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Whether there is a duty for a country to take an accused as a political refugee if his request for asylum is based on a well-founded fear of persecution.

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Memorandum for the
Office of the Prosecutor
International Criminal Tribunal for Rwanda

Issue 16: Whether there is a duty for a country to take an accused as a political refugee if his request for asylum is based on a well-founded fear of persecution.

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International War Crimes Prosecution Project
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11. *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999).

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14. *Prosecutor v. Bagilishema*, Case No.: ICTR-95-1, Judgement, 7 July 2001, section VI Verdict.

Reports and Law Review Articles

15. Amnesty International,*United States of America: A Safe Haven for Torturers* (April 2002)

16. James Sloan, *The Application of Article 1F of the 1951 Convention in Canada and the United States,* 12 International Journal of Refugee Law 223 (Special Supplementary Issue) (2000).

17. Lawyers Committee for Human Rights (LCHR), *Safeguarding the Rights of Refugees Under the Exclusion Clauses: Summary Findings of a Project Of the Lawyers Committee for Human Rights,* (October 2000).

18. Robert K. McAndrews, *Asylum Law Reform*, 8 New Eng. Journal of Int'l & Comp. Law 103 (2002).

19. Sibylle Kapferer, *Exclusion Clause in Europe—A Comparative Overview of State Practice in France, Belgium, and the United Kingdom*, 12 International Journal of Refugee Law 196 (Special Supplementary Issue) (2000).

Book Chapters and Sections

20. Dirk Vanheule, *United Kingdom,* in *Who is a Refugee?: A Comparative Case Law Study* 564 (Jean-Yves Carlier, Dirk Vanheule, Klaus Hullman, and Carlos Pena Galiano, eds., Kluwer Law Int. 1997).

21. Dirk Vanheule, *Belgium*, in *Who is a Refugee?: A Comparative Case Law Study* 59 (Jean-Yves Carlier, Dirk Vanheule, Klaus Hullman, and Carlos Pena Caliano, eds., Kluwer Law Int. 1997).

22. Gerry Van Kessel, *Canada's Approach Towards Exclusion Ground 1F in Refugee Law in Context: the Exclusion Clause* 288 (Peter J. Van Krieken, ed., T.M.C. Asser Press 1999).

23. Guy S. Goodwin-Gill, *The Refugee in International Law* 167 (2d ed. 1996).

24. Jeanne Donald and Dirk Vanheule, *Canada* in *Who is a Refugee?: A Comparative Case Law Study* 170 (Jean-Yves Carlier, Dirk Vanheule, Klass Hullman, and Carlos Pena Gailano, eds., Kluwer Law Int. 1997).

25. Klaudia Schand and Carlos Pena Caliano, *France* in *Who is a Refugee?: A Comparative Case Law Study* 373 (Jean-Yves Carlier, Dirk Vanheule, Klaus Hullman, and Carlos Pena Galiano, eds., Kluwer Law Int. 1997).

26. Nicole Michel, *Purposes and Principles of the United Nations: The Way in Which France Applies Article 1F(c)* in *Refugee Law in Context: The Exclusion Clause* 294 (Peter J. Van Krieken, ed., T.M.C. Asser Press 1999).

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27. ICTR, Tribunal Releases Bagilishema on Conditions (press release) ICTR.INFO-9-272.EN, Arusha, 8 June 2001.

28. UNHCR, Executive Committee, Note on the Exclusion Clauses, 30 May 1997.

29. UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status (1979, reedited 1992).

30. United Nations, Millennium Summit Multilateral Treaty Framework: An Invitation to Universal Participation, at 48-50 (6-8 Sept. 2000).

31. U.N High Commissioner for Human Rights, *Statement by Mary Robinson to the Ministerial Meeting of State Parties to the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, Geneva, 12 Dec. 2001.

32. William F. Schulz, *The Torturers Among Us,* The New York Review of Books, April 25, 2002.

Discussion

I. Introduction and summary conclusions.

The Rwandan crisis of 1994 caused the international community to examine more closely the terms of international instruments designed to protect asylum-seekers. Perpetrators of the Rwandan genocide fled along with the victims to neighboring countries seeking safety. Government officials as well as officials from the United Nation's office of refugee protection were unprepared to process the massive flow of refugees.

Refugee flows in recent years have been in the millions. Most flee to neighboring countries. But some attempt to find refuge in Europe or North America. As a result of the enormous increase in asylum requests in the 1990s, scholars and international organizations have turned their attention to certain provisions in international refugee law, provisions that were rarely applied before the refugee crises of the 1990s.

The exclusion provisions in refugee law have come to the center stage. This memorandum addresses narrow issues but they are well placed in the expanding literature on refugee exclusions. The issues that this report will address are:

A. Issues.

1) Whether there is a duty for a country to provide refugee status to an asylum-seeker who has been acquitted of all counts of an indictment by the International Criminal Tribunal for Rwanda (ICTR) but who, while subject to a Trial Chamber's order of conditional release, must defend himself at a later date against a Prosecutor's appeal of a Trial chamber's judgment.

2) Whether the relevant international refugee laws and State policies/practices provide for exclusions that would deny refugee status to an asylum-seeker who must defend himself against an ICTR Prosecutor's appeal of a Trial Chamber's acquittal judgment.

B. Conclusions

1. The European and North American nations examined in this report have all established clear policies and procedures for the provision of refugee protection for bona fide asylum-seekers. In addition, all the nations examined have adopted a number of provisions that disqualify non-bona fide asylum-seekers from refugee protection.

2. Caselaw from administrative tribunals and judicial courts demonstrates the recent developments in the application of exclusion provision determinations. The general trend among the European and North American nations examined is one of strict application of admission policies and exclusion law determinations.

3. With respect to the memorandum issues, the evidence supports the conclusion that the European and North American nations examined would likely deny refugee protection to any individual who has been accused of committing an international crime by the ICTR, even one who was acquitted at the trial stage but who must defend himself at a later date against a prosecutor's appeal of a trial changer's judgment.

II. Factual background

On 7 June 2001, the Trial Chamber of the International Criminal Tribunal for Rwanda acquitted the accused Ignance Bagilishema on all counts in the

indictment against him.[1] The Trial Chamber ordered the immediate release of the accused, pursuit to Rule 99(A) of the Rules of Procedure and Evidence.[2] The Trial Chamber stated that the order was without prejudice to any further order pursuant to Rule 99(B).[3] The following day, on 8 June 2001, the Trial Chamber ordered the conditional release of Ignance Bagilishema,[4] following the Prosecutor's request under Rule 99(B) for a new arrest warrant and continued detention pending the Prosecutor's appeal against the judgment of the Trial Chamber. The defense argued that Bagilishema should be released immediately. The Trial Chamber stated that it weighed the risk that Bagilishema might abscond during the appeals proceeding against the fact that he had been acquitted and he should exercise his fundamental right to liberty. Both the Prosecution and the Defense accepted the Trial Chamber's imposed conditions as an alternative to continued detention.

III. Legal Analysis.

A. International treaty protection and Asylum Exclusions

On 10 December 1948 the United Nations adopted the Universal Declaration of

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[1] Prosecutor v. Bagilishema, Case No.: ICTR-95-1, Judgement, 7 July 2001, section VI Verdict. [Reproduced in the accompanying notebook at Tab 14.]

[2]Rules of Procedure and Evidence, U.N. Doc. IT/32 Rev. 20, 12 April 2001 (Rule 99(a) provides: "In case of acquittal, the accused shall be released immediately.") [Reproduced in the accompanying notebook at Tab 4.]

[3]Id Rule 99(B) (Rule 99(B) provides: "If, at the time the judgement is pronounced, the Prosecutor advises the Trial Chamber in open court of his intention to file notice of appeal pursuant to Rule 10-8, the Trial Chamber may, at the request of the Prosecutor, issue a warrant for the arrest of the accused to take effect immediately.") [Reproduced in the accompanying notebook at Tab 4.]

