at 436-7. For ideology and immigration in the US generally, see SH Legomsky, *Immigration and Refugee Policy*, Foundation Press (1997) p 307-314.

(i) *The Legitimate Taking Up of Arms: Terrorist or Freedom Fighter*

The House of Lord's reasoning in *T's Case* illustrates the danger of applying extradition law to refugee law. Even if the 'political offence' exclusion may be obsolete in some extradition contexts (eg between 'democratic' states or Members of the European Communities), it retains its relevance in refugee law for exactly the sort of situation which our hypothetical asylum seeker may find himself in: it should, in theory, allow him to appeal to the right of self-determination and to justify the taking up of arms as the only way to achieve political change. At the very least, this should be a relevant consideration in the exercise of administrative discretion.

The legitimate taking up of arms has been recognised in refugee law since its very inception. As Grahl-Madsen points out,<sup>95</sup> the Allies applied refugee protection principles to individuals persecuted on account of their resistance activities against the Nazi regime and other totalitarian governments, including individuals who were guilty of treason. This formed the context in which the Refugees Convention was adopted. Subsequent UNHCR statements have gone further, confirming that legitimate violent resistance may found a claim to refugee status. For instance, in legal advice provided to the US District Court in 1988, the UNHCR advised that:

[I]n Africa, a coup is often the only means through which a change in the political regime can be effected... As a result, fear of persecution arising from an unsuccessful coup attempt may be regarded as grounded upon political opinion/activities and within the ambit of the 1951 Convention.<sup>96</sup>

This line of reasoning is also in keeping with the establishment in humanitarian law of the recognition of 'lawful belligerents'.<sup>97</sup> United States jurisprudence similarly supports recognition of this category, with decision-makers obliged to consider the *nature of the polity being rebelled against* to gauge the legitimacy of the armed revolt. Thus "a politically motivated attempt to overthrow by violent means a government which has no procedures for peaceful change" will not preclude the granting of refugee status.<sup>98</sup> As the Ninth Circuit colourfully put it, "when you are dealing with an ass it may be necessary to move the beast by a blow on a sensitive part even though what you want to move are the feet".<sup>99</sup>

In theory, if our hypothetical asylum seeker was seeking protection in the United States, he would therefore need to provide persuasive evidence that citizens, or at least Begonis, have no right to peacefully change their government, and that "the purpose of the rebellion" is "the enlargement of political freedom

95 A Grahl-Madsen, note 60 *supra*, p 228-9.

96 Letter from UNHCR to Bradford Smith, Esq, August 30, 1988, in relation to *Dwomoh v Sava*, US District Court, October 13, 1988.

97 Article I of Regulations annexed to 1907 Hague Convention IV, and Geneva Protocols I, II and III which reiterate the same conditions, making express reference to resistance movements. Article 44 of the 1977 Geneva Protocol I modified the requirements of distinctive emblems and carrying arms openly in "an attempt to afford legal recognition to certain types of guerilla activity": See A Roberts & R Guelff, *Documents on the Laws of War*, Clarendon (2nd ed, 1989) p 388.

98 *Dwomoh v Sava*, note 96 *supra*.

99 *Aguirre v INS* 121 F3d 521 (9th Cir, 1997) per Circuit Judge Noonan.

for the population as a whole".<sup>100</sup> It is not clear, however, whether the Ninth Circuit's objective reasoning will survive the repercussions of *Aguirre*, which has declared that such decisions affect the relations between governments and are therefore essentially foreign policy concerns, best left in the hands of the Attorney General and essentially unreviewable by the judiciary. Similar deference to the Executive would undoubtedly arise out of the UK's 'terrorism' test, as demonstrated in the recent decision of the Court of Appeal in *Secretary of State for the Home Department v Rehman* in which Lord Woolf MR declared that an assessment of what is a 'terrorist' activity goes to matters of national security, which is a question of policy primarily for the Secretary of State.<sup>101</sup>

