EVOLVING INTERPRETATION OF MULTILATERAL TREATIES: 'ACTS CONTRARY TO THE PURPOSES AND PRINCIPLES OF THE UNITED NATIONS' IN THE REFUGEE CONVENTION

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Abstract The 1951 Refugee Convention does not apply to a person with respect to whom there are serious reasons for considering that 'he has been guilty of acts contrary to the purposes and principles of the United Nations' (Article 1(F)(c)). To date, this exclusion clause has generally been interpreted by courts, commentators and UNHCR in a static manner which fails to take into account developments in international law and practice. This paper considers the 'evolutive approach' to treaty interpretation, generally, and applies this approach, alongside standard rules of treaty interpretation, to Article 1(F)(c). This paper challenges a number of assertions commonly made regarding this clause, and concludes that it should be interpreted to the effect that conduct amounting to serious or sustained human rights violations, such that would constitute 'persecution' for the purposes of Article 1(A)(2) of the Convention, meets the standard for exclusion under Article 1(F)(c).

Keywords: exclusion, purpose and principles, Refugee Convention, treaty interpretation, United Nations Charter.

INTRODUCTION

Where a treaty is being applied decades after it was adopted, its terms need not always be given the precise meaning they had at the time of adoption. The interpretation of words or phrases in a treaty is not necessarily fixed for all time: it can evolve in light of developments in international law and practice. This paper considers the 'evolutive approach' to treaty interpretation, generally, and employs this approach, alongside other principles of treaty interpretation, so as to reassess the contemporary scope of Article 1 F(c) of the 1951 Convention Relating to the Status of Refugees ('the Convention').

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Under this provision, the Convention shall not apply to a person with respect to whom there are serious reasons for considering that 'he has been guilty of acts contrary to the purposes and principles of the United Nations'. This paper will argue that, like other provisions of the Convention, Article 1 F(c) should be interpreted in an evolving manner, consistent with developments in international law and the practice of the United Nations. Broadly speaking, this has not been the case to date.

Section I discusses the notion of an evolving interpretation of treaty terms in international law generally. Sections II–III introduce the relevant provisions of the Refugee Convention and argue that an evolving interpretation is particularly appropriate for Article 1 F(c). Section IV summarizes the often static interpretations of Article 1 F(c) by domestic courts, the United Nations High Commissioner for Refugees (UNHCR), and commentators. This paper then analyses the special approach said to be required when interpreting Article 1(F) generally (Section V), before applying the standard principles of treaty interpretation to Article 1 F(c) in particular (Section VI). This paper concludes that conduct amounting to serious or sustained human rights violations, such that would constitute 'persecution' for the purposes of Article 1A(2) of the Convention,[1] meets the standard for exclusion under Article 1 F(c).

I. EVOLVING INTERPRETATION OF TREATY TERMS

A new or evolving meaning of treaty terms can be arrived at on the basis of the subsequent agreement between or subsequent practice of the parties (Article 31(3)(a)–(b) of the Vienna Convention on the Law of Treaties (VCLT)), by reference to the evolving meaning of certain terms used in the treaty, or by a combination of these methods.[2] For the purposes of Article 31(3)(b), subsequent practice must be in application of the treaty provision at issue.[3] The practice needs to have occurred with a certain frequency or consistency, though it is not necessary to show that each party has engaged in the practice, merely that all have accepted this practice, even tacitly.[4]

[1] This provides that the term 'refugee' shall apply to any person who 'As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it'.

[2] J Arato, 'Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences' (2010) 9 Law and Practice of International Courts and Tribunals 443, 449 ('Arato').

[3] *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, ICJ Reports 1999, para 74.

[4] A Aust, *Modern Treaty Law and Practice* (2nd edn, CUP 2007) 243 ('Aust'). A frequently cited example is that of the UN Security Council relating to art 27(3) of the UN Charter (see Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West

Turning to evolving meaning, this can result from an appreciation of developments in international law and/or of the evolving meaning given to certain concepts and terms. The 'evolutive approach' to interpretation can be grounded in the VCLT itself:[5] in Article 31(1) by reference to the object and purpose, or in Article 31(3)(c), under which interpretation shall take into account any relevant rules of international law applicable between the parties.[6] The latter, in contrast to preparatory works (Article 32 VCLT), are not merely supplementary means for interpretation. Indeed, the 'evolutive approach' generally downplays the significance of a treaty's preparatory works;[7] this makes it consistent both with the VCLT rules and with the reality (discussed further below) that preparatory works are rarely a source of clarity.[8]

With respect to Article 31(3)(c) VCLT, the International Court of Justice (ICJ) has described the application of relevant rules of international law as an 'integral part of the task of interpretation',[9] while in 2006 the International Law Commission (ILC) noted that,

> Rules of international law subsequent to the treaty to be interpreted may be taken into account especially where the concepts used in the treaty are open or evolving. This is the case, in particular, where: (a) the concept is one which implies taking into account subsequent technical, economic or legal developments; (b) the concept sets up an obligation for further progressive development for the parties; or (c) the concept has a very general nature or is expressed in such general terms that it must take into account changing circumstances.[10]

International law thus allows for the interpretation of generic terms 'to follow the evolution of the law and to correspond to the meaning attached to the expression by the law in force at any given time'.[11] In such cases, the broad

Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971 ('*Namibia*') para 22).

[5] Yearbook of the International Law Commission (1964) vol I, 34, para 10.

[6] Arato (n 2) 445–6; G Letsas, 'Intentionalism and the Interpretation of the ECHR' in M Fitzmaurice, O Elias and P Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On,* (2010) 257, 257, 270 ('Letsas').

[7] W Kalin, 'Implementing Treaties in Domestic Law: From "Pacta Sunt Servanda" to Anything Goes?' in V Gowland-Debbas (ed), *Multilateral Treaty-Making* (2002) 111, 115; *Secretary of State for the Home Department v K* [2006] UKHL 46 (UK) ('*SSHD v K*') paras 84–86, per Baroness Hale.

[8] R Bernhardt, 'Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights' (1999) 42 GYIL 11, 14–15 ('Bernhardt'); C McLachlan, 'The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention' (2005) 54 ICLQ 279, 290 ('McLachlan').

[9] *Oil Platforms (Islamic Republic of Iran v United States of America)*, Judgment, ICJ Reports 2003, 182–183, paras 41–42; see also *Amoco International Finance Corporation v Iran* (1987-II) 15 Iran-USCTR 189, 222, para 112; McLachlan (n 8) 293–4.

[10] International Law Commission, 'Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' in Report of the International Law Commission, 58th Session (2006) UN Doc GAOR A/61/10, 400, 415 (references omitted).

[11] *Aegean Sea Continental Shelf*, Judgment, ICJ Reports 1978 ('*Aegean Sea*') 32, para 77.

meaning of the term being interpreted remains the same, but its specific content changes over time.[12] Thus when interpreting a 1928 instrument 50 years later the ICJ interpreted 'disputes relating to territorial status' as including disputes relating to the continental shelf;[13] and in 1997 found that a bilateral treaty relating to a system of locks on the Danube was 'not static' and 'open to adapt to emerging norms of international law'.[14] Similarly, the WTO Appellate Body has found the term 'natural resources' to be 'generic' and 'by definition evolutionary'.[15] In the *Namibia* Advisory Opinion the ICJ interpreted provisions of both the 1919 Covenant of the League of Nations and the UN Charter in light of more recent international law developments regarding self-determination. Certain terms—'the strenuous conditions of the modern world', the 'well-being and development' of the peoples concerned, the 'sacred trust' existing with respect to non-self-governing territories—were determined to be 'not static' and 'by definition evolutionary'. As such,

> the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.[16]

Evolving interpretation is particularly relevant where the instrument in question was intended to be of continuing duration and/or universal. Moreover, in contrast to the requirements for subsequent practice under Article 31(3)(b) VCLT, evidence of an evolving meaning may be found also in practice that is not directly related to the precise treaty provision at issue.[17]

Plainly, an evolving interpretation will not be appropriate for *all* treaty terms or provisions: within the same human rights instrument, for example, provisions conferring substantive rights may be subject to an evolving interpretation, but that is not true of provisions stipulating which of these rights are derogable, or provisions on the procedures for denunciation.[18]

[12] McLachlan (n 8) 318.

[13] *Aegean Sea* (n 11) 34, para 80; 37, para 90.

[14] *Gabčíkova-Nagyamaros Project, Hungary/Slovakia)*, Judgment, ICJ Reports 1997, 67–68, para 112.

[15] WTO, *United States: Import Prohibition of Certain Shrimp and Shrimp Products—Report of the Appellate Body* (12 October 1998) WT/DS58/AB/R; (1999) 38 ILM 118, para 130.

[16] *Namibia* (n 4) para 53. See also *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)*, Judgment, ICJ Reports 2009, ('*Navigational and Related Rights*') 242, para 64, also paras 70, 89.

[17] *Ocalan v Turkey*, ECtHR, A No 46221/99, Judgment, 12 March 2003, paras 189–198.

[18] Consider eg arts 8(1), 15 and 58 of the ECHR. While the Human Rights Committee's General Comment 29 (on the derogation clause of the ICCPR, art 4) appears to call for a more expansive approach to identifying non-derogable rights, it primarily emphasizes the need for proportionality when States purport to derogate from obligations under the Covenant. Insofar as the Committee argues that certain rights not expressly included in art 4 of the Covenant are, nevertheless, non-derogable, its reasoning is unconvincing. For example, it associates restrictions on freedom of

In most cases, a treaty does not stipulate whether the parties intend to fix for all time the meaning of the terms employed or whether they wish to allow the meaning to evolve.[19] So evolutive character can instead be imputed on the basis of the terms employed (the use of precise terms, including numbers and specific place-names, will preclude an evolving interpretation)[20] and/or the object and purpose of the treaty.[21] The ease with which a treaty can be amended may be another relevant factor: onerous requirements for formal amendment may heighten the need for an evolving interpretation of certain terms.

II. ARTICLE 1 F(C) OF THE REFUGEE CONVENTION

Article 1 of the Refugee Convention defines the term 'refugee' for the purposes of that instrument. This includes: the basic criteria for falling within the scope of the Convention (paragraph (A)); persons falling within that scope but to whom the Convention shall cease to apply (C); and persons excluded from the Convention because they are already receiving the necessary protection from another UN entity (D) or a State (E). Under paragraph (F),

> The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

In November 2012 the UK Supreme Court characterized Article 1 F(c) as 'a little used provision',[22] and it is certainly true that, in comparison with Article 1 F(a) and (b), sub-paragraph (c) has been given limited attention thus far in practice and commentary relating to exclusion. The Supreme Court determined that Article 1 F(c):

movement (contrary to art 12 ICCPR) with deportation or forcible transfer as a crime against humanity. But the latter is an international crime with specific elements not included in art 12 of the Covenant, and to assert any link or equivalence between these distinct international rules is to also ignore the fact that art 12(3) allows for restrictions on the exercise of that right even in the absence of any 'public emergency' (UN Doc CCPR/C/21/Rev.1/Add.11, 31 August 2001, at paras 1, 8, 13).

[19] *Navigational and Related Rights* (n 16), Déclaration de M. le Juge ad hoc Guillaume 297, para 15.

[20] For example, the words 'events occurring before 1 January 1951' in art 1A(2) of the Refugee Convention could hardly be subject to an evolving interpretation, hence the need to adopt, in 1967, a Protocol to the Convention which removed this temporal limitation.

[21] Before the ECJ, see *Commission v United Kingdom*, 100 ILR at 114.

[22] *Al-Sirri v Secretary of State for the Home Department, DD v Secretary of State for the Home Department* [2012] UKSC 54, Judgment of 21 November 2012 ('*Al-Sirri*') at para 1.

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> should be interpreted restrictively and applied with caution. There should be a high threshold, defined in terms of the gravity of the act in question, the manner in which the act is organised, its international impact and long-term objectives, and the implications for international peace and security.[23]

In the following sections, this paper will reassess these and other questionable assertions commonly made regarding this provision.

In arriving at its conclusion here, the Supreme Court relied heavily on guidelines issued by UNHCR, the body which has the duty of supervising the application of the Convention.[24] This does not amount to a power to issue authoritative opinions, though UNHCR documents are often regarded by national courts as persuasive aids to interpretation.[25] Of particular relevance are conclusions adopted by UNHCR's Executive Committee (EXCOM), an assembly of States.[26]

The following sections will not focus on the potential application of Article 1 F(c) to terrorism-related offences. That matter—which is inevitably bound-up with the apparently insoluble question of defining 'terrorism'[27]—has already been discussed extensively elsewhere, by UNHCR,[28] commentators[29] and courts.[30] Cases and commentary relating to 'terrorism' will be discussed only where they raise issues relevant to the broader application of Article 1 F(c).

[23] ibid, para 16, per Lady Hale and Lord Dyson (for the Court).

[24] Art 35 of the Convention.

[25] See J McAdam, 'Interpretation of the 1951 Convention' in A Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (OUP 2011) 75, 79, 97 and 110–12 ('McAdam'); *Al-Sirri* (n 22) para 36. Domestic courts frequently derive assistance from UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, Doc HCR/IP/4/ENG/REV.1, January 1992 ('UNHCR RSD Handbook); *Butler v Attorney-General* [1999] NZAR 205, at 214 per Keith J.

[26] Established in 1958, EXCOM functions as a subsidiary organ of the UN General Assembly. At time of writing, 94 States are members of the EXCOM <http://www.unhcr.org/pages/49c3646c89.html>. The criteria for membership are: membership of the UN or its specialized agencies, demonstrated interest in refugee matters, and wide geographical representation. It is not required that a State be party to the 1951 Convention or its 1967 Protocol.

[27] D McKeever: 'The Human Rights Act and Anti-terrorism in the UK: One Great Leap Forward by Parliament, but Are the Courts Able to Slow the Steady Retreat That Has Followed?' (2010) 1 PL 110, 113–16 ('McKeever 2010').