[4]ICTR, Tribunal Releases Bagilishema on Conditions, (press release) ICTR/INFO-9-2-272.EN, Arusha, 8 June 2001. [Reproduced in the accompanying notebook at Tab 27.]

Human Rights.[5] One of the central principles of this document is the right to seek asylum from persecution which is provided in Article 14(1): "Everyone has the right to seek and to enjoy in other countries asylum from persecution." [6] The statutory foundation of modern international refugee law, however, is the 1951 Convention relating to the Status of Refugees[7] (1951 Refugee convention). In 1967, the Protocol relating to the Status of Refugees[8] (1967 Refugee Protocol) was adopted in order to remove the temporal and geographical limitations that were placed in the 1951 Refugee Convention, limitations that were put into place to target the protection of displaced persons in Europe following the Second World War. The 1967 Refugee Protocol incorporates, by reference, Articles 2 through 34 of the 1951 Refugee Convention. As of June 15, 2000, 136 countries have become parties to the 1951 Refugee Convention or the 1967 Refugee Protocol.[9]

The fundamental principle of the 1951 Refugee Convention is the right of an asylum seeker to non-refoulement (non-return), the prohibition against forcible return to territories where persecution is feared, which is provided in Article 33(1):

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group, or political opinion.[10]

According to Goodwin-Gill, an internationally recognized scholar of refugee law,

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[5] Universal Declaration of Human Rights, 10 Dec. 1948, UNGA res. 217 A(III). [Reproduced in the accompanying notebook at Tab 3.]

[6] *Id*. Art. 14(1).

[7] Convention relating to the Status of Refugees, 28 July 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137. [Reproduced in the accompanying notebook at Tab 2.]

[8] Protocol relating to the Status of Refugees, 31 Jan. 1967, 19 U.S.T 6223, 606 U.N.T.S. 267.

[9] United Nations, Millennium Summit Multilateral Treaty Framework: An Invitation to Universal Participation, at 48-50 (6-8 Sept. 2000). [Reproduced in the accompanying notebook at Tab 30.]

[10] 1951 Refugee Convention, *supra* note 7, Art. 33.

"[t]here is substantial, if not conclusive, authority that the principle (of non-refoulement) is binding on all states, independently of specific assent." [11]

The non-refoulement principle is also made explicit in the 1984 Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture).[12] There is an important difference between the 1951 Refugee Convention and the Convention Against Torture in terms of the requisite eligibility criteria for protected persons. Under the 1951 Refugee Convention, the refugee (asylum seeker) must establish that he or she has a "well founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[13] Whereas, under the Convention Against Torture, the person seeking refuge does not have to show that the danger of torture is related to any one of the five enumerated grounds stated in the 1951 Refugee Convention.

The principle of non-refoulement is not absolute. Article 33(2) of the 1951 Refugee Convention provides for the exclusion of refugee status for those claimants who would be considered a "danger to the security of the country," or where the claimant had been "convicted by a final judgement of a particularly serious crime" and "would be a danger to the community."[14] Article 32(1) includes an exclusion on the basis of "public

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[11] Guy S. Goodwin-Gill, *The Refugee in International Law*, at 167 (2nd ed. 1996). [Reproduced in the accompanying notebook at Tab 23.] *See also* U.N. High Commissioner for Human Rights, *Statement by Mary Robinson to the Ministerial Meeting of State Parties to the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, Geneva, 12 Dec. 2001 (where Commissioner Robinson stated that the principle of non-refoulement has achieved the status of customary international law.) [Reproduced in the accompanying notebook at Tab 31.]

[12] Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, 10 Dec. 1984, 1465 U.N.T.S. 85. Article 3(1) provides that: "[n]o State Party shall expel, return (refouler) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." [Reproduced in the accompanying notebook at Tab 1.]

[13] 1951 Refugee Convention, *supra* note 7, Art. 1A(2).
[14] *Id*. Art. 33(2).

order," as well as "national security." [15] Notwithstanding the explicit grounds for exclusion in Articles 32(1) and 33(2), State practice clearly shows a preference for making exclusion determinations based on Article 1F which provides that refugee protection (non-refoulement) "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 to 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 purpose and principles of the United Nations."[16]

Articles 1F(b) and (c) are essentially identical to the asylum exceptions that were provided in Article 14(2) of the Universal Declaration of Human Rights in 1948.[17]

States are provided with interpretive guidelines concerning policy formulations and procedural standards for the implementation of the three exclusion clauses by the Office of the United Nations High Commissioner for Refugees (UNHCR).[18] The UNHCR office publishes implementation source material, primarily through its Executive Committee, that is not binding on Party States but is nevertheless intended to be highly authoritative and is generally considered as such by the States. One of the key documents of the UNHCR is the Handbook on Procedures and Criteria for Determining

[15] Id. Art. 32(1).

[16] *Id*. Art. 1F(a-c)

[17] Universal Declaration of Human Rights, *supra* note 5, Art. 14(2): "This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations."

[18] The Office of the United Nations High Commissioner for Refugees was established under the Statute of the Office of the UNHCR, 14 Dec. 1950, UNGA res. 428 (V).

Refugee Status (UNHCR Handbook).[19] As a general implementation policy guide, the UNHCR Handbook cautions States to consider the serious consequences when making Article 1F exclusion determinations and recommends that "the interpretation of these exclusion clauses must be restrictive."[20] In an Executive Committee report entitled "Note on the Exclusion Clauses" (UNHCR Note),[21] the UNHCR states that the primary purpose of the 1951 Refugee Convention exclusion clauses are to deprive the perpetrators of serious crimes asylum protection and to protect the receiving countries from such criminals.[22] The Executive Committee also provides an explicit statement concerning the goal of avoiding inconsistent developments in international law: "If the protection provided by refugee law were permitted to afford protection to perpetrators of grave offenses, the practice of international protection would be in direct conflict with national and international law, and would contradict the humanitarian and peaceful nature of the concept of asylum."[23]

With respect to the three Article 1F(a) exclusion clauses, the UNHCR Handbook and the UNHCR Note provides implementation guidance to the States as follows:

1. Crimes Against Peace

The UNHCR Handbook does not define this statutory clause, nor is there any international legal instrument in force that specifically defines this category of criminal

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[19] UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status (1979, reedited 1992). [Reproduced in the accompanying notebook at Tab 29.]

[20] *Id*., para 149.

[21] UNHCR, Executive Committee, Note on the Exclusion Clauses, 30 May 1997. [Reproduced in the accompanying notebook at Tab 28.]

[22] Id., sec. 1.A(3)

[23] *Id.*

conduct. However, the UNHCR Note does provide some interpretive guidance. Section 2.A(I) of the UNHCR Note states that the criminal category of crimes against peace relates to the planning or waging of a war of aggression, or a war in violation of international treaties.[24] Aggression is defined as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any manner inconsistent with the Charter of the U.N."[25]

2. War Crimes

The UNHCR Handbook only refers generally to the 1945 London Agreement and the Charter of the International Military tribunal.[26] The UNHRC Note provides more specific interpretive guidance and states that the war crimes category refers to violations of international humanitarian law and the laws of armed conflict.[27] Specifically, the UNHCR Note cites Article 6 of the London Charter which includes crimes of murder, ill-treatment of civilian populations and prisoners of war, the killing of hostages, wanton destruction of cities, towns or villages, and devastation that is not justified by military necessity[28]. Other crimes include "grave breaches" that are specified in the 1949 Geneva Conventions and the 1977 Additional Protocol I, including, inter alia, willful killing, torture, indiscriminate attacks affecting civilians and forced population transfers.[29]

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[24] *Id*., sec. 2.A(I).