Even in the absence of *Aguirre* and *Rehman*, the assessment of the nature of the polity being rebelled against is particularly vulnerable to politicisation. Thus friendly governments are frequently deemed to legitimately prosecute, rather than persecute, their political opponents.<sup>102</sup> For instance, in the United States a student caught distributing political pamphlets in El Salvador and threatened with execution was found to be facing legitimate prosecution by the Government, whereas an Afghani supplying arms to the Mujahedin was found to face persecution by the 'illegitimate' Afghan authorities.<sup>103</sup>

The politicisation of the implementation of Article 1F(b), however, is merely a reflection of the more subtle political processes underlying determination of refugee status in general. Several authors have pointed out in relation to decisions in the United States that supposedly independent adjudicators are "discriminating against asylum-seekers on the basis of their nationality and ... obstructing certain nationals who attempt to claim asylum".<sup>104</sup> Thus, for instance, Salvadorans fearing torture have been shown to be disadvantaged in comparison to Iranians.<sup>105</sup>

It is likely that such subtle political considerations inform decisions about the legitimacy of insurrection in other jurisdictions. Notably, the assessment of the legitimacy of taking up arms will be influenced by the nature and source of the evidence considered by the decision-maker. As the level of human rights violations may also influence the legitimate exercise of the right to self-

100 *In re: DL & AM* Int. Dec 3162 (BIA Oct 16, 1991) per Board Member Heilman.

101 *Secretary of State for the Home Department v Shafiq Ur Rehman*, note 21 *supra*.

102 See J Fitzpatrick and R Pauw, note 86 *supra* at 768, citing D Anker and C Blum, "New Trends in Asylum Jurisprudence; The Aftermath of the US Supreme Court Decision in *INS v Cardoza-Fonseca*," (1989) 1 *IJRL* 67-80.

103 See *In re Chinchilla* (BIA Feb 9 1989) (unreported); compared to *In re Izatula* Int. Dec 3127 (BIA Feb 6 1990), in which it was concluded that a "legitimate and internationally recognised government" can take action "to defend itself from an armed rebellion". Some decisions regarding El Salvador defy credulity. Thus in rejecting the asylum-seekers claim in *MA v INS* 899 F2d 304 (4<sup>th</sup> Cir, 1990), the Fourth Circuit stated: "the government will not harm him because of political opinion, but rather because he is or was an opponent of the government".

104 Amnesty International USA, *Reasonable Fear: Human Rights and United States Refugee Policy* (1990) at 2.

105 See generally D Anker, "Determining Asylum Claims in the United States: Executive Summary of an Empirical Study of the Adjudication of Asylum Claims Before the Immigration Court," in H Adelman (ed), *Refugee Policy: Canada and the United States*, York Lanes Press (1991).

determination, the accuracy of such reporting is particularly crucial. And just as the use of State Department advisory opinions to influence Immigration and Naturalisation Service adjudications is worrying,<sup>107</sup> refugee advocates in Australia have similarly criticised the reliance of decision-makers on cables from the Department of Foreign Affairs and Trade (“DFAT”) on a given country situation, to the detriment of reports by independent non-governmental organisations. As a submission to an Australian Senate Committee examining the refugee determination process noted, such information “can at times be influenced by trade and diplomatic interests, which can inhibit a frank and impartial analysis of the human rights situation in a given country”.<sup>108</sup> Indeed, DFAT cables may exceed the problems associated with State Department advisory opinions, as they are more *ad hoc* and are often generated at the request of a decision-maker.

(ii) *Preferable Approaches*

The reasoning of Lord Lloyd of Berwick, who was in the minority in *T’s case*, provides a more enlightened approach to an objective investigation of the non-political criterion. For Lord Lloyd, a determination of the political nature of an offence can be made by bearing in mind “the *means* used to achieve the political end” and:

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*.<sup>109</sup>

This reasoning, which has been cited with approval in Australia in *Chanaka Hapugoda v Minister for Immigration and Multicultural Affairs*,<sup>110</sup> is more in keeping with the equitable and humanitarian considerations identified as key objectives of the exclusion clauses, and with the recognition in international humanitarian law that some armed activities may have legitimate political motives. It would also be equally applicable to an appropriate understanding of Article 1F(a), especially when assessing incidents which arise in a state of internal conflict.