[28] UNHCR, Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees, 4 September 2003, Doc HCR/GIP/03/05 ('UNHCR 2003 Exclusion Guidelines') paras 25–29.

[29] A Zimmerman and P Wennholz, 'Article 1F 1951 Convention' in Zimmermann (n 25) 579, 602–7 ('Zimmerman and Wennholz'); G Goodwin-Gill and J McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) ('Goodwin-Gill and McAdam') 190–7; G Gilbert, 'Current Issues in the Application of the Exclusion Clauses' in E Feller, V Turk and F Nicholson, *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP 2003) 425, 439–44 ('Gilbert'); M Kingsley Nyinah, 'Exclusion under Article 1F: Some Reflections on Context, Principles and Practice' (2000) 12 IJRL Special Supplementary Issue 295, 310–13 ('Kingsley Nyinah').

[30] *Al-Sirri* (n 22) and *Bundesrepublik Deutschland v B and D* (Joined Cases (C-57/09 and C-101/09, Grand Chamber Judgment of 9 November 2010 ('*Deutschland v B and D*').

A. Some Practical Considerations

Any discussion of Article 1(F) must acknowledge the practical difficulties inherent in applying these provisions. Perhaps more than any other, Article 1(F) exclusion is an area of refugee protection where a number of distinct areas of public international law—refugee law, human rights law, international humanitarian law (IHL) and international criminal law—intersect. Particularly where refugee status determination (RSD) is conducted by UNHCR, the decision-maker may be working in isolated or insecure environments,[31] where basic infrastructure and access to information is limited. Those conducting the exclusion assessment may not have any prosecutorial experience, yet must assess potentially criminal conduct without the benefit of prior investigation, with no or minimal access to witness evidence,[32] with the applicant not being under oath and usually lacking legal representation, and probably while working through an interpreter. Language difficulties, inherent in any RSD procedure, are particularly acute when it comes to assessing *mens rea*, levels of participation, possible mitigating circumstances, superior orders, etc.[33] All of these constraints are magnified when exclusion assessments have to be carried out in a situation of mass influx.[34] UNHCR's call for specialized exclusion units[35] is, therefore, to be encouraged, though resource constraints will likely make this possible on an *ad hoc* basis only.

III. THE NEED FOR AN EVOLVING INTERPRETATION OF ARTICLE 1 F(C)

A. Four Further Considerations

First, it is widely accepted that human rights treaties in general are 'living instruments', to be interpreted in line with the evolving meaning given to their terms. The European Court of Human Rights (ECtHR), has long rejected

[31] The author's own experience includes carrying out RSD for UNHCR in Sudan in 2003–04.

[32] Witnesses may still be in the country of origin and inaccessible to decision-makers in the forum State. On the other hand, where witnesses are in the forum State, and in particular living in the same refugee community/camp as the applicant, the risks of witness evidence being distorted by intimidation and/or score-settling are obvious (W O'Neill, B Rutinwa and G Verdirame, 'The Great Lakes: A Survey of the Application of the Exclusion Clauses in the Central African Republic, Kenya and Tanzania' (2000) 12 IJRL Special Supplementary Issue 135, 138–9 ('O'Neill *et al.*').

[33] Added to this is the operational reality that interpreters are often, by necessity, drawn from the refugee community in the forum State—the fact that an interpreter belongs to a particular ethnic/political group can affect perceptions of his/her neutrality in the eyes of the applicant.

[34] UNHCR RSD Handbook (n 25) para 44; UNHCR, Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees, September 2003 ('UNHCR Exclusion Background Note') paras 96–97; also UNHCR, Guidelines on the Application in Mass Influx Situations of the Exclusion Clauses of Article 1F of the 1951 Convention Relating to the Status of Refugees, February 2006. For a detailed account of the problems arising in such a context, see O'Neill *et al.* (n 32) 135–70.

[35] UNHCR 2003 Exclusion Guidelines (n 28) para 32; UNHCR Exclusion Background Note (n 34) para 101; Gilbert (n 29) 465.

the idea that ECHR rights should be interpreted in light of their 1950 meaning.[36] In a 1978 case concerning corporal punishment, the Court stated that that Convention is a 'living instrument' which 'must be interpreted in the light of present-day conditions', and that the Court 'cannot but be influenced by the developments and commonly accepted standards in general policy of the member States of the Council of Europe in this field.'[37] This approach has been replicated on numerous occasions.[38] In such cases, the Court often downplays the significance of the preparatory works,[39] and applies the evolutive approach to both the scope of the rights guaranteed (in the first paragraph of the articles), and the permissible restrictions thereon (in the second paragraph).[40] The Inter-American Court of Human Rights has taken a similar approach.[41]

Second, national courts, UNHCR, and commentators frequently characterize the Refugee Convention itself as a 'living instrument'.[42] This can be seen, in particular, with respect to the interpretation of Article 1A(2). For example, 'race' is now interpreted to include not just skin colour but ethnicity,[43] and 'particular social group' has been interpreted progressively so as to encompass individuals fearing persecution for reasons of their gender[44] or sexual orientation.[45] Needless to say, these were all welcome developments, and entirely in keeping with the evolution of international law since 1951.

Third, an evolutive approach has already been adopted with interpretations of the other two exclusion clauses. With respect to Article 1 F(a), UNHCR and commentators advocate reference to the Rome Statute of the ICC for determining what type of conduct can constitute a war crime or a crime

[36] Letsas (n 6) 257.

[37] *Tyrer v United Kingdom*, 25 April 1978, Series A, No 26, para 31.

[38] *Soering v UK*, Appl No 14038/88, ECHR (Series A) No 161 (1989); *Matthews v United Kingdom*, 1999, para 39; *Dudgeon v UK*, Judgment of 22 October 1981, Series A, No 45, 23.

[39] *Young, James and Webster v United Kingdom*, 1999, paras 51–52.

[40] Bernhardt (n 8) 12.

[41] See eg the 1999 Advisory Opinion in *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, OC-16/99, Opinion of 1 October 1999, para 114.

[42] *Sepet and Bulbul v Secretary of State for the Home Department* [2003] UKHL 15, at para 6, per Lord Bingham; also *R v Immigration Officer at Prague Airport, ex parte Roma Rights Centre* [2004] UKHL 5 ('Roma Rights Centre') at para 43, per Lord Steyn; UNHCR RSD Handbook (n 25) paras 59–60.

[43] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted ('EU Qualification Directive') art 10(1)(a); A Zimmermann and C Mahler, 'Article 1A, para 2' in Zimmermann (n 25) 281, 375–9 ('Zimmermann and Mahler'). See also UNHCR RSD Handbook (n 25) para 68; for a similar recommendation regarding 'nationality', see ibid, para 74.

[44] *SSHD v K* (n 7) at paras 84–86, per Baroness Hale. Also *Islam v Secretary of State for the Home Department; R v Immigration Appeal Tribunal and another, ex parte Shah* [1999] 2 AC 629 at 657, per Lord Hope; EU Qualification Directive (n 43) arts 9(2)(f).

[45] *A v Minister for Immigration and Ethnic Affairs* [1997] HCA 4; (1997) 190 CLR 225 ('*A v Minister for Immigration*') at 293–294. See also EU Qualification Directive (n 43) art 10(1)(d).

against humanity.[46] The former would therefore *now* include certain acts committed in non-international armed conflicts (which would not have been characterized as war crimes in 1951);[47] in respect of the latter, the conduct need no longer be connected to an armed conflict,[48] contrary to the requirements of the IMT Charter which was the most relevant instrument when the 1951 Convention was adopted.

To be clear, interpreting 1 F(a) in this manner, which in this author's view is entirely appropriate, is contrary to the approach frequently advocated (and discussed further below), according to which the exclusion clauses are to be applied 'restrictively'.[49] That is, broadening the category of 'war crimes' and 'crimes against humanity' in Article 1 F(a) will bring more applicants for refugee status within the scope of the exclusion clauses. But that is entirely consistent with developments in international law.

Equally, when assessing whether given conduct constitutes a 'serious non-political crime' for the purposes of sub-paragraph (b), UNHCR and commentators recommend judging the gravity of the conduct against (evolving) international standards.[50] The term is not given a fixed meaning. A similar approach has been recommended when assessing potential aggravating factors,[51] and the concept of a 'balancing test'.[52]

Fourth, it is accepted that constituent instruments are to be interpreted in a dynamic manner, reflecting the evolving practice of the organization established and with particular attention to the principle of effectiveness (discussed below).[53]

[46] UNHCR 2003 Exclusion Guidelines (n 28) paras 10–13; UNHCR Exclusion Background Note (n 34) para 25; Zimmermann and Wennholz (n 29) 595, 596; Goodwin-Gill and McAdam (n 29) 166; Gilbert (n 29) 433–9.

[47] *Prosecutor v Duško Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, ICTY Appeals Chamber, 2 October 1995, at paras 128–137; UNHCR Exclusion Background Note (n 34) para 30.

[48] UNHCR 2003 Exclusion Guidelines (n 28) para 13; UNHCR Exclusion Background Note (n 34) para 33. On the relevance of the ICC Statute for interpreting 'crimes against humanity' under art 1(F)(A) see *Attorney-General v Tamil X* [2010] NZSC 107, at para 47, per McGrath J; *B v Refugee Appeals Tribunal and Anor* [2011] IEHC 198, at para 28.

[49] Zimmermann and Wennholz (n 29) 609–10. It is therefore inherently contradictory to argue, as Kwakwa does, that 'Article 1(F) should be interpreted as restrictively as possible, but in a manner that reflects the current state of international law' (E Kwakwa, 'Article 1(F)(c): Acts Contrary to the Purposes and Principles of the United Nations' (2000) 12 IJRL Special Supplementary Issue 79, 86 ('Kwakwa').

[50] UNHCR Statement on Article 1F of the 1951 Convention: Issues in the context of the preliminary ruling references to the Court of Justice of the European Communities from the German Federal Administrative Court regarding the interpretation of Articles 12(2)(b) and (c) of the Qualification Directive, July 2009 ('UNHCR 2009 Statement on ECJ Reference') 20; UNHCR Exclusion Background Note (n 34), paras 38 (on 'serious') and 42 (on 'non-political').

[51] Zimmermann and Wennholz (n 29) 602.

[52] Gilbert (n 29) 450–4.

[53] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004 136, paras 27–28; S Kadelbach, 'Interpretation of the Charter' in B Simma and N Wessendorf (eds), *The Charter of the United Nations: A Commentary* (3rd edn, OUP 2012) 71, 74, 79–80 ('Kadelbach'); A McNair, 'The Functions and Differing Legal Character of Treaties' (1930) 11 BYIL, 100, 116–17.

While the 1951 Convention is not itself a constituent instrument—UNHCR was established under a 1950 Statute[54]—the UN Charter, from which the phrase 'purposes and principles of the United Nations' is taken, clearly is.

B. Consequences of This Approach

Acknowledging the need for an evolving interpretation of certain terms is not to suggest a departure from the VCLT system for interpretation, to invert the order prescribed therein by according undue significance to the *travaux* ahead of the text of the treaty, or to argue for a particularly 'restrictive' or 'expansive' interpretation.[55] Rather, it is to say that where a provision uses a general term which is not itself defined in the treaty, and the meaning of that term has evolved in the period since the treaty was adopted, interpretation of the provision should reflect that evolving meaning. With respect to Article 1 F(c), then, developments in international law and practice since 1951 should be taken into account in identifying the type of conduct that could be considered contrary to the 'purposes and principles' as listed in the UN Charter.[56] That is, to give tangible content to broadly expressed provisions.

IV. HOW HAS ARTICLE 1 F(C) BEEN INTERPRETED THUS FAR?

A. State Practice[57]

The 2004 EU Qualification Directive includes exclusion clauses comparable—but not identical—to Article 1(F) of the Refugee Convention. Art 12(2)(C) of the Directive excludes those 'guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1

[54] The Statute of the Office of UNHCR was annexed to General Assembly resolution 428 (V), adopted on 14 December 1950. The Office was established as of 1 January 1951.

[55] C de Visscher, *Problèmes d'interprétation judiciaire en droit international public* (Pedone 1963) 87–8; H Waldock, 'Third Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur', *1964 Yearbook of the International Law Commission*, vol. II, 60 ('Waldock').

[56] *Pushpanathan v Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982 at paras 128–129 ('*Pushpanathan*').

