vention; however, a civil war directed against a religious group in particular or a social group would be persecution within the definition in the Convention.[352]

Second, even within the context of generalized violence or war, there may exist a risk of serious harm specific to persons defined by a particular form of civil or political status. While early Canadian decisions preferred simply to adopt an absolutely dismissive view of claims derived from situations of conflict,[353] the decision of the Federal Court of Appeal in *Zahirdeen Rajudeen v. Minister of Employment and Immigration*[354] marked a watershed in the approach to this issue. This case involved a Sri Lankan Tamil whose need for protection from Sinhalese thugs had been ignored by the authorities. The Immigration Appeal Board dismissed the claim as nothing more than a reflection of the generalized violence in Sri Lanka.[355] The Federal Court, however, found that the harm faced by the claimant was in fact due to the unwillingness of authorities to protect him because of his race and religion:

> The applicant was not mistreated because of civil unrest in Sri Lanka but because he was a Tamil and a Muslim.[356]

This decision underscores the critical importance of inquiring into all of the circumstances of a claimant coming from an area which suffers from generalized violence in order to discern whether or not the risk faced by a particular individual or group is in fact rooted in civil or political status, in which case refugee status may follow.

Thus, while the general proposition is that the victims of war and violence are not by virtue of that fact alone refugees, it is nonetheless possible for persons coming from a strife-torn state to establish a claim to refugee status. This is so where the violence is not simply generalized, but is rather directed toward a group defined by civil or political status; or, if the war or conflict is non-specific in impact, where the claimant's fear can be traced to specific forms of disfranchisement within the society of origin.

[352] *Id.*, at 3, *per* G. Loiselle.

[353] *See*, e.g., *Hassan Darwich*, Immigration Appeal Board Decision 77-3038, May 20, 1977; affirmed by the Federal Court of Appeal at (1978), 25 N.R. 462, at 463, in which the Lebanese claimant had in fact been targeted as a Moslem sympathizer, and was thus more particularly at risk; and *Muhieddine Abdul Wahab Jomaa*, Immigration Appeal Board Decision T79-9032, C.L.I.C. Notes 7.17, May 8, 1979, where the Lebanese claimant was acutely at risk by reason of his political neutrality. Both claims were dismissed as reflecting simply the risk associated with generalized violence.

[354] (1985), 55 N.R. 129 (F.C.A.).

[355] "Whether events in Sri Lanka can be classed as 'civil war' or not, there is certainly civil unrest, but the nature of that unrest and the resulting harassment of Mr. Rajudeen is not such that he can be classed as a Convention refugee": Immigration Appeal Board Decision V83-6091, C.L.I.C. Notes 57.10, July 20, 1983, at 4, *per* B. Howard.

[356] *Supra*, note 354, at 134, *per* Heald J.

6

Cessation and Exclusion

The Convention conceives of refugee status as a transitory phenomenon, which expires when a refugee can either reclaim the protection of her own state or has secured an alternative form of enduring protection.[1] Because refugee law is intended simply to afford surrogate protection pending the resumption or establishment of meaningful national protection, the Convention explicitly defines the various situations in which the cessation of refugee status is warranted.[2]

Similarly, refugee status was not envisaged as the entitlement of every person genuinely at risk of persecution. Serious criminals[3] and persons whose actions have exhibited flagrant disregard for the purposes of the United Nations[4] may face the possibility of persecution in their state of origin, but they are outside the scope of the refugee definition. The Convention's exclusion clauses[5] are framed so as to bar persons who pose a critical risk to the receiving state, or whose own breach of fundamental standards of humane conduct renders them unworthy of protection.

Issues of cessation of and exclusion from refugee status may arise in two contexts. First, since the incorporation into Canadian law in 1989 of Arti-

[1] "It is the return of refugees to their own community or their integration in a new one which constitutes a permanent or durable solution. . . . [I]nternational protection is of an essentially temporary nature and is the sum of all action which seeks to achieve the admission of a refugee into, and his secure stay in, a country where he or she is not in danger of *refoulement* and can enjoy basic rights and humane treatment until the above objective is achieved — that of renewed belonging in a community": Executive Committee of the High Commissioner's Programme, "Note on International Protection", U.N. Doc. A/AC.96/680, July 15, 1986, at 3.