[25] *Id.*

[26] UNHCR, *supra* note 19, para. 150.

[27] UNHCR, *supra* note 21, sec. 2.A(ii).

[28] *Id.*

[29] Id.

The UNHCR Note also specifically cites the 1993 Statute of the International Tribunal of former Yugoslavia as a source for the definition of war crimes.[30] It is also noted that Article 76(1) of Additional Protocol I requires that women be protected from rape, forced prostitution and any form of indecent assault. The UNHCR Note states that the war crimes clause of Article 1F(a) applies to both internal and international armed conflicts and that individual liability under this provision does not require a link between the perpetrator and a State or a State-like entity[31]. Thus, war crimes can be committed by civilians as well as by military personnel.

3. Crimes Against Humanity

The UNHCR Handbook refers generally to the 1945 London Agreement and to the Charter of the International Military tribunal.[32] The UNHCR Note specifically cites the crimes of murder, extermination, enslavement, deportation against civilian populations, as well as crimes committed as part of a widespread or systemic attack against any civilian population on the basis of racial, ethnic, religious, or political grounds, including crimes of torture, persecution, and rape.[33]

The UNHCR Note states that these crimes are characterized by their deliberate and heinous nature. Genocide, which is not explicitly denoted in Article 1F(a), is specifically cited as a crime against humanity in the UNHCR Note and is characterized by the intent to destroy, in whole or in part, a particular group of people.[34] Also, unlike

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[30]Id.

[31]Id.

[32] UNHCR, *supra* note 19, para. 150.

[33]UNHCR, ,*supra* note 21, sec. 2.A(iii).

[34]Id.

war crimes and crimes against peace, the UNHCR Note states that crimes against humanity can be committed in peacetime or in a non-war context.[35] This category of exclusion applies to both internal and international armed conflicts and does not require an individual's connection with State authority.[36]

Concerning Article 1F(b), the exclusion based on the commission of a serious non-political crime outside the country of refuge, the UNHCR Handbook states that the aim of this exclusion is to protect the receiving country from the danger of admitting refugees who have committed serious crimes.[37] The UNHCR Handbook cautions States not to apply this exclusion to refugees who have committed only minor offences, but to reserve this exclusion to capital crimes or very grave punishable acts.[38] With respect to whether the offence is "non-political," the UNHCR Handbook states that an assessment is necessary concerning the possible link between the crime committed and its alleged political purpose and that the political element of the offence should outweigh its common-law character.[39] However, the UNHCR Handbook also states that the political nature of the offence cannot outweigh its criminal character if the offence involves "acts of atrocious nature." [40]

The UNHCR Note specifically lists examples of offences which are to be

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[35] Id.

[36] *Id.*

[37] UNHCR, *supra* note 19, para. 151

[38] *Id.* para. 155

[39] *Id.* para. 152

[40] *Id*.

considered serious, including rape, homicide, armed robbery, and arson.[41] The UNHCR Note state that refugees who commit serious crimes within the country of refuge are subject to exclusion on the basis of Article 32 or 33(2) of the 1951 Convention.[42] The UNHCR Handbook and the UNHCR Note both explain that States should apply a balancing test as to the nature and gravity of the offence presumed to have been committee against the degree of persecution feared should the asylum-seeker be returned to the country of origin.[43]

Concerning Article 1F(c), the exclusion clause based on offences contrary to the purposes and principles of the United Nations, the UNHCR Handbook states that this clause overlaps with the exclusion clauses in Article 1F(a) and that Article 1F(c) does not introduce any new element.[44] The UNHCR Handbook further explains that for an asylum-seeker to be excluded on the basis of Article 1F(c), the individual must have been in a position of power in a State and instrumental to the State's infringement of the principles of the United Nations.[45]

4. The "Serious Reasons" clause:

The introductory clause of Article 1F of the 1951 Convention states that the provisions of the Convention shall not apply to any person for whom there are "serious reasons" that the exclusion clauses should apply.[46] The 1951 Convention does not

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[41] UNHCR, *supra* note 21, para. 16.

[42] *Id*. para. 19

[43] *See id.* para 18, and UNHCR, *supra* note 19, para. 156.

[44] UNHCR, *supra* note 19, para. 156.

[45] *Id*., para. 163,

[46] *See* 1951 Convention, *supra* note 7, Art. 1F

provide States with any guidance concerning the "serious reasons" standard. However, although the UNHCR Handbook is also silent on this point, the UNHCR Note provides that States should "substantially demonstrate" their grounds for invoking an exclusion clause.[47] The UNHCR Note also states that to minimize the possibility of misuse, States must follow fair procedures with clear rules governing their usage.[48]

In September 1997, the UNHCR drafted an internal memo to provide guidance to the screening of Rwandan refugees in the Central African Republic.[49] The memo recommended that the "serious reasons" clause, as a standard of proof, was the equivalent to the criminal law standard relating to prima facie grounds for an indictment.[50] Further, the memo stated that the standard would equate with the standard required to bring a criminal indictment under the ICTR.[51] According to investigations conducted by members of the Lawyers Committee for Human Rights (LCHR) in the Central African Republic and in Tanzania of the screening processes of Rwandan refugees, individuals who were indicted by the ICTR were excluded from refugee status protection.[52] The

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[47]*See* UNHCR, *supra* note 21, para. 4.

[48] *Id*., para. 21. The UNHCR Note states that even if an exclusion clause is found to apply to a claimant, the individual might still be protected against refoulement under Article 3(1) of the 1984 Convention Against Torture (see supra note 12). This writer has not found a single instance, in the literature, whereby a State, after making a determination to exclude a claimant under an Article 1F clause, nevertheless admitted the individual for asylum protection under the 1984 Torture Convention.

[49]See Lawyers Committee for Human Rights (LCHR), *Safeguarding the Rights of Refugees Under the Exclusion Clauses: Summary Findings of a Project of the Lawyers Committee for Human Rights*, at 9 (October 2000) [Reproduced in the accompanying notebook at Tab 17.] (citing UNHCR Memo, Guidelines on Application of the Exclusion Clauses to Rwandan Asylum-Seekers (4 Aug. 1997) (internal UNHCR Memo).

[50]*Id.*

[51]*Id.*

[52]*Id*. at 9 and 11.

UNHCR issued a subsequent internal memo in which a higher threshold of proof was recommended, above the standard applied in domestic criminal indictments, and the UNHCR stated that the standard should be that of "more likely than not."[53]

B. Refugee Law and Practice in the States

1. United States

In the United States, the Refugee Act of 1980[54] (U.S. Refugee Act) established the statutory basis for the granting of asylum. The U.S. Refugee Act was codified as amending the Immigration and Nationality Act of 1952.[55] The definition of a refugee in the U.S. Refugee Act conforms strictly to the definition in the 1951 Convention[56] and the definition provides the requisite eligibility standard that an asylum-seeker must satisfy to be afforded a safe haven in the United States.

Under the immigration law of the United States, refugee status applies to those who are outside of U.S. territory when they apply for 1951 Convention protection.[57]

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[53]Lawyers Committee for Human Rights, *supra* note 49, (citing UNHCR Memorandum, Revised Internal Guidelines on Screening Rwandans, para. 8 (2 Dec. 1997) (internal UNHCR Memo). The Legal Advisory Group of the LCHR recommended that general standard for the "serious reasons" clause should be "clear and convincing," a standard between the lower threshold required for a domestic indictment and the higher threshold, beyond a reasonable doubt, required for a conviction. See LCHR, *supra* note 49 at 10. However, it is important to note that while the LCHR recommends that a higher threshold than the standard for a domestic indictment should generally be applied, the LCHR recommends that for individuals subject to an indictment, charge, or proceeding before an international tribunal, the indictment alone should usually constitute a "clear and convincing" reason for asylum exclusion. The rationale given for this exception to the general threshold standard recommended by the LCHR is that, in practice, the "tribunals require the existence of significant evidence of involvement in international crimes before an indictment is issued." *Id.* at 11.