[57] This section summarizes some of the more notable trends and reported cases. For more detailed accounts see: A Grahl-Madsen, *The Status of Refugees in International Law, Vol 1: Refugee Character* (Sijthoff 1966) 286–9 ('Grahl-Madsen); Goodwin-Gill and McAdam (n 29) 186–9; Kwakwa (n 49) 87–90; JC Hathaway and M Foster, *The Law of Refugee Status* (2nd edn, CUP 2014) 587–96 ('Hathaway and Foster'). For regional or country-specific reviews, see UNHCR, *Asylum in the European Union: A Study of the Implementation of the Qualification Directive* (2007) 101–4 ('UNHCR Asylum in the EU'); J Sloan, 'The Application of Article 1F of the 1951 Convention in Canada and the United States' (2000) 12 IJRL Special Supplementary Issue 222–48 ('Sloan'); S Kapferer, 'Exclusion Clauses in Europe: A Comparative Overview of State Practice in France, Belgium and the United Kingdom' (2000) 12 IJRL Special Supplementary Issue 195–221 ('Kapferer'); N Michel, 'France: Purposes and Principles of the United Nations: The Way in Which France Applies Article 1F(c)' in PJ van Krieken (ed), *Refugee Law in Context: The Exclusion Clause* (TMC Asser Press 1999) 294–9 ('Michel').

and 2 of the Charter of the United Nations'.[58] The stipulation as to sources, which is merely implied in Article 1(F) of the Convention, is elaborated in the Directive's recital, which provides that such acts 'are, among others, embodied in the United Nations Resolutions relating to measures combating terrorism, which declare that 'acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations'…'.[59]

In Germany, while in the early 1970s Article 1 F(c) was applied in respect of some terrorist and sabotage activities, as well as press censorship,[60] from 1975 courts stressed that Articles 1–2 of the UN Charter were concerned with international relations and thus the provision only applied where inter-State peace or understanding was affected.[61] More recently, there are few reported cases in which Article 12(2)(c) of the Qualification Directive has been applied by German courts outside the 'terrorism' context. [62] In 2009 a German court referred a number of questions regarding Article 12(2)(b) and (c) of the Directive for a preliminary ruling of the European Court of Justice.[63] The latter affirmed that the applicant's occupation of a prominent position within an organization could be a relevant factor in applying 12(2)(c) (but was not required), but said little regarding the potential scope *ratione materiae* of the provision beyond the terrorism context.[64]

In France, the clause was applied in the 1950s to exclude applicants involved in the denunciation of persons to the German occupying powers.[65] From the mid-1980s, the provision was applied to exclude a number of high-ranking State officials, notably in *Duvalier*.[66] More recently, the provision was applied to exclude lower-ranking State officials, including members of police or security units known to violate human rights, such as the *Tontons Macoute* in Haiti and the *Garde civil zaïroise*, a representative of the Khmer Rouge regime, and also individuals with no link to the State such as participants in attempted coups.[67] Interestingly, France has on occasion distinguished between (a) and (c), and not applied the latter to the Rwandan genocide on the basis that to do so 'would have denied the gravity of the events'.[68]

[58] EU Qualification Directive (n 43).
[59] ibid Recital, para 22
[60] Decision in *Case 5845 III/61* of 27 June 1962, discussed in Grahl-Madsen (n 57) 287–8.
[61] See Goodwin-Gill and McAdam (n 29) 186–7.
[62] UNHCR Asylum in the EU (n 57) 102–4.
[63] This was the subject of the UNHCR 2009 Statement on ECJ Reference (n 50).
[64] *Deutschland v B and D* (n 30).
[65] *Milosek* and *Kamykowski*, discussed in Grahl-Madsen (n 57) 286–7.
[66] *Commission des recours des réfugiés* (CRR) No 502.265, 18 July 1986 (confirmed by the *Conseil d'Etat* 31 July 1992); see discussion in Kapferer (n 57) 205; see also *Traoré (Commission des recours des réfugiés,* No 237/574, 16 June 1993), *Zende* (*Commission des recours des réfugiés*, No 253.901, 26 October 1994) and *Sultani (Commission des recours des réfugiés,* No 251.561, 4 February 1994).
[67] Kapferer (n 57) 206–7. Kapferer was critical of this 'expansive use' of art 1F(c) (ibid 221); Michel (n 57) 296–7.
[68] Michel (n 57) 296.

In contrast, Belgian authorities have held that (c) does not introduce any new element beyond what is provided for in (a)—hence involvement in the Rwandan genocide and large-scale attacks by rebel groups against human rights defenders in Algeria was held to trigger exclusion under both provisions.[69] Also, Belgian courts have held that a leadership role is required to trigger exclusion under (c).[70]

In the UK, *Al-Sirri and DD* concerned terrorist-related activities: armed action against ISAF, the UN-mandated force in Afghanistan (*DD*), and a number of activities including conspiracy to murder (*Al-Sirri*). In view of the mandate of ISAF, and its role in maintaining international peace and security, the Court concluded that an attack on ISAF was capable of being an act contrary to the purposes and principles of the United Nations.[71] In *Al-Sirri*, the appellant had argued that the impugned activity did not have an international dimension and so could not fall within (c). The Court concluded that the 'appropriately cautious and restrictive approach' would be to adopt the UNHCR guidelines, according to which the provision is only triggered 'by activity which attacks the very basis of the international community's existence' and that such activity 'must have an international dimension'.[72] The Court also made some more general comments: Article 1 F(c) applies to acts which, even if they are not covered by the definition of the crimes in (a), 'are nevertheless of a comparable egregiousness and character';[73] also 'not every act which is condemned by the United Nations is for that reason alone to be deemed contrary to its purposes and principles'.[74]

In 1999 Canada was described as a 'hotbed of innovation in devising ways to apply Article 1 F(c)', and—even if it still accounted for a very small percentage of exclusion cases[75]—the provision was applied to a wide range of conduct, including drug offences, laying land mines, hijacking and hostage taking, human trafficking, and vote rigging.[76] Perhaps the most detailed consideration was that of the Supreme Court in *Pushpanathan,* decided in 1998.[77] The applicant had been convicted of conspiracy to traffic narcotics, and sentenced

[69] Kapferer (n 57) 198–9 and decisions cited therein.

[70] *XXX v Commissaire général aux réfugiés et aux apatrides*, CCE, N. 24.173 (4 March 2009), discussed in UNHCR 2009 Statement on ECJ Reference (n 50) 29; on earlier Belgian jurisprudence, see UNHCR Exclusion Background Note (n 34) para 48.

[71] *Al-Sirri* (n 22) 63–8; similarly, *B v Refugee Appeals Tribunal and Anor* [2011] IEHC 198, at paras 55–56.

[72] The Court left open the possibility that, on the facts, an act of terrorism in one country could have the international repercussions required (*Al-Sirri* (n 22) paras 38–39).

[73] ibid para 13

[74] ibid para 14, also para 66.

[75] Between 1992 and 1999, of 'over 200' exclusion assessments carried out, 190 were on the basis of sub-para (a) only (G Van Kessel, 'Canada's Approach Towards Exclusion Ground 1F' in van Krieken (n 57) 287, 290 (Van Kessel).

[76] Sloan (n 57) 245–6; Kwakwa describes this practice as 'far-fetched', and 'clearly erroneous and overly broad' (n 49) at 87 and 89.

[77] Discussed in Kwakwa (n 76) 87–89; also Van Kessel (n 75) 291–2.

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to eight years in prison. In line with earlier Canadian cases, the Federal Court of Appeal upheld exclusion under Article 1 F(c), concluding that it did apply to individuals not acting on behalf of a State, and that drug trafficking was 'an act contrary to the purposes and principles of the United Nations'.[78] The Supreme Court agreed on the first point, but not the second,[79] in respect of which it stated that:

> Even though international trafficking in drugs is an extremely serious problem that the UN has taken extraordinary measures to eradicate, in the absence of clear indications that the international community recognizes drug trafficking as a sufficiently serious and sustained violation of fundamental human rights as to amount to persecution, either through a specific designation as an act contrary to the UN purposes and principles, or through international instruments which otherwise indicate that trafficking is a serious violation of fundamental human rights, individuals should not be deprived of the essential protections contained in the Convention for having committed those acts.[80]

The United States has not incorporated Article 1(F) into domestic law.[81] While the five 'bars for asylum' in US law overlap with the exclusion clauses to a certain extent, their weight as State practice in application of Article 1(F) itself is limited: only one of the five bars reproduces the wording used in Article 1(F) ('serious non-political crime').[82] There is also a bar in respect of persons who have persecuted others, but (notwithstanding the conclusions reached below), there is no suggestion that this constitutes the US courts' interpretation of 'acts contrary to the purposes and principles of the United Nations'.[83]

B. UNHCR

In addition to providing guidance to national authorities, UNHCR itself carries out refugee status determination on a large scale.[84] In 2011, UNHCR was the only responsible body for RSD in 52 countries, and shared that responsibility in a further 23 countries.[85] As such, the guidelines it prepares—whether or not

[78] *Pushpanathan* (n 56) paras 15–21.

[79] By four votes to two (Cory and Major JJ agreed that art 1F(c) is triggered by serious human rights violations, but dissented on the basis that, in view of its effects and responses of the international community, drug trafficking should also engage this provision).

[80] *Pushpanathan* (n 56) para 75.

[81] The United States is a party to the 1967 Protocol but not the 1951 Convention, though art 1(F) applies equally under both instruments (see art 1(2) of the Protocol).

[82] US Act section 208(b)(2)(C); discussed in Sloan (n 57) 224–5.

[83] Sloan (n 57) 245.

[84] This function is carried out under the UNHCR Statute, rather than the Convention. Persons so recognized are usually referred to as 'mandate refugees' (UNHCR RSD Handbook (n 25) paras 13–19). The definitions for both inclusion and exclusion in the Statute differ slightly from those in the 1951 Convention, though in practice the Convention formulations take precedence (UNHCR Exclusion Background Note (n 34) para 20).

[85] UNHCR, *Statistical Yearbook 2011: Trends in Displacement, Protection and Solutions* 37–41. In 2012, UNHCR 'conducted RSD in more than 60 countries and registered 110,400 new RSD

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they are followed by domestic courts—have a significant impact on the application of Article 1 of the Convention.

The comments on Article 1 F(c) in UNHCR's 1992 Handbook on RSD are, in full, as follows:

> It will be seen that this very generally-worded exclusion clause overlaps with the exclusion clause in Article 1 F(a); for it is evident that a crime against peace, a war crime or a crime against humanity is also an act contrary to the purposes and principles of the United Nations. While Article 1 F(c) does not introduce any specific new element, it is intended to cover in a general way such acts against the purposes and principles of the United Nations that might not be fully covered by the two preceding exclusion clauses. Taken in conjunction with the latter, it has to be assumed, although this is not specifically stated, that the acts covered by the present clause must also be of a criminal nature.
>
> The purposes and principles of the United Nations are set out in the Preamble and Articles and 2 of the Charter of the United Nations. They enumerate fundamental principles that should govern the conduct of their members in relation to each other and in relation to the international community as a whole. From this it could be inferred that an individual, in order to have committed an act contrary to these principles, must have been in a position of power in a member State and instrumental to his State's infringing these principles. However, there are hardly any precedents on record for the application of this clause, which, due to its very general character, should be applied with caution.[86]

In a 2003 Note, prompted partly by 'developments in contemporary international law', UNHCR took a position that was, if anything, more restrictive than in 1992:

> Given the broad, general terms of the purposes and principles of the United Nations, the scope of this category is rather unclear and should therefore be read narrowly. Indeed, it is rarely applied and, in many cases, Article 1 F(a) or 1 F(b) are anyway likely to apply. Article 1 F(c) is *only triggered in extreme circumstances by activity which attacks the very basis of the international community's coexistence. Such activity must have an international dimension*. Crimes capable of affecting international peace, security and peaceful relations between States, as well as serious and sustained violations of human rights, would fall under this category. Given that Articles 1 and 2 of the United Nations Charter essentially set out the fundamental principles States must uphold in their mutual relations, it would appear that in principle only persons who have been in positions of power in a State or State-like entity would appear capable of committing such acts.[87]

An accompanying Background Note took a similar position.[88]

applications, confirming UNHCR as the second largest RSD body in the world' <https://public.msrp.unhcr.org/psc/RAHRPRDX/EMPLOYEE/HR/c/HRS_HRAM.HRS_CE.GBL>.

[86] UNHCR RSD Handbook (n 25) paras 162–163.

[87] UNHCR 2003 Exclusion Guidelines (n 28) para 17 (emphasis added).

[88] UNHCR Exclusion Background Note (n 34) paras 47–49).

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A July 2009 Statement largely repeated the 2003 position regarding scope *ratione materiae*.[89] *Ratione personae*, the 2009 Statement contended that 'only high-ranking persons within UN Member States (ie Heads of State and persons in analogous positions) are capable of violating those purposes and principles in the exercise of their State leadership functions'. [90] Elsewhere in the same document, UNHCR appeared to concede that, in view of recent international developments, this may no longer be true in the context of 'terrorism',[91] but did not consider whether this evolution may have significance beyond that context.[92]

C. Commentators

Writing in 1966, Grahl-Madsen found it 'difficult to see how persons who do not occupy a responsible governmental position' could fall within this provision, with the possible exception of certain flagrant acts against human rights and fundamental freedoms. In the latter category he gave the examples of slave-owners and traders, persons guilty of torture, and those who impede the participation of others in government, e.g. by denying the right to vote. Overall, this provision must 'be applied with considerable restraint'.[93]

In the first edition of *The Law of Refugee Status*, published in 1991, Hathaway stated of Article 1(F) in general that a State's duty under international refugee law did not extend 'to those whose own actions are inconsistent with the basic human rights undertaking'.[94] Turning to sub-paragraph (c), he remarked that the interpretations of this provision 'mirror its confused drafting history', submitted that the principles of the UN speak essentially to governments,[95] queried the independent utility of (c), and argued that a 'sensible and purposeful' interpretation would be to enable States 'in bringing to bear basic norms of acceptable international conduct against government officials who ought reasonably to understand and respect them'.[96] In the second edition of this text, published in 2014, Hathaway and Foster accept a 'cautious evolution' in the scope of Article 1 F(c) *ratione personae*, but oppose any similar evolution

[89] UNHCR 2009 Statement on ECJ Reference (n 50) 14, 26–7.
[90] ibid 28.
[91] ibid 14–15.
[92] ibid 28–9.
[93] He suggested that a person who has carried out policies incompatible with the principle of 'equal rights of men and women', as found in the Preamble and art 1(3) of the Charter, should *not* automatically be labelled as guilty of acts contrary to the purposes and principles of the UN (Grahl-Madsen (n 57) 283–6).
[94] J Hathaway, *The Law of Refugee Status* (Butterworths 1991) 191 ('Hathaway').
[95] While arguments for the exclusion under this provision 'of those who breach human rights standards or fail to support other goals of the world community' were more compelling than some other positions advanced, nevertheless 'the range, detail, and relative obscurity of such standards would work a real hardship in the case of the average citizen, who generally looks only to domestic law to understand her duties' (ibid 228).
[96] ibid 227–9.