[2] *Convention relating to the Status of Refugees*, 189 U.N.T.S. 2545, entered into force April 22, 1954 ("*Convention*"), at Art. 1(C). While Arts. 1(D) and 1(E) of the *Convention* are phrased in the language of exclusion, substantively they speak to the fact of surrogate protection and are thus more appropriately comparable to Art. 1(C)(3) than to the primary exclusion clause, Art. 1(F). "It is generally agreed that the enumeration of cessation clauses in Article 1C of the Refugee Convention. . . is exhaustive. In other words, once a person has become a refugee as defined in Article 1 of the Convention. . . he continues to be a refugee until he falls under any of those cessation clauses": 1 A. Grahl-Madsen, *The Status of Refugees in International Law*, p. 369 (1966).

[3] *Convention, supra,* note 2, at Art. 1(F)(a)-(b).

[4] *Id.*, at Art. 1(F)(c).

[5] Arts. 1(D) and (E) are treated herein as substantively analogous to cessation clauses: *see* note 2, *supra.*

cles 1(C),[6] (E) and (F)[7] of the Convention, the Immigration and Refugee Board may determine that a person who otherwise meets the refugee definition is, as of the date of the hearing of the claim, within the scope of a cessation or exclusion clause.[8] Such a person is not a Convention refugee[9] and is subject to removal.[10] Alternatively, a cessation hearing may be convened before the Board subsequent to the recognition of refugee status.[11] If the case for cessation is made out at this level, the refugee not already landed as a permanent resident[12] is subject to removal. If landing has already taken place, the individual ought not to continue to benefit from Convention-based rights,[13] such as protection against *refoulement*,[14] but should nonetheless be subject to the ordinary rules which govern loss of permanent resident status.[15]

This chapter considers the scope of the Convention's cessation and exclusion clauses, with a view to identifying the limited situations in which even

[6] *Immigration Act*, R.S.C. 1985, c. I-2, ss. 2(1), 2(2), and 2(3) [ss. 2(1) and (2) re-en., (3) en. 1985, c. 28 (4th Supp.), s.1], hereafter referred to as the *Immigration Act*. The language of Art. 1(C) of the *Convention* is not reproduced exactly in the *Immigration Act*, although it is substantively indistinguishable.

[7] *Immigration Act*, at s. 2(1) [am. 1985, c. 28 (4th Supp.), s. 1] and Schedule [en. 1985, c. 28 (4th Supp.), s. 34]. It is noteworthy that the exclusion of persons in receipt of assistance from a United Nations agency (other than UNHCR) established by Art. 1(D) of the *Convention, supra,* note 2, has not been incorporated into Canadian law.

[8] *See*, e.g., *Fernando Ferreyra*, Immigration Appeal Board Decision M83-1097, C.L.I.C. Notes 68.5, July 18, 1984, at 19, *per* F. Glogowski: "[I]f at the time of the hearing, a refugee claimant, for any reason, can no longer fulfil the requirements to be characterized as a Convention refugee, he will not be given such status by the Board. A change in government can be such a reason in given circumstances."

[9] At the initial hearing before an adjudicator and a member of the Refugee Division, the claimant need only establish that there is at least some "credible or trustworthy evidence on which the Refugee Division might determine the claimant to be a Convention refugee": *Immigration Act*, at s. 46.01(6) [en. 1985, c. 28 (4th Supp.), s. 14]. In contrast, at the full hearing before the Refugee Division, s. 69.1(9) [en. 1985, c. 28 (4th Supp.), s. 18] of the *Immigration Act* requires a determination as to "whether or not the claimant is a Convention refugee", the latter term being defined in s. 2(1) of the *Immigration Act* to require consideration of the issues of cessation and exclusion.

[10] "If a person falls under a cessation clause before he has been formally recognized as a refugee, this has been considered a bar to his recognition. . .": A. Grahl-Madsen, *supra*, note 2, p. 370.

[11] "The Minister may make an application to the Refugee Division for a determination whether any person who was determined under this Act or the regulations to be a Convention refugee has ceased to be a Convention refugee": *Immigration Act*, at s. 69.2(1) [en. 1985, c. 28 (4th Supp.), s. 18].