[54] Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102 (1980).

[55] Immigration and Nationality Act of 1952; 8 U.S.C. 1101 et seq. (1994 & Supp. IV 1998).

[56] *Supra* note 8.

[57] *See* INA 101(a)(42)(A); 8 U.S.C. 1101 (a)(42)(A) (1994). [Reproduced in the accompanying notebook at Tab 4.]

Whereas, asylum status applies to those who are on U.S. soil or within U.S. territorial waters when they apply for protection.[58] Applicants for either status must satisfy the same requisite eligibility requirements. The granting of asylum is generally at the discretion of the Attorney General[59] whose authority is delegated to subordinate officials within the Immigration and Naturalization Service (INS) of the Department of Justice.

Generally, before an asylum-seeker is referred to an official for an interview, the individual's admission status must be determined. Under U.S. immigration law, individuals at ports-of-entry must pass through an inspection process which includes a determination concerning whether the individual falls within one of the enumerated classes of individuals who are inadmissible (also referred to as excludable). Section 212(a) of the Immigration and Nationality Act lists the classes of aliens who are ineligible for visas or admission.[60] Ineligible classes include individuals who have engaged in certain crimes, participated in acts of genocide, and any individual who is not in possession of the required entry documents (e.g. a valid immigration visa or a valid passport). Individuals in these or other enumerated classes will, generally, be issued deportation (removal) orders. For asylum-seekers who lack the necessary documents when attempting to enter the U.S., there are procedures that are to be followed in order to assure that bona fide claimants are not summarily deported. Nevertheless, recent changes in immigration law has established policies that, in general, subject arriving aliens without valid documents to an expedited removal process.[61] If an inspector believes that

[58] *See* INA 208(a); 8 U.S.C. 1158(a) (1994). [Reproduced in the accompanying notebook at Tab 6.]

[59]*See id*. (note also the status of "withholding of removal" INA 241(b)(3)(A); 8 U.S.C. 1231(b)(3)(A) (1994). [Reproduced in the accompanying notebook at Tab 9.]

[60] *See* INA 212(a); 8 U.S.C. 1182(a) (1984)

an asylum-seeker has a bona fide claim, but the individual lacks the proper admission documents, the individual is given a "Notice to Appear" order which requires the individual to defend him or herself before an administrative tribunal against possible deportation (removal).[62] Generally, such an individual would not have a right to seek a federal court review of a negative determination by the administrative tribunal.[63]

The asylum exclusions in the U.S. immigration law do not conform strictly to the terms of the provisions in the 1951 Convention. Section 208(b)(2)(A)(i –vi) of the Immigration and Nationality Act[64] lists the six grounds for mandatory exclusion from asylum protection:

(i) "the alien ordered, incited, assisted or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion";

(ii) "the alien, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of the United States";

(iii) "there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States";

(iv) "there are reasonable grounds for regarding the alien as a danger to the security of the United States";

(v) the alien is inadmissible or removable on the grounds of terrorist

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[61]*See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996), 8 U.S.C. 1225 (Supp. II 1997). For a critical review of this Act, see Robert K. McAndrews, *Asylum Law Reform*, 8 New Eng. Journal of Int'l & Comp. Law 103 (2002). [Reproduced in the accompanying notebook at Tab 18.]

[62]*See* 8 C.F.R. 208.30 (1999).

[63]*See* INA 242(a)(2); 8 U.S.C. 1252(a)(2) (Supp. IV 1998). [Reproduced in the accompanying notebook at Tab 10]

[64] INA 208(b)(2)(A); 8 U.S.C. 1158(b)(2)(A) (1994). [Reproduced in the accompanying notebook at Tab 7.]

activity or because the alien presents a danger to the security of the United States;

(vi) "the alien was firmly resettled in another country prior to arriving in the United States."

An asylum applicant is generally referred to an INS district office to appear before an asylum officer, unless the applicant must defend himself or herself against a removal (deportation) order. The INS asylum officer is empowered to conduct an asylum interview, which is a non-adversarial determination process, and the asylum officer has the authority to either grant or deny asylum status. The claimant has the burden of producing all relevant information, including affidavits, witnesses and documentation to support an asylum claim. The claimant has certain statutory and agency policy rights, notably the right to an interpreter and the right to be represented by counsel, however not at government expense. If the claimant receives a negative determination by an asylum officer, the individual would have a right to appeal to an administrative tribunal.

During the period of 1990 to 1995, the number of asylum applications ranged from 56,310 (1991) to 144,577 (1994).[65] The number of applicants with successful asylum claims during the same period ranged from 2,108 (1991) to 8,131 (1994), and the success rates ranged from 14.7 percent (1990) to 37.6 percent (1992).[66]

(i) Administrative Tribunal and Judicial Decisions

The United States relies primarily on subsection (iii), the serious non-political crimes clause, in making exclusion determinations. Subsection (i), the persecution

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[65]*See* Dirk Vanheule, *United States* in *Who is a Refugee?: A Comparative Case Law Study* 617 (Jean-Yves Carlier, Dirk Vanheule, Klaus Hullman, and Carlos Pena Galiano, eds. Kluwer Law Int. 1997.) [Reproduced in the accompanying notebook at Tab 24.]

[66]*Id.*

exclusion, is used in the context of individuals suspected of committing war crimes and crimes against humanity. The U.S. exclusion regime does not incorporate the Article 1F(c) exclusion, acts contrary to the purposes and principles of the United Nations.

Concerning subsection (iii), the persecution exclusion, the Bureau of Immigration Appeals (BIA), an administrative tribunal, held in one case that the exclusion did not apply because the evidence indicated that the military actions taken by the asylum-seeker were directed at the overthrow of a government and not at civilians.[67]

Balancing Test, "Serious Reasons," and Sources of Information

The UNHCR Handbook states that in applying the exclusion clause, it is necessary to strike a balance between the gravity and nature of the offense presumed to have been committed by the claimant and the persecution fear upon return.[68] Nevertheless, the administrative tribunals and federal courts in the U.S. do not regard this as a binding obligation, and, generally, they do not require a balancing test.

The Supreme Court, in *INS v. Aguirre-Aguirre*,[69] held that there is no need to consider the likelihood of persecution upon removal once it has been determined that an applicant had committed a serious non-political crime. *Aguirre-Aguirre* involved a Guatemalan national who, the court determined, engaged in acts of violence, with an alleged political purpose, that resulted in serious injury to numerous innocent civilians and considerable property destruction.[70] Aguirre-Aguirre, the asylum applicant, along

[67] *See* James Sloan, *The application of Article 1F of the 1951 Convention in Canada and the United States,* 12 International Journal of Refugee Law 223, 230 (Special Supplementary Issue) (2000). [Reproduced in the accompanying notebook at Tab 16.]

[68] *See* UNHCR, *supra* note 19, para. 156.

[69] *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999). [Reproduced in the accompanying notebook at Tab 11.]
[70] *Id.*, at 418.

with other students, burned ten buses, attacked police cars, and vandalized stores. The court held that his crimes were serious and non-political.[71]

Concerning the standard of proof for the "serious reasons" clause, the Ninth Circuit Court of Appeals, in *McMullen v. INS*,[72] applied a standard of probable cause. In making exclusion determinations, the authorities in the U.S. rely on declarations from the applicant and information gained through background checks, including fingerprints and photographs. In addition, decision-makers rely on State Department country reports as well as reports by other governments and international human rights organizations.[73]

Required Level of Complicity, *Mens Rea*, and Defenses

In the United States, exclusion determinations are made on individuals who have had direct or indirect involvement with serious criminal activity. The case of *McMullen v. INS* involved a self-described member of the Provisional Irish Republican Army (IRA) who, the court determined, aided the IRA's campaigns by training members and assisting in arms shipments.[74] The court stated that McMullen, the asylum-seeker, knowingly abetted and otherwise encouraged the violence of a modern terrorist organization.[75] Generally, membership alone in an organization alleged to be responsible for serious crimes is not a sufficient basis for an exclusion determination. Also, in general, the defenses of superior orders and duress are not accepted, nor are considerations of

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[71]*Id.*, at 431.