ratione materiae.[97] Recent State practice is described as 'disturbing', and the provision has become 'something of a ravenous omnivore'.[98] The authors make the pointed criticism that 'the amorphous nature of Art 1(F)(c) as too frequently applied facilitates the evasion of the rigors of pursuing exclusion under the grounds most directly applicable'.[99] They broadly approve the position of the UK Supreme Court in *Al-Sirri*, and conclude that the provision should mandate exclusion 'where there is clear and convincing evidence that the person concerned conceived or committed acts of such gravity that they threaten the stability of the international order'.[100]

Writing in 2000, Kwakwa argued that 'interpreting the exclusion clauses as restrictively as possible is not only consistent with, but is also dictated by, the ordinary meaning, the context and the object and purpose of the refugee convention'.[101] He accepted that private individuals, acting in a non-State capacity, can fall within Article 1 F(c), but cautioned against the use of this provision in anything but 'the most extreme of cases'.[102] The provision should be applied in 'few and exceptional situations' in respect of conduct which does not fall under (a) and (b), and which constitutes 'a blatant and egregious violation of fundamental human rights that clearly contravene the "purposes and principles of the United Nations"'. There will 'likely be less than a handful of such cases'.[103]

Writing within the context of UNHCR's 2001 Global Consultations, Gilbert argued that Article 1 F(c) is 'vague and open to abuse by States'. He contended that it would promote consistency within international law if the scope of this provision were confined to 'acts committed by persons in high office in government or in a rebel movement that controls territory within the State or in a group perpetrating international terrorism that threatens international peace and security'.[104]

In the 2007 edition of *The Refugee in International Law*, Goodwin-Gill and McAdam identify four categories of persons who might qualify for exclusion under Article 1 F(c):

> (1) policy-makers and those holding positions of political responsibility, in situations where, for example, violations of human rights or other activities contrary to the purposes and principles of the United

[97] Hathaway and Foster (n 57) 589.
[98] ibid 592, 596.
[99] ibid 593.
[100] ibid 596–7.
[101] Kwakwa (n 49) 83.
[102] He characterizes as 'obviously an erroneous interpretation of Article 1F(c)' the French decisions discussed above, and concludes that art 1F(c) has been 'misused and abused' (ibid 86, 89–90)
[103] ibid 91.
[104] Gilbert (n 29) 457.

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Nations have occurred, and where they might be considered to have covered such activities with their authority;

(2) the agents of implementation of such policies, including, for example, officials in government departments or agencies who knew or ought to have known what was going on; and the members of government and other organisations engaged in activities, such as persecution, contrary to the purposes and principles of the United Nations;

(3) individuals, whether members of organisations or not, who, for example, have personally participated in the persecution or denial of the human rights of others; and

(4) those individuals, whether connected with the organisation of a State or not, who are considered to have committed 'terrorist' or 'terrorist-related' acts.[105]

A 2011 commentary on the Convention argues that 'in general terms, the wording of Art 1 F, as chosen in 1951, calls for a dynamic interpretation'. For the purposes of sub-paragraph (a), reference must therefore be made to the Statutes of the ICTY, ICTR and ICC.[106] In terms of (c), developments in international law—particularly in the terrorism context—mean that it can no longer be assumed that it is only persons wielding public authority who can commit acts contrary to the purposes and principles of the UN.[107] The provision 'seems to have only a limited scope of application', and recent rulings of French courts were 'over expansive'.[108] The application of (c) 'still raises considerable doubts, due to the wideness and lack of precision of the clause', and 'needs to take place with restraint and should be limited to residual cases in which Art 1 F(a) and (b) fail to apply'.[109]

V. IS A SPECIAL APPROACH NECESSARY?

Before applying the standard principles of treaty interpretation to Article 1 F(c), it is worth considering whether a special approach is required when interpreting the exclusion clauses in general and sub-paragraph (c) in particular. As indicated above, a number of assertions to this effect have been made.

A. Serious Consequences Require a Restrictive Application?

In 1992, UNHCR stated that 'considering the serious consequences of exclusion for the person concerned … the interpretation of these exclusion clauses must

[105] Goodwin-Gill and McAdam (n 29) 189–90.
[106] Zimmermann and Wennholz (n 29) 596.
[107] ibid 603.
[108] ibid 604.
[109] ibid 609–10.

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be restrictive'.[110] This position has been repeated in subsequent UNHCR guidelines[111] and echoed by commentators.[112]

The possible consequences of the decision should not dictate a particular type of interpretation of the clause, however, for a number of reasons. First, the consequences of the decision for the individual concerned will vary depending on the (non-refugee) legal framework in the forum State: that State may have suspended removals to the country of origin, due to ongoing instability in the latter and/or the absence of readmission agreements; if the forum State is party to the ECHR, removal may be precluded in view of the nature of the harm feared in the country of origin (Article 3)[113] or the nature of links already established in the forum State (Article 8).[114] For non-ECHR States, removal may be precluded on the basis of guarantees in other instruments—notably Article 3 of the Convention against Torture, Article 7 of the International Covenant on Civil and Political Rights, Articles 5(2) and 22(8) of the American Convention on Human Rights, and Article 5 of the African Charter on Human and Peoples' Rights.[115] Indeed, even where an applicant *has* been excluded, States do not necessarily proceed to removal.[116] A differentiated application of the exclusion clauses, based on the (in)existence of potential alternative bars to *refoulement* in the forum State, is difficult to reconcile with the notion of 'international standards' of refugee protection.

There is also, second, a practical problem. Refugee status confers a number of protections which may not be extended to other categories of migrants. Hence an individual fearing persecution will often apply for refugee status *first*, before invoking other international or domestic instruments if that application is unsuccessful. When the exclusion assessment is being made, therefore, the decision-maker is unlikely to know how any other potential bars to removal will apply in the individual case, and so the actual consequences of any exclusion decision will be a matter of speculation.

B. Unclear Wording Requires a Restrictive Application?

In the RSD Handbook, UNHCR recommends that due to its 'very general' and 'vague' character, Article 1 F(c) 'should be applied with caution'.[117] Similarly,

[110] UNHCR RSD Handbook (n 25) para 149.
[111] UNHCR 2003 Exclusion Guidelines (n 28) para 2; UNHCR Exclusion Background Note (n 34) para 4.
[112] Kwakwa (n 49) 80, 82; Zimmermann and Wennholz (n 29) 605; Gilbert (n 29) 428.
[113] McKeever 2010 (n 27) 122–6.
[114] On the interaction of refugee law and other human rights protection within the EU legal order, see *Deutschland v B and D* (n 30) paras 113–121.
[115] Kingsley Nyinah (n 29) 300–1; UNHCR Exclusion Background Note (n 34) paras 21–22.
[116] In Belgium, France and the UK, forced removal of excluded asylum-seekers is 'very rare' (Kapferer (n 57) 218). Regarding Rwandan refugees in the 1990s, see O'Neill *et al.* (n 32) 169.
[117] UNHCR RSD Handbook (n 25) paras 163, 179.

in UNHCR's 2003 Note, 'given the broad, general terms of the purposes and principles of the United Nations, the scope of this category is rather unclear and should therefore be read narrowly.'[118]

There are two points to be made here. First, sub-paragraph (c) is scarcely less clear than sub-paragraph (b): difficult interpretative issues regarding the latter include how to determine 'serious'[119] and when an act is 'non-political',[120] whether the act needs to be criminalized under international and/or domestic law,[121] and the relevance, if any, of expiation.[122] Sub-paragraph (c) at least points to an obvious reference point for interpretation, namely the UN Charter, which lists the purposes and principles of the UN in Articles 1 and 2.

Second, that a treaty provision uses a term the meaning and scope of which is not immediately clear is by no means cause to depart from the standard principles of treaty interpretation. An obvious comparison can be made here with the use of 'persecution' in Article 1A(2) of the Convention,[123] with 'private and family life' in Article 8 ECHR[124] or indeed, from an entirely distinct field of international law, 'fair and equitable treatment' in bilateral investment treaties.[125] In each case, the precise meaning to be given to the term used is not immediately apparent, but courts and tribunals nevertheless interpret and apply these terms according to the VCLT rules, including the context in which the instrument was adopted, its object and purpose, and other relevant rules of international law. Treaty provisions may be deliberately imprecise, reflecting political compromise;[126] also, as discussed above, use of a general or imprecise term allows for an evolving interpretation of that term, to reflect developments in international law.[127]

[118] UNHCR 2003 Exclusion Guidelines (n 28) para 17; UNHCR Exclusion Background Note (n 34) para 46; UNHCR 2009 Statement on ECJ Reference (n 50) 13–14. See also, to similar effect, Zimmermann and Wennholz (n 29) 607, 610.

[119] Gilbert (n 29) 449; Grahl-Madsen (n 57) 294–7.

[120] UNHCR 2003 Exclusion Guidelines (n 28) para 155; Zimmermann and Wennholz (n 29) 597–602; Goodwin-Gill and McAdam (n 29) 178.

[121] Grahl-Madsen (n 57) 292–4.

[122] Hathaway (n 94) 222–3; UNHCR Exclusion Background Note (n 34) paras 72–75.

[123] The drafters of CSR51 intentionally left the meaning of 'persecution' undefined (Hathaway (n 94) 102); UNHCR RSD Handbook (n 25) para 51.

[124] Bernhardt (n 8) 12.

[125] C McLachlan, L Shore and M Weiniger, *International Investment Arbitration: Substantive Principles* (OUP 2007) 226–47.

[126] *A v Minister for Immigration* (n 45) 240 (Dawson J), 255–256 (McHugh J) and 275 (Gummow J); McAdam (n 25) 86–7; on 'deliberate imprecision' in the UN Charter, see J Crawford, 'Multilateral Rights and Obligations in International Law (2006) 319 *Recueil des Cours* 365–6 (Crawford); on the 'impossibility of attaining absolute certainty in the framing of laws', see *Michaud v France*, ECtHR, A No 12323/11, Judgment of 6 December 2012, para 96.

[127] Regarding the 'fair and equitable treatment' standard, see *Mondev International Ltd v USA* (2003) 42 ILM 85, discussion in McLachlan (n 8) 298–9.

C. An Exception to Human Rights Guarantees Requires a Restrictive Application?

In 2009, UNHCR stated that,

> as with any exception to human rights guarantees, and given the possible serious consequences for the individual, the exclusion clauses enumerated in Article 1 F should always be interpreted in a restrictive manner and applied with utmost caution.[128]

Commentators have taken a similar view,[129] but again there are problems with this assertion.

First, Article 1(F), like Article 1(A), delineates the category of individuals to whom the Convention, as a whole, applies to.[130] It does not limit the exercise of rights or freedoms by such persons—unlike, for example, Article 33(2) which plainly does constitute an exception to a (fundamental) human rights guarantee (namely, *non-refoulement*).[131] In these respects, Article 1, including paragraphs (C), (D), (E) and (F), is comparable to provisions such as Article 1 of the Convention on the Rights of the Child (CRC) or Article 1 ECHR. Those provisions identify the limits of the personal scope of the respective instruments *in their entirety*: persons over 18,[132] and persons not within the jurisdiction of the Contracting States, respectively. Permissible limitations on the rights provided in those instruments are, in contrast, stipulated in the provisions conferring each right (eg sub-paragraph (2) of Articles 8–11 ECHR, and Articles 13(2), 14(3) and 15(2) CRC). The Refugee Convention is structured in the same way.[133]

Second, modern international law has in any event moved away from using presumptions in favour of a more or less restrictive interpretation of particular

[128] UNHCR 2009 Statement on ECJ Reference (n 50) 7, 10; UNHCR Exclusion Background Note (n 34) para 4.

[129] Gilbert (n 29) 428, 445, 456–7; Kingsley Nyinah (n 29) 299.

[130] It is certainly appropriate for inclusion (under art 1A(2)) to be carried out before exclusion under art 1(F), but in cases where the inclusion assessment raises concerns about possible excludability, a final decision on status will not be taken until an exclusion assessment has been carried out: the individual will not have been recognized as a refugee prior to the exclusion assessment. Art 1(F) thus does not remove a status previously conferred, it precludes conferral of that status in the first place (*Pushpanathan* (n 56) at paras 7, 58).

[131] 'The benefit of [art 33(1)—*non refoulement*] may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.' The contrast between 1(F) and 33(2) is in fact drawn in the very same 2009 UNHCR Note (UNHCR 2009 Statement on ECJ Reference (n 50) 8, also 33; also Zimmermann and Wennholz (n 29) 589–90, 609; Hathaway (n 94) 225–6.

[132] Art 1 CRC provides that 'For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.'

[133] The exclusion clauses are included in art 1 'definition of a refugee', part of Chapter I (General Provisions), while the various rights which accrue from refugee status are detailed in Chapters II–IV.

types of treaty provisions.[134] In *Nicaragua v Costa Rica*, the ICJ rejected Nicaragua's argument that a treaty provision limiting its sovereign rights over a river should be interpreted restrictively, concluding that:

> While it is certainly true that limitations of the sovereignty of a State over its territory are not to be presumed, this does not mean that treaty provisions establishing such limitations, such as those that are in issue in the present case, should for this reason be interpreted *a priori* in a restrictive way. A treaty provision which has the purpose of limiting the sovereign powers of a State must be interpreted like any other provision of a treaty, i.e. in accordance with the intentions of its authors as reflected by the text of the treaty and the other relevant factors in terms of interpretation.[135]

The advantages of such an approach are obvious. Absent express indications to the contrary, the established rules on treaty interpretation should be applied.

VI. APPLYING THE STANDARD RULES OF INTERPRETATION

Analyses of Article 1 F(c) sometimes pay insufficient attention to the standard rules of treaty interpretation. These are, of course, codified in Articles 31 and 32 of the VCLT, which reflect customary international law and also apply to treaties concluded prior to 1969.[136]

A number of principles operate alongside the VCLT system. One is the principle of effectiveness, which precludes interpreting a treaty provision in such a way as to leave it 'devoid of purport or effect'.[137] Comments to the effect that the 'independent utility' of Article 1 F(c) is 'somewhat elusive',[138] or that (c) does not introduce 'any specific new element' beyond what is in (a) and (b),[139] are difficult to reconcile with this principle. If a given interpretation renders a treaty provision without effect, this is in fact a strong basis for *not* adopting such an interpretation.