Developments in human rights law may provide further guidance for objectively distinguishing the political from non-political by adding substance to international humanitarian law’s recognition of struggles for self-determination.<sup>111</sup> As Chadwick has pointed out:

106 Although no known study exists, refugee advocates frequently condemn this practice.

107 SH Legomsky, note 94 *supra*. For other articles on the political bias amongst decision-maker, see Legomsky’s comprehensive bibliography.

108 Submission by South Brisbane Immigration and Community Legal Service, reported in Senate Legal and Constitutional References Committee: *A Sanctuary Under Review* (June 2000) at 13 and 153. The Committee took these concerns seriously, and recommended better methods of critical evaluation of information.

109 *T’s case*, note 76 *supra* at 786-7, per Lord Lloyd.

110 No V96/328 ATT No 11738, Administrative Appeals Tribunal.

111 General Protocol I, Article 1 although this arguably only refers to traditional colonial situations.

[Self determination can be viewed as] a new standard for evaluating a government's right to rule, and to manage system change.... [It has also] expanded to include 'peoples' in post-colonial states, or in those states where human rights violations by a government<sup>112</sup> afford a justification for the use of force in modes of self-defence or -preservation.

While it is difficult to settle on the degree of gravity of violations that would found a legitimate claim to international recognition of the right to self-determination in an existing (non-colonial) state, Tomuschat notes that:

[I]f a State machinery turns itself into an apparatus of terror which persecutes specific groups of the population, those groups cannot be held obligated to remain loyally under the jurisdiction of that State.<sup>113</sup>

Other writers have linked the right to self-determination to the existence of a truly representative government. If a government is unrepresentative and repressive, international law may recognise "even a seriously destabilizing self-determination claim as legitimate".<sup>114</sup>

In the case of Begonia, the asylum seeker could argue – and attempt to support by independent evidence – that serious human rights violations perpetrated against the Begoni as a people *as such*, in addition to the failure to hold elections for a lengthy period entitled him to take arms against the state in the exercise of his right to self-determination.

## B. Serious Crime - Moving from Rebuttable to Conclusive Presumptions

If the non-political nature of an asylum seeker's actions is established, a decision-maker needs to consider the seriousness of the crimes allegedly committed.

According to the *UNHCR Handbook*, a 'serious' crime must be a "capital crime or a very grave punishable act".<sup>115</sup> The UNHCR gave specific content to this definition following the arrival of some 125 000 Cuban asylum-seekers in the United States in 1980. The organisation proposed that, in the absence of any political factors, a *presumption* of serious crime might be raised by evidence of commission of a non-exhaustive list of acts including homicide, rape, child molesting, wounding, arson, drugs trafficking and armed robbery.<sup>116</sup> Other offences, such as burglary, simple robbery, embezzlement, possession of drugs in quantities exceeding that required for personal use, and assault, might also raise the presumption if accompanied by factors such as use of weapons, injury to persons, and evidence of habitual conduct. The elements suggested as tending to rebut a presumption include "the minority of the offender; parole; elapse of five

112 E Chadwick, *Self-Determination, Terrorism and the International Humanitarian Law of Armed Conflict*, Martinus Nijhoff (1996). Chadwick dedicates a chapter to 'Problems in defining which 'peoples' are entitled to use force to achieve self-determination.'

113 C Tomuschat, "Self-determination in a Post-Colonial World' in C Tomuschat (ed), *Modern Law of Self-Determination* (1993) at 2, cited in HJ Steiner and P Alson, *International Human Rights in Context*, Clarendon (1996) at 979-80.

114 F Kirgis, "The Degrees of Self-determination in the United Nations Era" (1994) 88 *Am J Int L* 304 at 308.

115 *UNHCR Handbook*, note 9 *supra* at para 155.