[72]*McMullen v. INS*, 788 F.2d 591 (1986). [Reproduced in the accompanying notebook at Tab 12.]

[73]*See* James Sloan, *supra* note 67, at 227.

[74]*See McMullen v. INS, supra* note 72, at 596.

[75]*Id.*

mitigating circumstances.

(ii) Amnesty International Report: United States of America: A Safe Haven for Torturers[76]

In a recent report, Amnesty International presents a disturbing examination of the extent to which individuals who are alleged to have committed serious violations of human rights and war crimes have nonetheless found a safe haven in the United States. Through case studies, interviews with U.S. government officials, and an analysis of government actions and inaction, the Amnesty International report represents an indictment of the failure of the U.S. government to deprive human rights violators of immunity from either prosecution or removal.

The report is relevant to the issue of this memorandum because if the findings of the Amnesty International report are true, many human rights violators and war criminals have either eluded immigration authorities in gaining entry to the U.S. or they have found legitimate avenues of admission and are free from government intrusion. According to the Director of the National Security Unit (NSU) of the INS, the NSU has investigated approximately 400 cases of suspected human rights violators.[77] The Director estimates that there are 800 to 1,000 suspected human rights violators who have entered the U.S. in recent years.[78]

According to Amnesty International, there has not been a single prosecution or

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[76]Amnesty International, *United States of America: A Safe Haven for Torturers* (April 2002). [Reproduced in the accompanying notebook at Tab 15.] *See* also William F. Schulz, *The Torturers Among Us*, The New York Review of Books, April 25, 2002. [Reproduced in the accompanying notebook at Tab 32.]

[77]*Id.* at 24

[78]*Id.*

extradiction of a suspected human rights violator under the Convention Against Torture.[79] And while there are a number of such violators who are currently in INS custody, the Amnesty International report provides specific case examples of suspected human rights violators and war criminals who have been granted diplomatic immunity,[80] or temporary protection status,[81] or who, because of alleged ties to the CIA, are free from removal action by the Justice Department.[82] The case of Pastor Elizaphan Ntakirutimana was examined in the report, the Rwandan minister who was indicted by the ICTR, and who the U.S. authorities finally surrendered to the ICTR following lengthy federal court challenges.[83]

In general, the Amnesty International report faults the U.S. government for its inaction and for holding certain political considerations above international treaty obligations under the Convention Against Torture and the 1951 Refugee Convention.

(iii) Conclusion

It is clear that the United States has established policies and procedures to provide refugee protection to bona fide asylum-seekers. And the U.S. has established exclusion policies and procedures that would prevent non-bona fide asylum-seekers from taking advantage of safe haven protection. In addition, immigration officials, at ports-of-entry, have the authority to issue removal (deportation) orders to inadmissible aliens, including

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[79]*Id* at 22.

[80]*Id.* at 29.

[81]*Id.* at 42.

[82]*Id.* at 34.

[83]*Id.* at 53. *See* also *Ntakirutimana v. Reno,* 184 F.3d 419 (1999). [Reproduced in the accompanying notebook at Tab 13.]

individuals who have committed certain crimes, participated in acts of genocide, and who lack the required entry documents.

Caselaw from the administrative tribunals and the federal courts support a conclusion that the U.S. asylum policies are strictly applied and exclusion determinations are made against non-bona fide applicants. The low standard of proof for exclusion, probable cause, and the lack of a balancing test concerning the gravity of the offense committed against the persecution feared if deported, and the general lack of recognition of affirmative defenses, all support a conclusion that the U.S. policy of exclusion is liberally applied. Therefore, with respect to the issues of this memorandum, the evidence supports a conclusion that with the adoption of the 1951 Refugee Convention and exclusions from its protection, the U.S. would likely deny refugee protection to an individual who has been accused of committing an international crime by the ICTR, even one who was acquitted at the trial stage but who must defend himself at a later date against a prosecutor's appeal of a trial
chamber's judgment.

A word of caution is appropriate, however, given the findings of the Amnesty International report concerning the loopholes that appear to exist that have allowed a large number of suspected human rights violators and war criminals to take up residence, legally or illegally, in the United States.

2. Canada

Refugee protection in Canada is governed by the Immigration Act. Section 2(a) of the Immigration Act provides the statutory definition of a refugee and the definition is

in strict conformity with the 1951 Convention. Refugee determinations are initially conducted by immigration officers and their supervisors. The initial screening is focused on a determination of whether the claimant is ineligible for admission based on an enumerated class of ineligible persons. According to the Canadian Director General of Refugees, Gerry Van Kessel, over 400 suspected war criminals have been refused in determinations made overseas in the early to mid-1990's on the basis of inadmissibility.[84] Inadmissible classes include "serious criminals," terrorists, and persons involved in atrocities such as genocide, war crimes and crimes against humanity.[85] In addition, the Immigration Act lists specific regimes as having been involved in war crimes, crimes against humanity, terrorism, and other serious human rights violations. Senior officials of such designated regimes are automatically considered inadmissible. Notably, the Rwandan government led by President Habyarimana and the interim government in power between April 1994 and July 1994 are among the proscribed regimes.[86] Applicants who are denied admission on grounds of statutory inadmissibility have limited rights of appeal. Director Van Kessel states that an assessment must be made by an immigration official concerning the level of risk an individual might face under the "substantive risk" standard of the 1984 Torture Convention.[87] However, there is no right of an appeal concerning this assessment.[88]

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[84] See Gerry Van Kessel, *Canada's Approach Towards Exclusion Ground 1F* in *Refugee Law in Context*: *the Exclusion Clause* 288 (Peter J. Van Krieken, ed., T.M.C. Asser Press 1999). [Reproduced in the accompanying notebook at Tab 22.]

[85] *Id.*

[86] *Id.*

[87] *See supra* note 12.

[88] *See* Gerry Van Kessel, *supra* note 84 at 289. Director Van Kessel is forthright in his advocacy of an aggressive policy concerning the implementation of inadmissibility and exclusion grounds against

Individuals who are granted admission status and who are seeking asylum are referred to the Convention Determination Division (CRDD) of the Immigration and Refugee Board for a full hearing on the merits of their claim for asylum. The CRDD, which exercises its authority under the Ministry of Citizenship and Immigration, conducts a non-adversarial review and the CRDD has the authority to grant asylum. Claimants have certain statutory rights, such as the right to interpreter assistance and the right to counsel.[89] The burden of proof is on the claimant to provide sufficient evidence and testimony to support an asylum claim. Judicial review is possible if a claimant receives a negative asylum determination by the CRDD.

Under Canadian immigration law, the Article 1F exclusion clauses of the 1951 Convention have been incorporated verbatim. The burden is on the government to prove that one of the exclusion grounds applies to a claimant. According to Director Van Kessel, from 1992 to 1995, over 200 Article 1F decisions were made and 190 of those cases were decided against the asylum-seeker.[90] During the period of 1990 to 1995, the number of asylum applicants ranged from 21,206 (1990) to 35,584 (1993).[91] The number of applicants with successful asylum claims during the same period ranged from 9,614 (1995) to 19,425 (1991), and the success rates ranged from 55 percent (1993) to 70

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suspected war criminals: "In this context it is important to note that exclusion is only one aspect of the arsenal of immigration remedies which can be used against criminals. It is equally important to understand that exclusion in isolation will not be effective or even possible." *Id.*

[89]According to Donald and Vanheule, Canadian provinces are not uniform in the provision of government funded legal services for asylum-seekers. *See* Jeanne Donald and Dirk Vanheule, *Canada* in *Who is a Refugee?: A Comparative Case Law Study* 170-171 (Jean-Yves Carlier, Dirk Vanheule, Klaus Hullman, and Carlos Pena Galiano eds., Kluwer Law Int. 1997). [Reproduced in the accompanying notebook in Tab 24.]