When interpreting a treaty provision a decision-maker is likely to take into consideration all available information regarding the conclusion of the treaty and its application in practice.[140] That said, the VCLT scheme does provide a useful structure for analysis, and—in respect of preparatory works at least—indicates which types of information should be accorded less significance.

[134] Bernhardt (n 8); for earlier discussions, see H Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (1949) 26 BYBIL 48.

[135] *Navigational and Related Rights* (n 16) 24–25, para 48.

[136] ibid 24, para 47.

[137] *Corfu Channel (United Kingdom v Albania), Merits*, Judgment, ICJ Reports 1949, 24; see also *Anglo-Iranian Oil Co. (United Kingdom v Iran), Preliminary Objections*, Judgment, ICJ Reports 1952, 93 at 105; *Namibia* (n 4) 35, para 66; *Aegean Sea Continental Shelf;* ICJ Reports 1978, 22, para 52. See also Waldock (n 59) 60–61.

[138] Hathaway (n 94) 229.

[139] UNHCR RSD Handbook (n 25) para 162.

[140] K Keith, 'Interpreting Treaties, Statutes and Contracts' (May 2009) New Zealand Centre for Public Law, Occasional Paper No 19, 55; I Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester University Press 1984) 116 ('Sinclair').

In the following sections, therefore, Article 1 F(c) will be analysed according to the VCLT scheme.

A. Ordinary Meaning

Any interpretation must start with the text as this must be assumed to be the authentic expression of the intentions of the parties.[141]

1. *Application* ratione materiae

Before considering the meaning of 'purposes and principles of the United Nations', an initial comment on the text can be made. Unlike sub-paragraphs (a) and (b) which relate to an individual in respect of whom there are serious reasons for considering that he has 'committed a … *crime*', (c) relates to individuals who are 'guilty of *acts*'. This wording does not preclude criminal conduct from *also* falling within the scope of (c), but nor does it indicate that only conduct which is criminalized engages the provision.[142]

It has been argued that these differences in wording in fact 'suggest a higher threshold to establish culpability' under (c), and even that the latter 'requires an actual pronouncement of guilt by a competent body'.[143] This is unpersuasive. The applicable standard of proof for Article 1 F is stipulated in the *chapeau* ('serious reasons for considering'): this standard applies in respect of (a), (b) and (c) equally.[144] What is defined within those sub-paragraphs is, rather, the different type of conduct which requires exclusion. Use of the word 'guilty' allows for consideration of possible circumstances precluding liability, but does not require that the conduct be criminalized under domestic or international law.[145]

Turning to the main contentious issue in Article 1 F(c), the 'purposes and principles of the United Nations' are defined in the UN Charter (Articles 1 and 2, respectively). It is true that those provisions are couched in general, sometimes vague language. But this does not mean that they are devoid of content. The powers of the Security Council, the General Assembly, and regional arrangements are all circumscribed by reference to these purposes and principles.[146] Many Charter provisions refer to the purposes and principles

[141] *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, ICJ Reports 1950, 8; *SSHD v K* (n 7), para 10, per Lord Bingham. Indeed, in 1951 one of the drafters described it as 'essential that the text [of the Convention] should be as clear as possible, since in its interpretation of any convention the International Court of Justice could only take into account its actual text, nor what had been said during the preparatory work without finding expression in the text' (Conference of Plenipotentiaries, UN Doc A/CONF.2/SR. 19 (1951) ('Plenipotentiaries 19') 13).

[142] cf UNHCR 2003 Exclusion Guidelines (n 28) para 163.

[143] Kwakwa (n 49) 84.

[144] *Al-Sirri* (n 22) paras 15–16, 75.

[145] Zimmermann and Wennholz (n 29) 603.

[146] Charter, arts 24(2), 14 and 52(1), respectively. See A Paulus, 'Article 2' in B Simma, D-E Khan, G Nolte and A Paulus (eds), *The Charter of the United Nations: A Commentary, Third*

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in general[147] or to specific elements thereof.[148] A number of universal instruments adopted since 1945 identify the 'purposes and principles of the United Nations' as a source of obligations for States.[149] Moreover, just as the content of the prohibition on the use of force in Article 2(4),[150] and of the principle of self-determination in Article 1(2),[151] have been elaborated considerably since 1945, the same is true of other elements of Articles 1–2.[152]

The Charter is to be interpreted in the light of the practice of its organs since 1945:[153] as early as 1949 the ICJ affirmed that the 'the rights and duties of an entity such as the [UN] must depend upon its purposes and functions as specified or implied in its constituent documents *and developed in practice*'.[154]

Article 1(1) of the Charter identifies the main purpose of the UN: maintaining international peace and security.[155] As widely noted, the Security Council's determination of threats to international peace and security increasingly takes account of matters beyond purely inter-State relations,[156] including violations of IHL and humanitarian crises within a single country (Somalia,[157] Rwanda[158]),

Edition, Vol 1, 121, 128–9. On the binding nature of arts 1–2, A Randelzhofer, 'Purposes and Principles of the United Nations' in R Wolfrum (ed), *United Nations: Law, Policies and Practice, Vol 2* (1995) 994, 996–7 .

[147] Arts 14, 24(2), 52, 76, 104 and 105.

[148] Arts 11, 12, 13, 24(1), 33–39, 42, 43, 48, 51, 55, 73, 84 and 99; R Wolfrum, 'Article 1' in B Simma *et al.* (n 146) 107, 108–9 ('Wolfrum').

[149] Art 4(1), International Convention for the Suppression of Acts of Nuclear Terrorism, 2005; art 19(1), International Convention for the Suppression of Terrorist Bombings, 1998. It is noted that these are not merely hortatory references included in the respective preambles.

[150] D McKeever, 'The Contribution of the International Court of Justice to the Law on the Use of Force: Missed Opportunities or Unrealistic Expectations?' (2009) 78 Nordic Journal of International Law 361, 378–9 ('McKeever 2009').

[151] In 1995, the ICJ described as 'irreproachable' the assertion 'that the right of peoples to self-determination, *as it evolved from the Charter and from United Nations practice*, has an *erga omnes* character' (*East Timor (Portugal v Australia)*, Judgment, ICJ Reports, 1995, at 102, para 29—emphasis added); M Bedjaoui, 'Article 1: commentaire générale' in J-P Cot, A Pellet and M Forteau (eds), *La Charte des Nations Unies: Commentaire article par article* (3rd edn, Economica 2005) 313, 316–17 ('Bedjaoui').

[152] '[C]ertains buts ou principes recèlent parfois, comme c'est le cas en ce paragraphe 2 [de l'article 1], une dynamique propre qui en permet une récupération et une utilisation extensive et inattendue' (ibid 317); *Pushpanathan* (n 56) para 62.

[153] *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, ICJ Reports 1950, 4, at 8–9; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, ICJ Reports 1962 ('*Certain Expenses*') 151, at 157, 165.

[154] *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, 174, at 180 (emphasis added).

[155] *Certain Expenses* (n 153) 151, at 168.

[156] Kadelbach (n 53) 93–95; B Simma, 'From Bilateralism to Community Interests in International Law' (1994) 250 Recueil des Cours 264–8; C Tomuschat, 'Obligations arising for States without or against Their Will' (1993) 241 Recueil des Cours 336–7 ('Tomuschat').

[157] SC res 733, 23 January 1992; SC res 751, 24 April 1992, SC res 767, 24 July 1992, and SC res 794, 3 December 1992; Goodwin-Gill and McAdam (n 29) 194.

[158] See eg SC res 929, 22 June 1994.

large-scale refugee movements,[159] a declaration of independence by a racist regime[160] and internal action against a democratically-elected government (Haiti).[161] Attention to such diverse phenomena must be taken into account when considering the type of activity which could conceivably be considered contrary to Article 1(1) of the Charter. In this context, there have, of course, been many resolutions adopted by the Security Council[162] and General Assembly[163] affirming that acts of, and support for, 'terrorism' are contrary to the purposes and principles of the UN.

The Council has also employed an increasingly diverse range of measures in responding to such threats:[164] deploying peacekeeping forces;[165] demarcating and guaranteeing the inviolability of boundaries;[166] establishing international criminal tribunals;[167] imposing sanctions against non-State actors;[168] ordering the arrest and surrender of individuals;[169] establishing compensation schemes following an armed conflict;[170] legislating;[171] determining that an entity claiming to be a government is an illegal regime;[172] establishing commissions of inquiry[173] and referring situations to the International Criminal Court.[174]

But even if maintaining international peace and security is the main purpose of the United Nations, it is not the only one. Article 1(3) of the Charter aims at 'respect for human rights', and the Charter expressly includes respect for, and observance of, human rights among the mandatory objectives of the UN as a whole (Article 55(c)). The latter provision is particularly important:[175] in

[159] UNSC res 688, 5 April 1991 (Iraq); UNSC res 814, 26 March 1993 (Somalia); UNSC res 1556, 30 July 2004 (Darfur).

[160] SC resolutions 216, 12 November 1965 and 217, 20 November 1965, relating to Southern Rhodesia; Tomuschat (n 156) 337–8.

[161] SC res 940, 31 July 1994.

[162] SC res 1373 (2001); res 1624 (2005); res 1377 (2001).

[163] GA res 49/60 (1994); res 51/210 (1996); res 60/158 (2006); res 60/288 (2006).

[164] See overview in Crawford (n 127) 381–2.

[165] On early UN peacekeeping operations and the purposes of the UN, see *Certain Expenses* (n 153) 151, 171–2 and 175–7. As of March 2015, there are 16 UN peacekeeping missions operating. Actions against ISAF, a UN-mandated peacekeeping force which ceased operations in late 2014, have been held to constitute acts contrary to the purposes and principles of the UN under art 1F(c) (see section IV.A above).

[166] SC res 687 (1991), 3 April 1991 (Iraq–Kuwait border).

[167] UNSC res 827, 25 May 1993 (Yugoslavia) and res 955, 8 November 1994 (Rwanda).

[168] See eg SC res 864, 15 September 1993; SC res 1267 (1999), 15 Oct 1999 and SC res 1333 (2000), 19 Dec 2000.

[169] SC res 731 (1992), 21 January 1992 and 748 (1992), 31 March 1992 regarding the Lockerbie bombing; SC res 1638 (2005), 11 November 2005, regarding Charles Taylor.

[170] UNSC res 692, 20 May 1991 (regarding the Iraqi invasion of Kuwait).

[171] See discussion in McKeever 2009 (n 151) 394–6.

[172] SC res 217 (1965) on Southern Rhodesia; SC res 276 (1970) on South West Africa; SC res 1975 (2011), 30 March 2011 on Côte d'Ivoire.

[173] SC res 1564 (2004), 18 September 2004, para 12.

[174] SC res 1592 (2005), 31 March 2005 (Darfur).

[175] E Riedel and J-M. Arend, 'Article 55(c)' in B Simma, D-E Khan, G Nolte and A Paulus (eds), *The Charter of the United Nations: A Commentary* (3rd edn, OUP 2012) vol 2, 1565–1602 ('Riedel and Arend').

Article 56, all Members pledge to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55, while Article 59 allows for the future establishment of 'any new specialised agencies required' for the accomplishment of those purposes. Promoting the realization of human rights is also a mandatory objective of the General Assembly (Article 13(1)(b)), and the Economic and Social Council (Articles 62(2), 68)). A concern with 'fundamental human rights' is, of course, also reflected in the Preamble.[176]

While it is wrong to say that 'l'adoption de la Charte est l'année zéro des droits de l'homme à l'échelle internationale', [177] the Charter certainly did give human rights a more prominent role within the sphere of international legal obligations.[178] Moreover, the range, and effectiveness, of this area of law has developed exponentially since 1945[179] and, indeed, 1951. Binding universal instruments were adopted with the two Covenants, alongside international instruments addressing the rights of specific groups (women, children, minorities, refugees), and protection from certain conduct (apartheid, racial discrimination, torture). Regional instruments in the Americas and Africa were established post-1951, while that of Europe developed hugely since then in terms of the number of Contracting States,[180] the jurisprudence of the Strasbourg Court, and the influence of its rulings. That which was expressed in general terms in Article 1(3) of the Charter has thus been elaborated and developed in the decades since: what may have been a vague statement of principle has been given real content.[181] Moreover, this development had been envisaged from the very outset.[182]

That certain human rights violations are contrary to the purposes and principles of the UN has been expressly confirmed by the principal organs of the UN. In *Tehran Hostages*, the ICJ stated that 'wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles

[176] Charter, second preambular para. The EU Qualification Directive identifies the preamble of the Charter, along with arts 1 and 2, as the source for identifying the purposes and principles of the UN (see above).

[177] O de Frouville, 'Article 1, paragraphe 3' in Cot, Pellet and Forteau (n 151) 357, 360. This position ignores, for example, the 1926 Slavery Convention (later supplemented in the 1950s), the Minorities Treaties associated with the League of Nations Covenant and the various labour rights conventions adopted by the International Labour Organization (I Brownlie, *International Law at the Fiftieth Anniversary of the United Nations: General Course on Public International Law* (1995) 255 Recueil des Cours 78–9 ('Brownlie').

[178] Brownlie (n 177) 79.

[179] Riedel and Arend (n 175) 1579–1602.

[180] In 1951 the Council of Europe had 14 Member States; it currently has 47.

[181] Brownlie (n 177) 79; J Crawford, 'The Charter of the United Nations as a Constitution' in H Fox (ed), *The Changing Constitution of the United Nations* (BIICL 1997) 3–16, 11; Riedel and Arend (n 175) 1576.