116 See GS Goodwin-Gill, note 10 *supra*, p 106, who participated in the exercise.

years since conviction or completion of sentence; general good character (for example, one offence only); offender was merely accomplice”, and other circumstances such as provocation and self-defence.<sup>117</sup>

This ‘rebuttable presumption’ approach complements the *UNHCR Handbook’s* reference to ‘mitigating’ and ‘aggravating’ circumstances at paragraph 157. In particular, the *Handbook* asserts that when someone has served their sentence or been pardoned, there is a presumption *against* the applicability of the exclusion clause.

Unfortunately, US legislation imposes on decision-makers an expansive regime of crimes which will lead to *mandatory* exclusion. In the implementation of Article 33(2) (which parallels Article 1F(b) but applies to those already recognised as refugees who have subsequently committed a ‘particularly serious crime’), an alien who is convicted of an ‘aggravated felony’ is conclusively presumed to have committed a particularly serious crime.<sup>118</sup> No independent finding that an individual is a danger to the community is required,<sup>119</sup> in clear breach of the wording of Article 33(2).<sup>120</sup> A sweeping expansion of the aggravated felony definition in criminal law to include offences as innocuous as document fraud or deceit – a relatively common ‘crime’ for refugees fleeing persecution – heightens the danger of such an approach.<sup>121</sup> Someone with a conviction of over five years is thus conclusively presumed ineligible for asylum and the ‘withholding of deportation’.<sup>122</sup> No consideration is given to ‘mitigating circumstances’.<sup>123</sup> The legislation also appears to override the finding of the courts that no crime is inherently ‘particularly serious’ and that all circumstances must be considered on a case by case basis.<sup>124</sup> Unfortunately, the Seventh and Third Circuit Courts have upheld the current law as not contrary to an alien’s due process rights, nor to the Convention.<sup>125</sup>

117 For an example of the application of this test, see *Chanaka Hapugoda*, note 110 *supra* at paragraph 36.

118 See BM Guerra, “A Tortured Construction: the Illegal Immigration Reform and Immigrant Responsibility Act’s Express bar Denying Criminal Aliens Withholding of Deportations Defies the Principles of International Law” (1997) *Saint Mary’s Law Journal* 941 at 948, 960-5, and 966 for an examination and critique of these developments.

119 Affirmed in *Ahmetovic v INS* 62 F3d 48, 52-3 (2nd Cir, 1995).

120 Article 1F(b) must be seen as parallel to Article 33(2), which denies prohibition of expulsion or return being claimed by “a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a *particularly* serious crime, constitutes a danger to the community of that country”.

121 For a comprehensive overview of the different provisions, see generally EG Abriel, “Presumed Ineligible: the Effect of Criminal Conviction on Application for Asylum and Withholding of Deportation under s 515 of the Immigration Act of 1990” (1992) 6 *Geor Imm LJ* 27. See also SH Legomsky, note 94 *supra* at 888.

122 ‘Withholding of deportation’ is the US equivalent of the principle of *non-refoulement*. For ‘withholding’, the law now says that a five year prison sentence will lead to such conclusive presumptions.

123 As EG Abriel, note 121 *supra*, points out at 369, “[t]he consequences of criminal conduct for persons seeking protection in the United States are much more severe under U.S. law than... under the UN Convention and Protocol”.

124 See the four-fold test established by the BIA in *Matter of Frentescu* 18 I&N Dec 244, 246 n7 (BIA 1982). I note that the US legislation muddles the different Convention tests set in Article 33(2) (‘particularly serious’) and Article 1F(b) (‘serious’).