[90]*See* Gerry Van Kessler, *supra* note 84 at 290.

[91]*See* Jeanne Donald and Dirk Vanheule, *supra* note 89, at 176.

percent (1994).[92]

(i) Administrative Tribunal and Judicial Decisions

In Canada, the Article 1F(a) "crimes against peace" category has not been relied on and only rarely has the "war crimes" category been applied.[93] Most exclusion clause cases have been based on the category "crimes against humanity."[94] In *Sivakumar v. Canada,* the court held that crimes against humanity requires that the acts were: (1) widespread and systematic; (2) committed against a country's own nationals; (3) committed pursuant to State action or policy.[95] There is no requirement that the individual has had direct ties to the state. In reviewing a number of recent cases, one commentator, James Sloan, has stated that the following acts have been found to constitute crimes against humanity: torture, murder of innocent civilians, training attack dogs, reporting people to the secret police thereby facilitating torture, acting as a driver and bodyguard for secret police, assisting in covering up police brutality by transporting a corpse, and acting as a judge in a court which unjustly sentenced people to death.[96]

Balancing Test and "Serious Reasons for Considering"

The UNHCR Handbook states that in applying the exclusion clause, it is necessary to strike a balance between the nature of the offense presumed to have been committed by the claimant and the degree of persecution feared.[97] Nevertheless, the

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[92] *Id.*

[93] *See* James Sloan, *supra* note 67, at 230.

[94] See id.

[95] *See id.,* at 234 (citing *Sivakumar v. Canada,* [1994] 1 F.C. 433 (C.A.))

[96] See *id.* at 231-232.

courts in Canada do not regard this as a binding obligation and, generally, they do not require a balancing test.

As discussed in a previous section, the UNHCR has not provided clear and consistent guidelines to the States concerning the meaning of the serious reasons for considering clause that applies to Article 1F exclusions. In *Moreno v. Canada*, the court applied a standard that was less than proof on a balance of probabilities.[98] Also, generally, the courts have held that a conviction of a crime is not dispositive of the issue of whether the "serious reasons" standard has been satisfied.

Authorities in Canada appear to rely on information on an applicant's background from fingerprints, photographs, and personal documents. In his discussion with officials, James Sloan has determined that they very often rely on information from the applicant and that the subjective assessment of the applicant's credibility is central to official determinations concerning exclusion clause determinations.[99] Officials also rely on country status reports and only in rare instances will officials actually have a record of an individual's foreign criminal conviction.[100]

Required Level of Complicity and *Mens Rea*

The issue of the level and nature of a claimant's participation in criminal conduct arises in most "crimes against humanity" determinations. As a defense, applicant's will often minimize their degree of involvement in any crime. In *Gutierrez v. Canada*, the court held that three elements must be met to prove an applicant's complicity: (1)

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[97] See UNHCR Handbook, supra note 19, at para. 156.

[98] *See* James Sloan, *supra* note 67, at 238 (citing *Moreno v. Canada*, [1993] 1 F.C. 298 (C.A.))

[99] *See id.* at 227.

[100] *See id.*

membership in an organization which has committed offences as a continuous and regular part of its operation; (2) personal and knowing participation; (3) failure to disassociate from the organization at the earliest safe opportunity.[101] In general, mere membership in a group responsible for the crimes will not be sufficient proof of guilt. The defense of superior orders is available; however, Canadian courts apply a strict test: (1) the orders must not be manifestly unlawful; (2) the applicant must face an imminent, real and inevitable threat to his life; and (3) the applicant must have deserted at the earliest opportunity.[102] Other defenses or mitigating factors, such as duress or good conduct, are generally not available.

Article 1F(b) Serious Non-Political Crimes

Concerning the application of the Article 1F(b) clause, the court in *Gil v. Canada* looked to the political nature of the offence and to the nexus between the means employed and the alleged political objective.[103] The applicant in *Gil* was an Iranian national who was involved with a group of anti-Khomeini activists in 1980 and 1981. The applicant engaged in attacks, including the use of Molotov cocktails, targeted at certain business establishments. The Immigration and Refugee Board (IRB) determined that the applicant was personally involved in the murder of innocent people during their attacks. The IRB concluded that although he did have a well founded fear of persecution should he return to Iran, he nonetheless should be excluded from asylum protection on the basis of Article 1F(b). The Court of Appeals sustained the IRB decision.[104] The

[101] *See id.* (citing *Gutierrez v. Canada,* 1994] 84 F.T.R. 227).

[102] *See id.* at 237.

[103] *See id.* at 242 (citing *Gil v. Canada,* [1995] 1. F.C. 508).

[104] *See id.*

court reasoned that the attacks were not carried out against armed adversaries and were likely to injure innocent people.

(ii) Conclusion

Canada has established policies and procedures, under the 1951 Refugee Convention, to provide protection to bona fide asylum-seekers and to exclude non-bona fide applicants. A large number of suspected war criminals have been refused entry into Canada, as the authorities exercise considerable discretion in the implementation of the nation's immigration admission policies. Serious criminals and persons involved in genocide, war crimes, and crimes against humanity are automatically considered inadmissible for entry. The decisions from the administrative tribunals and federal courts support a conclusion that non-bona fide asylum-seekers will be excluded from 1951 Refugee Convention protection. Tribunals do not recognize the need for a balancing test concerning the gravity of the offense committed and the persecution feared if deported, and, in general, the courts do not recognize a number of affirmative defenses. Therefore, with respect to the memorandum issues, the evidence supports the conclusion that Canada would likely deny refugee protection to an individual who has been accused of committing an international crime by the ICTR, even one who was acquitted at the trial stage but who must defend himself at a later date against a prosecutor's appeal of a trial chamber's judgment.

3. Belgium

Refugee protection in Belgium is governed by the Law of 15 December 1980 on the Access, Residence and Removal of Aliens.[105] Immigrants attempting to enter Belgium must first undergo an inspection process to determine eligibility. The Office of the Minister of the Interior has discretionary authority in the determination of inadmissibility of applicants, for example on the basis of invalid travel documents.[106] Entering immigrants who are denied admission have a limited opportunity for an appeal before the Commissioner General for Refugees and Stateless Persons.[107] Once an individual is accepted as admissible then the person has a right to apply for asylum before the Commissioner General's office. The applicant has a right to the assistance of counsel and the right to appeal a negative determination.[108] Belgium immigration laws have incorporated all Article 1F exclusion clauses.

During the period of 1990 to 1995, the number of asylum applicants ranged from 11,458 (1995) to 26,498 (1993).[109] The number of applicants with successful claims during the same period was 750 (1993) to 1,202 (1990), and the success rates ranged

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[105]*See* Dirk Vanheule, *Belgium* in *Who is a Refugee? A Comparative Case Law Study* 59 (Jean-Yves Carlier, Dirk Vanheule, Klaus Hullman, and Carlos Pena Galiano, eds. Kluwer Law Int. 1997). [Reproduced in the accompanying notebook at Tab 21.]

[106]*See id.* at 59-60

[107]*Id.,* at 60.