[182] Wolfrum (n 148) 115; JM Ruda, *The Purposes and Principles of the United Nations Charter: A Legislative History of the Preamble, Article 1 and Article 2* (Editorial Estudios Internacionales 1983) 154–61.

of the Charter of the United Nations'.[183] The ICJ and Security Council made even stronger statements with respect to apartheid.[184] Similarly, the General Assembly has characterized enforced disappearance and torture as acts contrary to the purposes and principles of the UN.[185]

In addition, the purposes and principles of the UN have frequently been invoked by the organs of the UN in resolutions adopting new human rights instruments,[186] or on specific human rights issues.[187] Equally, the preambles of human rights instruments often invoke the purposes and principles of the UN and States' obligations, under Article 55 of the Charter, to promote universal observance of human rights.[188] Articles 1 and 55 of the Charter, and the purpose of promoting universal respect for human rights, are also invoked by the General Assembly when considering the reports of various human rights monitoring bodies.[189] In short, through the practice of its organs, the emphasis on the protection of human rights as one of the purposes of the UN has changed dramatically, from a perceived precondition to peace to an end in itself.[190] This practice must inform the interpretation of Article 1(3).[191]

In view of the foregoing, it follows a) that the protection of human rights has always been one of the purposes of the UN, b) that developments since 1951 have given tangible content to that broad purpose, such that c) serious violations of human rights instruments adopted by the UN can plausibly be considered 'acts contrary to the purposes and principles of the UN'.

2. *Application* ratione personae

It is true that some of the purposes and principles listed in Articles 1–2 of the Charter are hardly susceptible to contrary action by an individual who does not occupy high public office: for example, Article 2, paragraphs (2) (compliance

[183] *United States Diplomatic and Consular Staff in Tehran*, Judgment, ICJ Reports 1980, 42, para 91.

[184] Apartheid 'constitute[s] a denial of fundamental human rights [and] is a flagrant violation of the purposes and principles of the Charter' (*Namibia* (n 4), para 131); SC res 554, 17 August 1984.

[185] GA resolutions 47/133, 18 December 1992 (art 1(1)), and 3452 (XXX), 9 December 1975 (art 2) respectively.

[186] GA res 2200 (XXI), 16 December 1966 (on the ICCPR and ICESCR); GA res 34/180, 18 December 1979 (CEDAW); GA res 36/55.

[187] SC res 554, 17 August 1984, GA res 265 (III), 14 May 1949 and GA res 616 A (VII), 5 December 1952 (on racial discrimination in South Africa); GA res 56 (I), 11 December 1946 (the political rights of women); GA res 3452 (XXX), 9 December 1974 (Torture); GA res 44/69, 8 December 1989 (apartheid).

[188] 1948 UDHR (preambular para 6); 1965 ICERD (preambular para 1); 1966 ICCPR and ICESCR (preambular paras 1, 4); 1979 CEDAW (preambular paras 1, 3); 1984 Convention against Torture (preambular paras 1, 3); 1989 Convention on the Rights of the Child (preambular paras 1–3).

[189] GA res 44/73, 8 December 1989 (on CEDAW).

[190] GA res 60/1, 12 September 2005, paras 2, 4, 9; Kadelbach (n 53) 92; Renewing the United Nations: A Programme for Reform, Report of the Secretary-General, 14 July 1997, UN Doc A/51/950, paras 78–79.

[191] Kadelbach (n 53) 86, 88.

of Member States with their Charter obligations in good faith), (3) (settlement of inter-State disputes by peaceful means), and (7) (non-intervention in domestic matters of another State).[192] Also, UNHCR's contention that to engage Article 1 F(c) the impugned conduct needs to have an 'international dimension' makes sense in respect of Article 2(4) (prohibition on the use of force *in international relations*). Other stated purposes and principles, however, particularly when interpreted in view of practice since 1951, plainly *are* susceptible to contrary action by individuals acting at lower levels of State activity, or independently of any State. As outlined above, Article 1(3) on respect for human rights is the most obvious example.[193]

It seems incongruous to argue that while the acts giving rise to refugee status can be perpetrated by both State and non-State actors,[194] only the former can engage Article 1 F(c). More tangibly, UN practice and developments in international law dictate that that provision cannot plausibly be limited to those occupying senior roles in State or, indeed, non-State entities. Just as the UN Security Council has established criminal tribunals with a jurisdiction over individuals that is determined not by their occupation of a particular public office, but by the nature of the conduct attributed to them,[195] similarly human rights instruments focus not on the author, but the nature of the conduct. While the fact of occupying senior (State) roles may make it easier to perpetrate the acts which trigger exclusion under Article 1 F(c), this can no longer be a requirement.[196]

B. Object and Purpose

Commentators argue that,

> consistent with international refugee law, protection must be expanded to as many persons as are *deserving*. … One of the key goals of international refugee law is to provide international protection to all who need it. In interpreting and applying the exclusion clauses, the primary consideration for decision-makers should be to ensure that everyone who deserves refugee protection gets it.[197]

[192] Zimmermann and Wennholz (n 29) 603.
[193] Goodwin-Gill and McAdam (n 29) 189.
[194] On non-State agents of persecution, see EU Qualification Directive, art 6(C); *Canada (Attorney General) v Ward*, [1993] 2 SCR 689; UNHCR RSD Handbook (n 25) para 65; Hathaway (n 94) 125–33; Zimmermann and Mahler (n 43) 362–9.
[195] The first convictions secured by the ICTY and ICTR (Duško Tadić and Jean-Paul Akayesu, respectively) were of individuals far removed from high public office. The same is true of the ICC (Thomas Lubanga Dyilo).
[196] *Pushpanathan* (n 56) at paras 68, 131–134.
[197] Kwakwa (n 49) 82 (emphasis in original). UNHCR's position is that 'the exclusion clauses can only be of an exceptional character and require a restrictive application and interpretation, with utmost caution, in the light of the overriding humanitarian character of the 1951 Convention' (UNHCR 2009 Statement on ECJ Reference (n 50) 19).

This assertion is question-begging, however, and rests on an unbalanced view of the object(s) and purpose(s) of the Convention.

A recurring problem in treaty interpretation is to identify 'the level of abstraction at which to state the object and purpose of a treaty'.[198] Or, with respect to the Refugee Convention[199] as with many other treaties, how to weigh different and potentially conflicting objects and purposes.[200]

The 1951 Preamble[201]emphasizes the object of revising and consolidating existing agreements so as to amplify protection accorded to refugees (paragraphs 2 and 3),[202] the need for coordinated international action to ensure burden-sharing in providing such protection (paragraphs 3–5), and the role to be played by UNHCR in this respect (paragraph 6).[203] The Preamble does not speak of broadening the category of persons to whom such protections will be provided.

The object and purpose of the Refugee Convention was the creation of a comprehensive, permanent[204] refugee protection framework, which codified and built upon the *ad hoc* arrangements already in place.[205] This necessitated a definition of 'refugee', certainly, but it does not necessarily follow that the Convention was intended to apply to the largest number of individuals possible.[206] A number of factors indicate that in fact this was not the case.

First, the definition of a refugee enshrined in Article 1A(2) of the 1951 Convention is more restrictive than that incorporated in earlier instruments.

[198] Arato (n 2) 475.

[199] McAdam notes that it is possible to discern 'various, and possibly conflicting, objects and purposes from the Preamble to the 1951 Convention' (n 25) 91.

[200] A treaty's object and purpose can be 'elusive', but 'fortunately, the role it plays in interpreting treaties is less than the search for the ordinary meaning of the words in their context'. (Aust (n 4) 235).

[201] On preambles and interpreting a treaty's object and purpose, generally: G Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951–54: Treaty Interpretation and Other Treaty Points', (1957) 33 BYBIL 203, 228; *Beagle Channel Arbitration, Argentina v Chile*, 52 ILR 93. With respect to the 1951 Convention, see *Islam v Secretary of State for the Home Department; R v Immigration Appeal Tribunal and another, ex parte Shah* [1999] 2 AC 629, 639 (Steyn); R Allweldt, 'Preamble to the 1951 Convention' in Zimmermann (n 25) 225, 227–8 ('Allweldt') .

[202] The 1951 Convention contains a much longer list of refugee rights than the earlier instruments: property rights under arts 13–14 and access to employment in arts 17–19 were new, while other guarantees such as those relating to education were strengthened (Allweldt (n 201) 236).

[203] At the time of its adoption the Convention 'was seen as an instrument of burden sharing' T Einarsen, 'Drafting History of the 1951 Convention and the 1967 Protocol' in Zimmermann (n 25) 37, 40 ('Einarsen').

[204] By contrast, the Preamble of the 1946 Constitution of the International Refugee Organization stipulated that this was to be a non-permanent organization (18 UNTS 3). It was in fact liquidated in February 1952.

[205] C Skran, 'Historical Development of International Refugee Law' in Zimmermann (n 25) 3, 6 ('Skran'); on the interwar instruments generally, see Grahl-Madsen (n 57) 122–40; also N Robinson, *Convention Relating to the Status of Refugees: Its History, Significance and Contents* (1952) 1–3. Robinson, who had participated in the drafting, stressed that the scope of rights guaranteed in the Convention was broader than in any of the previous agreements (ibid 6).

[206] *A v Minister for Immigration* (n 45) at 247–248, per Dawson J.

The 1922 and 1924 'Nansen Passport' arrangements, as amended in 1926,[207] applied to a person of Russian/Armenian origin, 'who does not enjoy or no longer enjoys the protection' of their respective government and 'who has not acquired another nationality'. In contrast to the 1951 Convention, there was no requirement that the absence of State protection was 'for reasons of' any particular characteristic of the individual in question, nor that such absence had resulted in an objective fear of treatment of a certain gravity ('persecution').[208] The 1933 Convention, which formalized the arrangements adopted in the 1920s and 'more than any other [document] of the interwar era, served as the basis for the 1951 Convention',[209] retained the definitions used in the earlier instruments.[210] The same was true of the July 1936 Provisional Arrangements Concerning the Status of Refugees Coming from Germany,[211] and the 1938 Convention relating to that group.[212]

The same point can be made regarding the International Refugee Organization (IRO), the predecessor to UNHCR established in the aftermath of World War II. Under its 1946 Constitution,[213] 'refugee' covered six categories of persons.[214] At least two of these categories—those outside their country of origin due to events since the outbreak of the war,[215] and unaccompanied children who were war orphans or whose parents had disappeared[216]—would not, without more, fall within the refugee definition provided in Article 1A(2) of the 1951 Convention.[217] A 'convention ground' was required with respect to one category only.[218]

[207] Skran (n 205) 7–10; Einarsen (n 203) 43–4; Grahl–Madsen (n 57) 109.

[208] In a resolution of December 1926, the Council of the League of Nations asked High Commissioner Nansen to expand the scope of these arrangements, to new groups of refugees who 'as a consequence of the war and of events directly connected with the war, are living under analogous conditions' (League of Nations Official Journal, February 1927, 155).

[209] Skran (n 205) 14.

[210] ibid 18.

[211] Art 1 defined as 'refugee coming from Germany' 'any person who was settled in that country, who does not possess any nationality other than German nationality, and in respect of whom it is established in law or in fact he or she does not enjoy the protection of the Government of the Reich' (ibid 27).

[212] This covered 'persons possessing or having possessed German nationality and not possessing any other nationality [as well as stateless persons not covered by previous conventions] who are proved not to enjoy, in law or in fact, the protection of the German Government' (art 1(a)–(b)), but stipulated that 'persons who leave Germany for reasons of purely personal convenience are not included in this definition'. (ibid 30).

[213] 18 UNTS 3. The Constitution was approved by the General Assembly of the United Nations in resolution 62 (I) of 15 December 1946.

[214] IRO Constitution, Annex I, Part I, Section A(1)–(4).

[215] ibid Section A(2).

[216] ibid Section A(4).

[217] In this respect, the 1951 Convention adopts a more restrictive definition than that provided in art 1(2) of the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa.

[218] Namely, persons considered refugees prior to the war 'for reasons of race, religion, nationality or political opinion' (Annex I, Part I, Section A (1)(c)—as discussed above, the pre-war instruments had not in fact required a 'convention ground'. Above and beyond definition as a 'refugee', the IRO Constitution also defined who from this category would become 'the

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While the 1951 Convention brought within its scope those already recognized as refugees under the earlier instruments,[219] Article 1A(2) embodies a narrower definition of 'refugee' than had been provided for in the earlier instruments. That is, the circumstances which had given rise to refugee status under the pre-war instruments would not necessarily give rise to such status if determined *de novo* under the 1951 Convention. The temporal and geographical limitations[220] which were included in the 1951 Convention (and are still maintained by some States)[221] further illustrate that it was not the intention in 1951 to accord refugee status to the largest possible group of individuals. Also, while the *travaux* are ambiguous regarding the precise meaning of Article 1 F(c) itself (see below), many statements made during the drafting process illustrate widespread concerns to limit the personal scope of the Convention.[222]

A second factor is the acknowledged need to protect the institution of asylum.[223] For purposes of interpreting the Convention, the Conclusions of UNHCR's Executive Committee (EXCOM) have been found to have higher status than Guidelines issued by the Office, on the basis that EXCOM 'is itself an assembly of states which has debated the issue and settled on a formal statement concerning it'.[224] EXCOM has adopted relatively few conclusions with respect to Article 1(F), which it mentioned only in passing

concern of the Organisation' (ibid Section C (1)(a)(i))—here one 'valid objection' for a refugee not wishing to return was 'persecution, or fear, based on reasonable grounds of persecution because of race, religion, nationality or political opinions').

[219] Art 1(A)(1). See Grahl-Madsen (n 57) 108–46. The status of these persons, usually referred to as 'statutory refugees' would, however, be subject to application of the exclusion clauses in art 1F (UNHCR RSD Handbook (n 25) para 33).