125 See *Garcia v INS* 7 F3d 1320, 1326 (7th Cir, 1993); and *Al-Salehi v INS*, 47 F3d 390, 395 (10th Cir, 1995).

## V. BALANCING HARM FEARED AGAINST OFFENCE COMMITTED

In relation to Article 1F(b), the *UNHCR Handbook* states:

In applying this exclusion clause, it is also necessary to strike a balance between the nature of the offence presumed to have been committed ... and the degree of persecution feared.<sup>126</sup>

This balancing test is similarly advocated by all eminent writers in the field,<sup>127</sup> and is clearly consistent with the object and purpose of the clauses, and overarching human rights purpose of the Convention. However, it has been explicitly abandoned in the common law jurisdictions of the United Kingdom,<sup>128</sup> Australia,<sup>129</sup> Canada,<sup>130</sup> New Zealand,<sup>131</sup> and the United States.<sup>132</sup> In other words, once a non-political crime is characterised as 'serious', no assessment of the feared persecution is required.

While an argument could be made that Article 1F(a) should also involve a balancing process, others have insisted that the drafters considered these crimes "in a light different from that of other crimes".<sup>133</sup> Following this reasoning, a necessary 'balancing' exercise for Article 1F(a) has been rejected by the courts in Canada<sup>134</sup> and Australia.<sup>135</sup> Given the opprobrium which attaches to such crimes, such a conclusion is inevitable and arguably in keeping with the policy objectives of the clauses. Its abandonment in relation to Article 1F(b), however, is a stark manifestation of judicial deference to national sovereignty concerns.

In Australia, the lack of a weighing principle is given systemic support by the institutional arrangements for review under the *Migration Act 1958* (Cth)

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- 126 Paragraph 156. The UNHCR reiterated this balancing test in the *1997 Note on Exclusion* at paragraph 18.
- 127 See GS Goodwin-Gill GS, note 10 *supra*, p 106-7; also JC Hathaway, note 4 *supra*, p 224, who considers it the most important element of the determination. See also P Zambelli, "Procedural Aspects of Cessation and Exclusion: the Canadian Experience" (1996) 8:1/2 *International Journal of Refugee Law* 144 at 152 who notes Grahl-Madsen's advocacy of a balancing process for the three sub-clauses.
- 128 In *T v Secretary for the Home Department*, note 71 *supra* upheld on appeal in the House of Lords. It could be argued, however, that balancing is still required for deportation of a recognised refugee under Article 33(2), as found in *R v Secretary of State for the Home Department, Ex parte Chahal* [1995] WLR 526 at 533, per Staughton LJ.
- 129 See *Dhayakpa v Minister for Immigration and Ethnic Affairs* (1995) 62 FCR 556. Although the decision could be read otherwise, Tribunals read it as abandoning a balancing exercise.
- 130 Confirmed by the Supreme Court in *Pushpanathan v Canada (Minister of Citizenship and Immigration)* note 8 *supra* and *Gil v Canada (Minister of Employment and Immigration)* note 10 *supra*.
- 131 *S v Refugee Status Appeals Authority* [1998] 2 NZLR 291. For a critique of the decision, see A Ives, "Exclusion for Extortion: An Inquiry Into the Suitability of a Balancing Exercise for Article 1F(b) of the Refugee Convention (June 1998)" (1998) at <<http://io.knowledge-basket.co.nz/refugee/comment.htm>> .
- 132 *INS v Aguirre-Aguirre*, note 90 *supra* confirming earlier practice, notably *Matter of Rodriguez Coto*, Int. Decision 2985, (Feb 21, 1985) at 3 and following the House of Lords in *T v Secretary of State*, note 76 *supra* at 882, per Lord Mustill.
- 133 A Grahl-Madsen, note 60 *supra*, p 281.
- 134 *Gonzalez v MEI* (1994) 170 NR 302 (FCA) at 308.
- 135 *Chanaka Hapugoda and Minister for Immigration and Multicultural Affairs* (1997) 46 ALD 654, in which the Federal Court's interpretation of 1F(b) was held to be applicable to 1F(a).

whereby an appeal from a primary rejection on the basis of an exclusion clause is reviewed not by the expert refugee review body, but by the Administrative Appeals Tribunal ("AAT"),<sup>136</sup> which has neither the appropriate resources nor the expertise to consider fully the human rights implications of a negative decision.