[108]*Id.*

[109]*Id.* at 61.

from 3.50 percent (1993) to 9.97 percent (1990).[110] In 1994 and 1995, asylum-seekers from Rwanda were the top nationality in terms of asylum recognition: 402 in 1994 and 87 in 1995.[111]

(i) Administrative Tribunal and Judicial Decisions

In Belgium, most of the exclusion clause determinations are made on the basis of Article 1F(a) "crimes against humanity." The "crimes against peace" clause has not been applied and there have been very few "war crimes" clause determinations.[112] Asylum authorities consider the following actions to constitute crimes against humanity: genocide, slavery, torture, assassination or persecution of populations targeted for religious, racial or political motives. [113] The "crimes against humanity" clause is to be distinguished from Article 1F(b), serious non-political crimes, on the basis of crimes that have been committed as part of a policy aimed at terrorizing a population.

In this context, four Rwandans were determined to be excludable under the "crimes against humanity" clause because the international community had determined that their actions were related to the genocide in Rwanda.[114] One was a former minister under the Habyarimana government, two were leading members of extreme political parties, and one was a journalist who had broadcast propaganda. In making these

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[110]*Id.*

[111]*Id.*

[112]*See* Sibylle Kapferer, *Exclusion Clause in Europe—A Comparative Overview of State Practice in France, Belgium, and the United Kingdom,* 12 International Journal of Refugee Law 196 (Special Supplementary Issue) (2000). [Reproduced in the accompanying notebook at Tab 19.]

[113]*See id.* at 198.

[114]*Id.*

determinations, the tribunals found that their crimes not only constituted crimes against humanity, but also the crimes were considered to be contrary to the purposes and principles of the United Nations (Article 1F(c)).[115]

Balancing Test, "Serious Reasons," and Sources of Information

According to Sibylle Kapferer, the balancing test is rarely used in Belgium.[116] With respect to the "serious reasons" threshold question, the determinations by Belgian authorities and tribunals provide some clarity on the standard of proof issue, but there does not appear to be a stringent rule. Actual proof of a crime is not necessary, and, in two decisions by the Permanent Refugee Appeals Commission (CPRR), the principle of the benefit of the doubt in favor of the applicant was applied.[117] Significantly, in one decision involving a Rwandan asylum-seeker, the Commissioner General for Refugees and Stateless Persons (CGRA) stated that one of the elements it applied was the fact that the applicant was under an order to appear before the ICTR.[118] In another Rwandan case, the CGRA based its decision, in part, on the fact that the applicant was named on a list of presumed perpetrators of genocidal crimes.[119] In addition to these types of information sources, authorities rely on the statements made by the applicants, and, in some cases, their statements have been the sole evidentiary basis of reaching an exclusion clause determination. Authorities also rely on reports and documents by governments and

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[115] *Id.*

[116] *Id.* at 217.

[117] *Id.* at 207.

[118] *Id. at 209.*

[119] *Id.*

international human rights organizations.

Required Level of Complicity, *Mens Rea*, and Defenses

In Belgium, Article 1F has been applied to those having direct participation in crimes as well as those who knowingly encouraged and facilitated the crimes. Mere membership alone in an organization is generally not considered sufficient to establish "serious reasons" for exclusion. In one case involving a member of a special military unit under the Mobutu regime in Zaire, the CPRR held that such membership constituted an indication of involvement for the purpose of making an exclusion determination.[120]

Concerning command leadership, the CPRR held in one case that involved a former chief of the gendarmerie in Rwanda, that the person's position was sufficient to justify a presumption of "serious reasons," but that the presumption was not irrefutable. In principle, the possibility of an applicant raising certain defenses has been recognized. Generally, the defense of duress is not available.[121] However, in one case, a court required an administrative tribunal, upon remand, to consider an applicant's young age at the time of the crimes as one factor to be considered in the exclusion decision.

(ii) Conclusion

Belgium provides refugee protection under the 1951 Refugee Convention and the authorities recognize and apply the exclusion provision of the Convention. In recent years, the figures for asylum applicants demonstrates that asylum-seekers have very low success rates in comparison to the other nations reviewed in this paper. The authorities

[120] *Id.* at 211.

[121] *Id.* at 214.

rely primarily on the "crimes against humanity" exclusion clause and this exclusion has been applied to four Rwandans due to their involvement with the genocide in their country.

The tribunals do not, generally, apply a balancing test to their determinations. Also, it was noted that in the case of one Rwandan, the tribunal stated that one of the elements it applied toward proof of exclusion was that the applicant was under an order to appear before the ICTR. Direct and indirect involvement in crimes is recognized, and command leadership, as was noted in one case involving a Rwanda, is recognized as a basis of criminal complicity. Therefore, with respect to the memorandum issues, the evidence supports the conclusion that Belgium would likely deny refugee protection to an individual who has been accused of committing an international crime by the ICTR, even one who was acquitted at the trial stage but who must defend himself at a later date against a prosecutor's appeal of a trial chamber's judgment.

4. FRANCE

The statutory basis for the recognition of refugee protection in France is Law No. 52-803 of 25 July 1952 and Decree No. 53-377 of 2 May 1953.[122] The right to asylum is also recognized in the preamble to the Constitution of 27 October 1946 and in the new article 53 of the constitution inserted by Law No. 93-1256 of 25 Nov. 1993.[123] Asylum applicants must first submit their requests to the Director of the French Office for the Protection of Refugees and Stateless Persons (OFPRA). The OFPRA first decides

[122]*See* Klaudia Schand and Carlos Pena Galiano, *France* in *Who is a Refugee?: A Comparative Case Law Study* 373 (Jean-Yves Carlier, Dirk Vanheule, Klaus Hullman, and Carlos Pena Galiano eds., Kluwer Law Int. 1997). [Reproduced in the accompanying notebook at Tab 25.]

[123]*See id.*

whether the person is eligible to apply for refugee status. In the event of a negative determination, the individual has a right to appeal before the Refugee Appeals Board.[124] There is also the possibility of an appeal before the highest administrative court, the Council of State.[125]

During the period of 1990 to 1995, the number of asylum applicants ranged from 20,145 (1995) to 54,813 (1990).[126] The number of applicants with successful asylum claims during the same period was 7,025 (1994) to 16,000 (1991), and the success rates ranged from 16.3 percent (1995) to 28 percent (1992 & 1993).[127]

(i) Administrative Tribunal and Judicial Decisions

Most exclusion clause determinations in France are made on the basis of Article 1F(b), the "serious, non-political crimes" clause. The "crimes against peace" and "war crimes" clauses have rarely been applied. There have been three recent "crimes against humanity" exclusion cases involving Rwandan nationals. The Commissioner des recours des refugies (CRR), an administrative tribunal, relied on the international community's classification of the massacre of Tutsis in Rwanda as genocide.[128] The CRR applied Article 1F(a) against a former minister of transportation and communication for the interim government which was formed after the death of President Habyarimana, and against a business manager of a public enterprise that funded the purchase of arms, and against a journalist who worked for a state radio station that was used as an instrument of

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[124] *Id.*

[125] *Id.*

[126] *Id.* at 377.

[127] *Id.*

[128] *See* Sybylle Kapferer, *supra* note 112, at 197.

state propaganda.[129]

Balancing Test, "Serious Reasons," and Sources of Information

According to Sibylle Kapferer, none of the Aticle 1F decisions in France contained any reference to a balance test.[130] The "serious reasons" threshold in France does not require that authorities have actual proof of a crime in order to exclude an applicant. An official noted that the standard is not as high as to amount to a criminal law burden of proof, and that the "serious reasons" determination must be supported by reliable and verifiable information or statements from the applicant.[131] Authorities also rely on other sources of information, including documents from the applicant, and reports by government and human rights organizations.

Required Level of Participation, *Mens Rea*, and Defenses.