[220] These limited refugee status to those displaced 'as a result of events occurring before 1 January 1951', and in Europe (UNHCR RSD Handbook (n 25) paras 7, 108).

[221] At time of writing, Turkey retains the geographic limitation under art 1(B) of the 1951 Convention. Turkey provides non-European refugees with 'temporary asylum seeker status', leaving it up to UNHCR to find permanent solutions for these individuals (see <http://www.unhcr.org/pages/49e48e0fa7f.html>). The practical consequences of this position remain significant (D McKeever, 'The Social Contract and Refugee Protection: A Comparative Study of Turkey and Germany in the 1990s' in A Bolesta (ed), *Forced Migration and the Contemporary World: Challenges to the International System* (Libra 2003) 146, 156–60.

[222] Ad Hoc Committee on Statelessness and Related Problems, *Status of Refugees and Stateless Persons – Memorandum by the Secretary General,* 3 January 1950, UN Doc E/AC.32/2 ('Secretary-General Memorandum'), comments on draft Article 1; Ad Hoc Committee on Statelessness and Related Problems, UN Doc E/AC.32/SR.3 (1950) 9 (US); ECOSOC, UN ECOSOCOR, 11th Session, SR 406 (1950), para 55 (France); Plenipotentiaries 19 (n 137) 11 (France); ibid 15–16; see also 21st Meeting, UN Doc A/CONF.2/SR.21 (1951) ('Plenipotentiaries 21') 4 (Italy); Plenipotentiaries 19, 21–22 (US); ibid 25; see also Plenipotentiaries 21, 13 (Colombia and Venezuela); Plenipotentiaries 19, 13–14 (Sweden); Plenipotentiaries 21, 6 and Conference of Plenipotentiaries, UN Doc A/CONF.2/SR. 24 (1951) ('Plenipotentiaries 24') 18 (Yugoslavia).

[223] Kingsley Nyinah (n 29) 296–8.

[224] *Attorney-General v Refugee Council of New Zealand, Inc.* [2003] 2 NZLR 577 at paras 100, 111 per McGrath J. EXCOM conclusions have been frequently invoked in UK courts (*Roma Rights Centre* (n 42) at para 24); *SSHD v K* (n 7) at para 84.

in conclusions adopted in 1978,[225] 1980[226] and 2004.[227] Where EXCOM has made more substantive comments, however, these have taken a different approach to the UNHCR exclusion guidelines discussed above. In 1997, EXCOM stressed

> 'the need for full respect to be accorded to the institution of asylum in general, and consider[ed] it timely to draw attention to the following particular aspects:
>
> ….
>
> (v) the need to apply scrupulously the exclusion clauses stipulated in Article 1 F of the 1951 Convention and in other relevant international instruments, to ensure that the integrity of the asylum institution is not abused by the extension of protection to those who are not entitled to it.[228]

Similarly, with respect to combatants, EXCOM in 2002 recommended that '*utmost attention* should be paid to Article 1 F of the 1951 Convention, in order to avoid abuse of the asylum system by those who do not deserve international protection'.[229] In two Conclusions adopted in 2005, EXCOM reiterated that the exclusion clauses must be applied 'scrupulously', to 'ensure that the integrity of the asylum system is not abused by the extension of refugee protection to those who are not entitled to it'.[230] There is little here to support the argument that the object and purpose of the Convention require a 'restrictive' application of Article 1(F).

That is not to suggest that protecting the institution of asylum was somehow the primary objective in 1951, ahead of the desire to increase the standards of protection accorded to refugees, and that Article 1(F) should thus be given an 'expansive' interpretation so as to exclude as many applicants as possible from refugee status. Plainly, that is not the case. Rather, it is to suggest that the objects and purposes of the Convention do not suggest the need for a particularly 'restrictive' interpretation of Article 1(F).

That merely confirms what is evident from the text of Article 1, taken as a whole: conferral of refugee status under the Convention is subject to certain requirements (in Article 1A(2)) and to certain exceptions (in sub-paragraphs (D), (E) and (F)). The same principles of interpretation should be applied to each. [231] Applying Article 1 F (and, for that matter, 1D, and 1E) in a neutral rather than a 'restrictive' manner, such that individuals whose conduct falls within an ordinary meaning of 'acts contrary to the purposes and principles

[225] Conclusion No, 12 (XXIX) (all reproduced in UNHCR, *A Thematic Complication of Executive Committee Conclusions* (6th edn, Division of International Protection Services 2011).
[226] Conclusion No 17 (XXXI).
[227] Conclusion No 100 (LV).
[228] Conclusion No 82 (XLVIII).
[229] Conclusion No 94 (LIII) (emphasis added).
[230] Conclusions No 102 and 103 (LVI).
[231] The Convention was 'a compromise between competing interests … between the need to ensure humane treatment of the victims of oppression on the one hand and the wish of sovereign states to maintain control over those seeking entry to their territory on the other' (*Roma Rights Centre* (n 42) at para 15, per Lord Bingham).

of the United Nations' and who are therefore excluded from the benefits of the Convention, is in no way inimical to the object(s) and purpose(s) of the Convention.

C. Context

Under the VCLT, the terms of a treaty shall be interpreted in their context, defined as comprising the text, including its preamble and annexes, and any other instrument adopted by the parties in connection with the treaty.[232] Courts have frequently had recourse to the context of the 1951 Convention in interpreting its provisions.[233]

As with the temporal and geographical limitations included (discussed above), so the mandatory language used in sub-paragraphs (C), (D), (E) and (F) of Article 1[234] suggests that it was not intended to accord refugee status to the largest possible group of individuals.

D. Other Rules of International Law

Courts often have regard to other rules of international law in interpreting Article 1 of the Refugee Convention—particularly human rights instruments, such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) when interpreting Article 1A(2)[235] and Article 1C(5).[236] When interpreting Article 1 F(b), courts have had regard to instruments proscribing terrorism-related activities,[237] and to principles of extradition law.[238]

The concept that the benefits of an instrument guaranteeing certain freedoms cannot be invoked by those who act in a manner inimical to those freedoms, is not unique to the Refugee Convention. Nor is it a creation of the twentieth century. In *De Jure Belli ac Pacis* Grotius asserted that asylum is 'in fact for the benefit of those who suffer from undeserved enmity, not those who have done something that is injurious to human society or to other men'.[239]

[232] VCLT art 31(1) and (2).

[233] See eg *Attorney-General v Zaoui and Inspector-General of Intelligence and Security* [2006] 1 NZLR 289 at paras 25–30.

[234] 'This Convention shall not apply' (sub-paras (D), (E), (F)) or 'shall cease to apply' (sub-para (C)). The same phrasing was used in the Statue of UNHCR (see arts 6(A) on cessation and 7 on exclusion).

[235] *SSHD v K* (n 7) at para 86, per Baroness Hale. Similarly, reference has been had to art 1 of the ICERD when interpreting 'race' for the purposes of art 1A(2) (Zimmermann and Mahler (n 43) 376).

[236] *R. v Special Adjudicator, ex parte Hoxha* [2005] UKHL 19, at para 38, per Baroness Hale.

[237] *T v Secretary of State for the Home Department* [1996] AC 742, at 786, per Lords Mustill, Slynn and Lloyd.

[238] *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, at 743.

[239] H Grotius, *De Jure Belli ac Pacis* (1625), Bk II, ch 21 ('On the Sharing of Punishments') in S Neff (ed), *Hugo Grotius On the Law of War and Peace* (CUP 2012) 294.

While the interwar refugee instruments, discussed above, did not contain provisions analogous to Article 1(F), a 1945 resolution of the United Nations Relief and Rehabilitation Administration (UNRAA)[240] precluded assistance in respect of those displaced persons 'who may be detained in the custody of the military or civilian authorities of any of the United Nations on charges of having collaborated with the enemy or having committed other crimes against the interests or nationals of the United Nations'.[241]

Annex I to the IRO Constitution defined 'refugees' for the purposes of that instrument, and also defined who from that category would 'become the concern of the Organisation'.[242] In terms of the latter, one 'valid objection' for an individual not wishing to return to his or her country of origin was a fear of persecution because of, *inter alia*, political opinions 'provided these opinions are not in conflict with the principles of the United Nations, as laid down in the Preamble of the Charter of the United Nations'.[243] Relating more closely to 'exclusion' *per se*, persons who would not be of concern to the Organization included:

1. War criminals, quislings and traitors.
2. Any other persons who can be shown:
   (a) to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations; or
   (b) to have voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations.[244]

Article 14(2) of the Universal Declaration of Human Rights (UDHR) provides that the right to seek and enjoy asylum '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.' This is not an exclusion clause *per se*, but rather precludes reliance on prosecutions arising from the impugned acts serving as the basis for *inclusion.* Article 29(3) UDHR provides that the rights and freedoms proclaimed in the Declaration 'may in no case be exercised contrary to the purposes and principles of the United Nations'.

Article 7(d) of the UNHCR Statute provides that the competence of the High Commissioner shall not extend to a person,

> In respect of whom there are serious reasons for considering that he has committed a crime covered by the provisions of treaties of extradition or a

[240] An international relief agency, founded in 1943. It provided assistance in particular to displaced persons seeking to return home after the war. From 1947 its functions were transferred to a number of UN agencies including the IRO and the World Health Organization.
[241] UNRAA, Resolution 71.
[242] Annex I, Pt I, Section A and C, respectively.
[243] IRO Constitution, Annex I, Pt I, Section C (1)(A)(i).
[244] IRO Constitution, Annex I, Pt II.

> crime mentioned in article VI of the London Charter of the International Military Tribunal or by the provisions of article 14, paragraph 2 [UDHR].

The 1969 OAU Refugee Convention includes exclusion clauses identical to Article 1 F(a)–(c), and also provides for exclusion for acts contrary to the purposes and principles of the OAU.[245]

Beyond the refugee context, Article 5(1) ICCPR provides that nothing in that instrument implies a right—of States or individuals—to engage in conduct aimed at destroying the rights recognized therein.[246] The ECHR has a similar provision.[247]

In short, relevant rules of international law, both pre- and post-1951, suggest that those who perpetrate the type of acts which give rise to the protected status conferred by the Convention, are not themselves entitled to that status.

E. Preparatory Works (Travaux)

In 1966, Grahl-Madsen wrote that:

> it appears from the records that those who pressed for the inclusion of [art 1 F(c)] had only vague ideas as to the meaning of the phrase 'acts contrary to the purposes and principles of the United Nations' … It seems that agreement was reached on the understanding that the phrase should be interpreted very restrictively.[248]

This assessment has been relied on by commentators[249] and courts.[250] Even those who characterize the drafting history of Article 1 F(c) as 'at best, confusing and hardly helpful', rely on this assessment when calling for a 'restrictive' interpretation.[251] UNHCR guidelines invoke the *travaux* to similar effect.[252]

With respect, preparatory works have often been accorded undue significance in analyses of Article 1 F(c). The role assigned to preparatory works in the VCLT —a supplementary source to be relied on in certain circumstances—cannot be ignored. Particularly as, in practice, an assessment of a treaty's *travaux* will rarely lead decisively in favour of one interpretation over another.[253] Article 1 F(c) is an example of this: commentators and Courts have often cited statements by individual delegates who opposed the proposed wording on the basis that it was 'overly vague' and/or risked abuse by States. But where that wording was nevertheless adopted by an overwhelming majority of the

[245] Convention Governing the Specific Aspects of Refugee Problems in Africa, art 1(5).
[246] See also, *mutatis mutandis*, art 5(1) ICESCR.
[247] ECHR, art 17.
[248] Grahl-Madsen (n 57) 283.
[249] Kwakwa (n 49) 82.
[250] *Al-Sirri* (n 22) para 12.
[251] Kwakwa (n 49) 82 and 84; Zimmermann and Wennholz (n 29) 605.
[252] UNHCR 2009 Statement on ECJ Reference (n 50) 13.
[253] Aust (n 4) 244–7; Sinclair (n 140) 116.

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delegates, what weight can plausibly be accorded to such individual views given that they were not shared by the majority? [254]

The main phases in the preparation of the Convention[255] were as follows. On the request of ECOSOC,[256] the UN Secretary-General prepared a memorandum[257] for the Ad Hoc Committee on Statelessness and Related Problems.[258] That Committee met from January to February 1950, and its report was discussed in the ECOSOC Social Committee in July–August of that year. The Ad Hoc Committee was then reconvened, in August 1950, and prepared a revised draft[259] for the General Assembly's Third Committee. The Third Committee did not itself discuss the substance of the draft Convention, but instead convened a Conference of Plenipotentiaries which met from July 1951.

The first substantive discussion of what became Article 1 F(c) took place in ECOSOC in August 1950.[260] As is often the case when assessing preparatory works, however, support for any number of interpretations can be found here. The Canadian representative argued that the formulation proposed was so vague as to be open to abuse by States wishing to exclude refugees, and tabled a motion to delete the words altogether.[261] She later clarified that the concept underlying the provision had a certain value, that re-drafting was required, and withdrew her motion.[262] The representative of Chile found it difficult to see how an individual could commit such acts.[263] The representative of Pakistan suggested that the wording was 'so vague as to be open to abuse by governments wishing to exclude refugees'.[264] The US representative suggested that the phrase was to exclude 'collaborators' and recalled similar wording

[254] There are other problems in placing too much emphasis on the *travaux* here. Much of the record relating to the 1951 Convention comprises minutes of meetings—ie not verbatim, but rather summary records (McAdam (n 25) 99–100). Art 1F(c) had initially been drafted by a working group of the Ad Hoc Committee, but no record of that group's deliberations had been kept, and the paragraph had not been discussed in the Ad Hoc Committee itself when the group's report had been adopted. (ECOSOC, *Social Committee: Summary Record of the Hundred and Sixtieth Meeting*, 2 August 1950, UN Doc E/AC.7/SR.160 ('ECOSOC 160') 17). Also, only 26 of the (145) States currently party to the 1951 Convention actually participated in the drafting process (Goodwin-Gill 2010 (n 6) 209).