Removing the balancing test raises serious human rights concerns. Technically, an asylum seeker with a well-founded fear of torture or extrajudicial (or indeed judicial) execution can be sent back to their country of origin without their claims having been properly examined. This concern is exacerbated when one considers the low burden of proof required to establish the commission of certain crimes now deemed 'serious' and the inherent potential for an exclusion decision to be laced with political considerations.

Rhetoric about concern for the preservation of national sovereignty, or even something as weighty as the promotion of 'international morality', should not be permitted to undermine the non-derogable right not to be subjected to torture. The European Convention on Human Rights<sup>137</sup> has preserved this minimum safeguard in asylum claims: the European Court of Human Rights has repeatedly affirmed that Article 3 prohibits the forcible return of a person who is threatened with torture and cruel, inhuman or degrading treatment, asserting that the right not to be subjected to such violations is one of the fundamental values of democratic societies.<sup>138</sup> This reasoning represents the flip-side of the international morality argument, according to which it is more repugnant to return any human being to a situation which they would be tortured than it is to protect a persecutor. Yet as the quote from the UK's Special Immigration Appeals Commission which heads this article indicates, this proposition is far from being accepted as an ethical conclusion, regardless of its legal standing in Europe.

Even in the absence of a balancing principle, there is a strong argument that good decision-making warrants that inclusion be considered before exclusion. As the Federal Court of Canada has pointed out in the case of *Moreno*, it is often very difficult to separate the grounds of a refugee claim from the circumstances giving rise to the application of an exclusion clause.<sup>139</sup> The UNHCR has similarly argued:

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136 Section 500(1)(c) of the *Migration Act* 1958 gives the AAT jurisdiction to review a decision under Article 1F. Other appeals for refusal to grant a protection visa go to the Refugee Review Tribunal.

137 European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 ETS 221, ETS 5.

138 *HLR v France* 745 Eur Ct of HR (1997), which affirmed *Soering v UK* 161 Eur Ct HR (ser A) para 88 (1989); *Chahal v UK*, note 24 *supra* at para 79. See J Kokott & H Berger-Kerkhoff, "European Court of Human Rights judgments on deportations of alien informant facing private violence in Colombia and of alien treated for AIDS while imprisoned" (1998) *AJIL* 92(3) at 524-528. See Guerra, note 118 *supra* at 969 ff for obligations under Article 3 of the Convention against Torture which explicitly forbids refoulement, with no exceptions.

139 Note 63 *supra*.



'Inclusion before exclusion' gives full effect to the applicant's right to be heard and ensures that exclusion decisions are made in accord with standards of fairness and natural justice.<sup>140</sup>

While a full examination of procedural fairness in the context of Article 1F lies outside the scope of this essay, the seriousness of the consequences of a decision to exclude should provide a strong argument for implementing some of the basic procedural safeguards that apply in domestic and international criminal law.<sup>141</sup> The fact that the basic protections found in Article 14 of the International Covenant on Civil and Political Rights ("ICCPR") have now been largely incorporated into the statutes of the Yugoslav and Rwandan *ad hoc* Tribunals and the Rome Statute would also militate in favour of greater protection of those suspected of involvement in international crimes in domestic jurisdictions.<sup>142</sup> At the very least, governments should ensure free and competent legal representation and access to a competent independent interpreter for those faced with such technical criminal matters. Procedural safeguards may also ameliorate some of the dangers noted above of ideological intrusions into the decision-making process, the lowering of the standard of proof, and the tendency for states to ignore the UNHCR's calls for proportionality, proximity and balancing tests.