In the cases involving the Rwandan nationals, the former minister of transportation and communications was excluded on the basis of his office and functions, and the exclusion of the business manager and journalist were also on the basis of their indirect complicity in the international crime of genocide.[132] In general, membership alone in groups or organizations responsible for crimes will not rise to the level of "serious reasons' for exclusion. The decision is based on the role and activities of the applicant in the planning, preparation or commission of the crimes.[133] Membership is

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[129] *Id.*

[130] *Id* at 217

[131] *Id.*

[132] *Id.* at 210.

[133] *Id.* at 211.

generally viewed as an element of proof which can be rebutted by the applicant; the applicants will need to show that they dissociated themselves from the crimes of the group. Persons in positions of authority were typically found to be responsible for the human rights violations committed by group members,

In principle, defenses to exclusion are recognized in France. However, authorities appear to take a strict view on defenses; for example, in a case involving a police officer who admitted to human rights violations and who argued that he was following the orders of his superior officers, this defense was not accepted.[134] Concerning an applicant's youthful age, in one case an applicant was fourteen years old when he committed certain offenses in a guerilla unit fighting in Burma and the CRR did not consider his age a defense against exclusion.[135] In another case by the CRR, an applicant argued that the government of Chad had passed an amnesty law and, therefore, the offenses for which he was being held responsible for which were committed in Chad should not form a basis of exclusion. The CRR rejected his amnesty defense argument.[136]

Article 1F(b) and 1F(c) Exclusions

As stated above, most exclusion determinations in France have been based on Article 1F(b), the "serious, non-political crime" clause. The CRR has cited the following as specific examples of this type of crime: murder or attempted murder, acts related to inter-ethnic violence, and drug trafficking.[137] In general, the nature and gravity of the offense is assessed regardless of whether the participant was directly or indirectly

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[134] *Id.* at 214.

[135] *Id.*

[136] *Id.* at 215.

[137] *Id.* at 199.

involved. Violence targeted at civilians, although committed with a political purpose, will satisfy Article 1F(b). Also, hostage taking, the repairing of weapons, and extortion of funds, regardless of motive, will constitute evidence toward an exclusion determination.[138]

French authorities have applied this exclusion basis to serious violations of human rights, including acts of torture, extrajudicial executions, and the detention of women and children. In applying Article !F(c) against the former Haitian President Duvalier, a court stated that he had attempted to cover-up serious violations of human rights. French authorities hold the view, consistent with the UNHCR, that Article 1F(c) applies not to the "private citizen," but to those who were acting on behalf of a state, as in the case of Duvalier.[139]

(ii) Conclusion

France has established refugee protection and bases of exclusion under the 1951 Refugee Convention. Most exclusion clause determinations in France have been made on the basis of the "serious non-political" clause. It was noted that there were three recent cases involving the exclusion of Rwandan nationals where the tribunals cited their connection with the genocide in Rwanda as a basis of their exclusion from asylum protection.

Direct and indirect complicity in crimes is recognized and membership in groups involved in serious crimes is recognized as an element of proof. Authorities take a strict

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[138]*Id.* at 200.

[139]Nicole Michel, *Purposes and Principles of the United Nations: The Way in Which France Applies Article 1F(c)* in *Refugee Law in Context: The Exclusion Clause* 294, 299 (Peter J. Van Krieken, ed., T.M.C. Asser Press 1999). [Reproduced in the accompanying notebook at Tab 26.]

view concerning affirmative defenses, and they do not accept the defense of following the orders of a superior. Therefore, with respect to the memorandum issues, the evidence supports the conclusion that France would likely deny refugee protection to an individual who has been accused of committing an international crime by the ICTR, even one who was acquitted at the trial stage but who must defend himself at a later date against a prosecutor's appeal of a trial chamber's judgment.

5. The United Kingdom

In the United Kingdom, the statutory basis of refugee protection was established by the Immigration Act of 1988 and the Asylum and Immigration Appeals Act of 1993.[140] Initially, a claimant will be interviewed by an immigration officer for the Secretary of State of the Home Department. If a claim is found to be made without foundation, generally the individual would be refused entry.[141] Claimants do have a right of appeal before a "special adjudicator." Judicial review is possible; however, a review of a decision of an immigration officer is not a re-hearing of the facts, and the courts are guided by a principle of deference to the administrative discretion of the office of the Secretary of State.[142]

During the period of 1990 to 1994, the number of asylum applications ranged from 28,500 (1993) to 73,400 (1991).[143] The number of applicants with successful

[140]Dirk Vanheule, *United Kingdom*, in *Who is a Refugee?: A Comparative Case Law Study* 564 (Jean-yves Carlier, Dirk Vanheule, Klaus Hullman, and Carlos Pena Galiano eds., Kluwer Law Int. 1997). [Reproduced in the accompanying notebook at Tab 20.]

[141]*Id.*

[142]*Id.* at 566-567.

[143]*Id.* at 569.

asylum claims during the same period ranged from 800 (1991) to 2,900 (1993), and the success rates ranged from 3.2 percent (1992) to 26 percent (1990).[144]

(i) Administrative Tribunal and Judicial Decisions

In the United Kingdom, only Article 1F(b) was relied on with regularity. The leading exclusion case in the U.K. is *T. v. Secretary of State for the Home Department* which involved an individual who belonged to an organization that bombed an airport near Algiers killing ten people.[145] The Court of Appeal considered the nexus between the alleged political purpose and the means used to achieve the action. The court determined that the individual did have a political motive, but that the means used to carry out the acts were too indiscriminate and involved the killing of innocent civilians.[146] The applicant's request for asylum was denied on the basis of an Article 1F(b) exclusion. In contrast to the outcome in this case, the Immigration Appeal Tribunal (IAT) determined that Article 1F(b) would not apply in a case where an individual, with a political motive, attempted to poison the wife of former President Mobutu of Zaire.[147]

Balancing Test, "Serious Reasons," and Sources of Information

The authorities in the U.K reject the application of a balancing test when making exclusion determinations.[148] Concerning the "serious reasons" standard of proof, the courts have held that a positive finding of guilt is not required; rather, a determination can

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[144]*Id.*

[145]*See* Sibylle Kapferrer, *supra* note 112, at 201 (citing T. v. Secretary of State for the Home Department, [1996] Imm. A.R. 443.

[146]*Id.*

[147]*Id.* at 202.

[148]*Id.* at 217.

be made on evidence that points strongly to the individual's guilt.[149] Authorities appear to rely heavily on the credibility of an applicant, as well as on other sources of information, including reports and documents from governments and human rights organizations.

Required Level of Participation, *Mens Rea*, and Defenses.

Direct and indirect involvement in crimes can be assessed for exclusion determinations. In a decision by the IAT, a senior commander of a quasi-military unit that engaged in indiscriminate killings was found to be excludable.[150] Thus, those who hold positions of authority over groups and organizations that are responsible for serious crimes are themselves held responsible as if they participated directly in the acts.[151] In principle, membership alone in a group or organization responsible for serious crimes will not satisfy an exclusion determination. Affirmative defenses, in general, are recognized; however, they are narrowly construed and strictly applied.

(ii) Conclusion

The United Kingdom has established policies and procedures, under the 1951 Refugee Convention, to provide safe haven protection to bona fide asylum-seekers and to exclude from protection non-bona fide applicants. Most exclusion cases were based on the "serious non-political crimes" clause of the 1951 Refugee Convention.

The administrative tribunal and judicial decisions reflect the recognition of direct and indirect criminal complicity. In addition, the courts do not apply a balancing test

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[149] *Id.* at 208.

[150] *Id.* at 202.

[151] *Id.* at 213.

when making exclusion determinations and affirmative defenses, while recognized, are narrowly construed and strictly applied. Therefore, with respect to the memorandum issues, the evidence supports the conclusion that the United Kingdom would likely deny refugee protection to an individual who has been accused of committing an international crime by the ICTR, even one who was acquitted at the trial stage but who must defend himself at a later date against a prosecutor's appeal of a trial chamber's judgment.