[255] Summarized in Einarsen (n 203) 49–68; also McAdam (n 25) 99–103.

[256] Res 116 (VI)(D), 2 March 1948.

[257] The memorandum referred to art 14 UDHR under draft art 3 (Admission), and the comments on that draft article reproduced the limitation to the right of asylum embodied in art 14(2) UDHR (Secretary-General Memorandum (n 222), draft art 3 and comment).

[258] Constituted under ECOSOC Resolution 248 (IX) B of 8 August 1949.

[259] This provided for exclusion of an individual who 'has committed a crime specified in Article VI of the London Charter of the [IMT] or any other act contrary to the purposes and principles of the Charter of the United Nations' (Ad Hoc Committee on Statelessness and Related Problems, UN Docs E/1618 and E/AC.32/5 (1950) 13).

[260] ECOSOC 160 (n 254) and ECOSOC *Social Committee: Summary Record of the One Hundred and Sixty-Sixth Meeting*, 22 August 1950, UN Doc E/AC.7/SR.166 ('ECOSOC 166').

[261] ECOSOC 160 (n 254) 15.

[262] ibid 19.

[263] ibid 15, 18.

[264] ibid 16.

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used in the UDHR and IRO Constitution.[265] The Indian representative, opposing deletion, recalled a case 'where a refugee running a licensed hotel had refused to admit coloured people' and suggested this as an act which would violate the UDHR and be contrary to the purposes and principles of the UN.[266] The French representative seemed to suggest that practice of racial discrimination would engage this provision (which was, in fact, based on a French draft).[267]

At the next meeting, the French representative stated that the provision 'was not aimed at the man-in-the-street, but at persons occupying government posts, such as heads of State, ministers and high officials'. Equally, however, he emphasized the purpose of excluding those responsible for *acts of persecution*, ie those who had 'helped to create the fear from which the refugees had fled'.[268] A representative of the UN Secretariat affirmed that, in line with the UN Charter and the Nuremberg Judgment, 'an individual could nowadays be held liable under international law, and could be called upon to answer for crimes constituting a violation of such law';[269] and that 'an individual who, without having committed a crime against humanity, had violated human rights, for instance, by the exercise of discrimination, could be considered to have committed 'acts contrary the purposes and principles of the United Nations''.[270]

Discussions at the Conference of Plenipotentiaries were equally unclear. The UK representative expressed the view that it was difficult to define what acts would come within this provision, and expressed concern that it might be misused.[271] The French delegate responded that this concern had already been expressed by the UK delegate in ECOSOC, the Third Committee, and the GA itself, and rejected on each occasion; and that the deletion or retention of the exclusion clause would be 'a prime factor in determining France's attitude towards the Convention as a whole'.[272] At the final discussion, the representatives of the UK and the Netherlands objected to the reference to Article 14(2) UDHR.[273] The Swiss representative stated that inclusion of a reference to the purposes and principles of the UN appeared unnecessary.[274] The Yugoslav representative, who 'attached great importance to the restrictive

[265] ibid 15–16.
[266] ibid 17.
[267] ibid 20.
[268] ECOSOC 166 (n 260) 6.
[269] ibid 8.
[270] ibid 9. ECOSOC adopted (by a vote of 7–0–8) a text providing that 'no contracting State shall be obliged, under the provisions of this Convention, to grant refugee status to any person whom it has serious reasons to consider as falling under [art 14(2) UDHR]' (ibid 11).
[271] Plenipotentiaries 24 (n 222) 4–5.
[272] ibid 5–6, 13.
[273] Conference of Plenipotentiaries, UN Doc A/CONF.2/SR. 29 (1951) ('Plenipotentiaries 29') 11–12.
[274] ibid 17.

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provisions of paragraph [F]',[275] proposed splitting up the draft text into (b) and (c) and, for sub-paragraph (c), the words 'acts contrary to the purposes and principles of the United Nations'. The French representative then stated that, were that proposal to be rejected,

> The Convention would become applicable to persons in respect of whom there were good grounds for suspecting that they had committed serious common law crimes or had been guilty of acts contrary to the purposes and principles of the United Nations. It would be rather paradoxical if persons guilty of such acts [were] thus enabled to claim the protection of the United Nations.[276]

The Yugoslav proposal was finally adopted by 22 votes to none, with 2 abstentions.[277]

In sum, the preparatory works relating to Article 1 F(c) are scarcely less 'ambiguous or obscure' than the provision the meaning of which they are supposed to clarify.

VII. WHERE SHOULD THE BAR BE SET?

Characterizing human rights violations as acts 'contrary to the purposes and principles of the United Nations' is plainly consistent with developments in international law and the practice of the United Nations since 1951. But where should the bar be set? Do such violations need to be 'blatant and egregious'[278] or 'of a fairly exceptional nature'[279] to engage Article 1 F(c)? Should the provision be limited to 'acts bearing a certain element of "policy-making", i.e. conceptual planning that exceeds the mere execution of single acts'?[280]

Contrary to these positions, the present author would suggest that conduct amounting to serious or sustained human rights violations, such that would constitute persecution for the purposes of Article 1A(2), meets the standard for exclusion under Article 1 F(c). Hathaway's well-known framework for determining 'persecution'[281] is one possible point of reference here. As with

[275] Plenipotentiaries 24 (n 222) 18; Plenipotentiaries 29 (n 273) 16.

[276] Plenipotentiaries 29 (n 273) 20.

[277] ibid 27. At second reading, the text of art 1(F) was adopted by 18 votes to 1, with 1 abstention (A/CONF.2/SR. 34 (1951) 13).

[278] Kwakwa (n 49) 91

[279] UNHCR Exclusion Background Note (n 34) para 46.

[280] Zimmermann and Wennholz (n 29) 605. In fact, this interpretation would impose a particular mode of (criminal) responsibility—beyond simple commission—which cannot be read in to the text of the Convention.

[281] Hathaway based his model on the International Bill of Rights, distinguishing between a) non-derogable rights (freedom from torture, slavery etc), b) rights which are derogable in certain circumstances only (freedom from arrest and detention, right to privacy and family life), c) rights in respect of which States are to take steps towards progressive realization (primarily economic, social and cultural rights), and d) those rights listed in UDHR but not included in either of the 1966 Covenants. Whether a violation of a given right would amount to 'persecution' under art 1A(2) would depend on its categorization and the circumstances of its violation (discriminatory, etc) (Hathaway (n 94) 108–12).

Article 1A(2),[282] a series of acts which individually would not amount to 'persecution', could cumulatively meet the threshold.[283]

Recalling the discussion above, the meaning of 'persecution' is, of course, itself not fixed. Zimmermann and Wennholz argue that since the Convention 'itself constitutes an instrument of human rights protection, its dynamic interpretation with regard to the standards of human rights law, as it exists today, is also required as a matter of systemic consistency'[284] The present author would fully endorse this statement of principle, but would stress that it must be applied to Article 1 F(c) as much as to Article 1A(2).

Such an interpretation of Article 1 F(c) is not entirely novel. For the Canadian Supreme Court in *Pushpanathan*, 'the rationale is that those who are responsible for the persecution which creates refugees should not enjoy the benefits of a Convention designed to protect those refugees',[285] and whether or not the impugned conduct constituted persecution was decisive for the application of (C).[286] Similarly, Goodwin-Gill and McAdam identify persecution as one category of conduct potentially falling within Article 1 F(c).[287]

This approach precludes the scenario whereby international protection could be accorded to both the victim and the perpetrator of the same persecutory act (s). The Convention does not itself impose on States (still less individuals) an obligation to refrain from persecution, but it does aim to provide protection to those who fear such treatment. That it could be relied on by those who have themselves *committed* persecution is, at the very least, incongruous,[288] and inconsistent with the approach taken in other relevant instruments.

A. Overlap with (A) and (B)

A common refrain is that all persons falling with sub-paragraph (c) would fall within (a) or (b) anyway. While some overlap is inevitable, under the interpretation proposed here there would, in fact, be cases which fall under sub-paragraph (c) only.[289]

[282] EU Qualification Directive (n 43), art 9(1)(b); UNHCR RSD Handbook (n 25) para 53.

[283] In *Pushpanathan*, the Court held that the purpose of art 1F(c) was to exclude 'those individuals responsible for serious, sustained *or* systemic violations of fundamental human rights which amount to persecution in a non-war setting' (*Pushpanathan* (n 56) at para 64—emphasis added). On this point, the Court was unanimous; see para 126 for the concurring view of Cory and Major JJ. cf UNHCR 2009 Statement on ECJ Reference (n 50) 27.

[284] Zimmermann and Wennholz (n 29) 609). With respect, those authors do not fully apply this logic in their interpretation of art 1F(c) (609–10).

[285] *Pushpanathan* (n 56) at para 63, also at para 74.

[286] The purpose of art 1F(c) is: 'to exclude those individuals responsible for serious, sustained or systematic violations of fundamental human rights *which amount to persecution* in a non-war setting' (*Pushpanathan* (n 56) at para 64—emphasis added), and the Court repeatedly emphasized the need to determine whether the conduct amounted to persecution (ibid, at paras 65, 70, 71, 74, 75).

[287] Goodwin-Gill and McAdam (n 29) 188, 190.

[288] ECOSOC 166 (n 260) 9; Kingsley Nyinah (n 29) 296–7.

[289] A detailed consideration of the type of conduct which could fall within (c), so interpreted, is beyond the scope of this paper. The examples given here are illustrative only.

Regarding the potential overlap with (b), an act which constitutes a human rights violation can also constitute a criminal offence, of course, under both domestic and international law (an act of torture being one example). But this is certainly not true of all human rights violations. Freedom of expression, rights to privacy and family life, the right to vote and participate in government[290] are all within the second category of Hathaway's framework, such that violation of these rights (save in the context of a permissible derogation) can constitute persecution for the purposes of Article 1A(2).[291] But the conduct which violates these rights is not itself criminalized under international law, and in domestic law is likely to be characterized as tortious rather than criminal; it is thus difficult to see how it could engage Article 1 F(b). Under the interpretation proposed here, however, such conduct could engage Article 1 F(c).

Also, while (b) requires that the conduct in question occurred 'outside the country of refuge prior to [the applicant's] admission to that country as a refugee', no such temporal or geographic requirements are imposed by (c). This could be relevant in respect of activity which could qualify as a 'serious non-political crime' but is of a trans-boundary nature, such as human trafficking.[292]

Regarding the potential overlap with Article 1 F(a), enlisting children under age 15 into the armed forces constitutes a war crime when committed in an armed conflict.[293] Outside of that context,[294] such conduct is not criminalized under international law. Such conduct does constitute a human rights violation, under Article 38(3) CRC. But that instrument does not oblige contracting States to criminalize this conduct.[295] So, outside the context of an armed conflict, this conduct does not constitute a war crime falling under Article 1 F(a), is unlikely to be criminalized so as to fall under (b), but could reasonably be considered an act of persecution such that it falls under (c).

These examples are speculative, of course, but suffice to illustrate that the proposed interpretation of Article 1 F(c) also has the benefit of consistency with the principle of effectiveness.

[290] Grahl-Madsen suggested that denial of the right to vote could trigger exclusion under art 1F (c) – see section IV.C above.

[291] Hathaway (n 94) 109–10.

[292] UNHCR has stated, without explanation, that art 1F(c) should not be applied in respect of smuggling or trafficking of migrants (UNHCR Exclusion Background Note (n 34) para 48).

[293] ICC Statute, art 8(2)(B)(xvi) for international armed conflict, and art 8(2)(E)(vii) for non-international armed conflicts. These provisions also characterize as a war crime the use of such persons to actively participate in hostilities.

[294] The fluid nature of many conflicts, particularly non-international (as defined in art 8(2)(D) ICC Statute), may make it difficult for the decision-maker to determine whether that element of the *actus reus* for 'war crimes' under art 1F(a) was satisfied at the material time.

[295] In respect of actual participation in hostilities, the CRC obligation is even softer: 'States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities' (art 38(2)).

CONCLUSION

While assertions that Article 1(F), in general, requires a special, restrictive interpretation do not bear scrutiny, much of the analysis and application of Article 1 F(c), in particular, has failed to keep track with developments in international law and practice. While there has been some movement regarding the scope of this provision *ratione personae*, beyond the context of 'terrorism' there have been few attempts to interpret its scope *ratione materiae* in a progressive manner. Even those who accept that the provision is not limited to high-ranking State officials, often limit its application to acts of 'extreme gravity' or acts of an international character. Such interpretations are overly static and plainly out of step with developments in international law—particularly human rights and refugee law—since 1951. The failure to systematically interpret Article 1 F(c) in the light of such developments contrasts sharply with the standard approach to sub-paragraphs (a) and (b). This inconsistency is difficult to justify.

To counter this uneven approach, Article 1 F(c) should be interpreted such that conduct that would qualify as persecution for the purposes of Article 1A (2) is considered 'contrary to the purposes and principles of the United Nations', so as to trigger this exclusion clause. This would be entirely consistent with the standard rules of treaty interpretation, with developments since 1951, and with the need to protect the integrity of the protection regime established by the Convention.

Looking forward, sub-paragraphs (a) and (b), interpreted progressively as they have been to date, will suffice to exclude individuals responsible for certain egregious and/or criminal conduct. At the same time, domestic courts will likely continue to apply Article 1 F(c) to conduct falling within contested, and ever-expanding,[296] domestic definitions of 'terrorism'. That the latter practice may be skewed by reliance on questionable definitions does not, however, obviate the need for UNHCR and domestic courts to reassess the applicability of Article 1 F(c) beyond that context. If anything, the absence of a coherent, plausible interpretation which takes into account developments in international law and practice, merely encourages the amorphous application of this provision.

[296] McKeever 2010 (n 27) 116–17.