Unfortunately, removing due process rights for asylum seekers has become yet another tactic used by states to obstruct access to determination procedures. In Australia, for instance, legislators have severely restricted the rights of judicial review for asylum seekers, and are attempting to introduce a 'privative' clause to oust the jurisdiction of the Courts altogether.<sup>143</sup> Similar trends are being witnessed in the United Kingdom.<sup>144</sup>

## VI. CONCLUSIONS AND DIRECTIONS

Current refugee law has been conceptualised by Hathaway as "a compromise between the sovereign prerogatives of states to control immigration and the reality of coerced movements of person at risk".<sup>145</sup> This compromise was nowhere more evident than in the debates surrounding the drafting of the exclusion clauses. Unfortunately, contracting states have exploited the resulting concessions to state sovereignty, seen in the lowering of the standard of proof,

140 Report on Article 1F Exclusion Clauses, Standing Committee of the UNHCR Executive Committee, paragraph 15(i) (1998) (unpublished text of oral report, cited by M Bliss, note 62 *supra*). The UNHCR also argue that "the practice of employing exclusion as a test of admissibility is inconsistent with the exceptional nature of the exclusion clauses".

141 For an exhaustive analysis of procedural fairness in the context of the exclusion clauses, see M Bliss, note 62 *supra*.

142 See Articles 20 and 21 Yugoslav Statute, Articles 19 and 20 Rwandan Statute. The protections in the statutes exceed those in the Charters of the Nuremberg or Tokyo Tribunals. See T Meron, note 33 *supra* at 83.

143 See Migration Amendment Legislation Bill 1998 [2000], still before the Australian Senate.

144 See generally P Billings, "The Influence of Human Rights Law on the Procedural Formalities of the Asylum Determination Process," (1998) 2:1 *IJHR* 32-61.

145 JC Hathaway, note 4 *supra*, p 2.

the undermining of the 'political offence' exception, and the removal of the balancing test which would mandate a consideration of the degree of persecution feared. By moving away from the objective standards recommended by the UNHCR, the doors have also been opened to more direct political interference in the decision-making process, seen most starkly in the introduction of the 'terrorism test' and the decision in *Aguirre*.<sup>146</sup>

For practitioners attempting to uphold the Refugees Convention's stated objective of affirming the enjoyment of fundamental rights and freedoms without discrimination, these trends are worrying. Placing refugee procedures in a human rights framework may help to counter some of the dangers arising from expansive interpretations of the exclusion clauses, for instance by focusing on non-discriminatory procedural guarantees, using the mechanisms established under the ICCPR and Torture Convention to protect non-derogable rights,<sup>147</sup> and appealing to the growing law relating to self-determination. Similarly, developments in international humanitarian and criminal law should inform the decision-making process. The more neutral and objective tests found within international humanitarian law can be referred to when establishing the existence of an armed conflict and assessing the nature of an armed group's activities, and the definitions and procedural norms in the Statutes, Rules and decisions of the international tribunals should be brought before domestic tribunals.

Theoretically, the establishment of a depoliticised and properly empowered permanent international criminal court could alleviate the tensions inherent in the exclusion clauses by setting up mechanisms whereby international criminals identified in the refugee process could be tried domestically or removed to face international justice. This would help address the oft-repeated concerns of states that criminals are abusing their asylum systems by ensuring their identification and prosecution, and perhaps even deterring their arrival in the first place. It would also ensure a fair judicial determination of guilt for those accused of international crimes, and could act as a stimulus for domestic systems to apply more objective, human rights-based criteria when assessing claims through closer adherence to international criminal norms. While the existence of such a robust regime still seems a long way off, the legal developments and popular movements of the last decade provide hope for the eventual realisation of this key goal of global justice.

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146 Further impetus for more universal establishment of a 'terrorism' test has been supplied by the UN General Assembly, which in 1997 called on states not to give refugee status to 'terrorists': UN General Assembly Resolution, 16 January 1997, Fifty-first session, *Measures to eliminate international terrorism* UN Doc A/RES/51/210, and the annex to the *Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism*, 17 December 1996.

147 The Optional Protocol to the International Convention on Civil and Political Rights, 999 UNTS 171. And Article 22 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res 39/56, 39 UN GAOR, Supp (No 51), UN Doc A/39/51 at 197 (1984).