[12] Under s. 46.04(1) [en. 1985, c. 28 (4th Supp.), s. 14] of the *Immigration Act*, "[a]ny person who is finally determined under this Act to be a Convention refugee may, within the prescribed period, apply to an immigration officer for landing of that person and any member of that person's family who is in Canada at the time of the application", subject to certain exceptions where the refugee retains status in a non-persecutory state.

[13] *Convention, supra*, note 2, at Arts. 3-34.

[14] *Id.*, at Art. 33(1).

[15] *Immigration Act*, at ss. 24, 27(1) [am. 1985, c. 30 (3rd Supp.), s. 4].

persons who are or have been genuinely at risk of serious harm grounded in civil or political status may not qualify as refugees. Because these clauses are to be applied only in relation to persons who otherwise present a *prima facie* need for protection, they ought reasonably to be strictly construed.[16] Nonetheless, it is clear that a state's duty under international refugee law extends neither to persons who benefit from sufficient protection elsewhere, nor to those whose own actions are inconsistent with the basic human rights undertaking.

The discussion here is divided into three parts. First, when can it be said that a refugee has regained the protection of her state of origin, such that she no longer requires refugee status? Second and alternatively, under what circumstances is surrogate national or international protection sufficient to meet the refugee's needs? Finally, which categories of persons are genuinely unworthy of international protection as refugees?

6.1 Persons Who Have Regained the Protection of Their State of Origin

It is a truism that the happiest solution to involuntary migration is the resumption of protection within a refugee's state of origin, such that she can return home in safety.[17] Under the Convention, the sufficiency of national protection may be manifested in either of two ways. First, the refugee herself may elect to entrust her safety to the state of origin by way of re-availment of its formal protection, re-acquisition of its nationality, or re-establishment in its territory.[18] Behaviour of this sort is deemed inconsistent with the refugee's professed need for protection, and gives rise to an objectively rebuttable presumption of cessation of status.[19] Second, the authorities in the

[16] "The cessation clauses are negative in character and are exhaustively enumerated. They should therefore be interpreted restrictively, and no other reasons may be adduced by way of analogy to justify the withdrawal of refugee status": United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*, p. 27 (1979).

[17] "Both the facilitation and the promotion of voluntary repatriation fall within the province of UNHCR, and the right to return to one's own country locates such efforts squarely in a human rights context. To ignore this dimension, and other legal implications arising from the concept of nationality would be to condone the institutionalization of exile at the expense of fundamental human rights": G. Goodwin-Gill, "Refugees: The Functions and Limits of the Existing Protection System", in A. Nash, ed., *Human Rights and the Protection of Refugees under International Law,* p. 163 (1988).

[18] *Convention, supra,* note 2, at Art. 1(C)(1), (2), and (4).

[19] "'[W]ell-founded fear'. . . may exist irrespective of the state of mind of the individual concerned. It is the likelihood of his being persecuted upon his eventual return to his home country which matters. . . . It seems reasonable to apply. . . objective criteria with respect to Article 1(C)(1). It is not a 'penal' provision, and it should not operate against a person who has realized that his re-availment of protection was a mistake, and who is able to show that he — still or again — has well-founded fear of persecution": A. Grahl-Madsen, *supra*, note 2, at 390-91. *Accord* C. Pompe, "The Convention of 28 July 1951 and the International Protection of Refugees", [1956] Rechtsgeleerd Magazyn Themis 425, published in English as U.N.

country of reception may determine that human rights conditions in the country of origin have improved to such an extent that the once-present genuine risk of persecution is no longer a reality, thus opening the way for the refugee's return.[20]

6.1.1 Voluntary Re-availment of National Protection

Cessation based on re-availment of national protection[21] generally involves the consideration of efforts by a refugee to secure diplomatic or consular protection from the authorities of the state of which she is formally a citizen. Typically, the refugee will seek the issuance or renewal of a passport or other identity document, although a minority of cases centres on more formal requests for intervention or representation of the claimant's interests.[22] Because actions of this sort are technically viewed as implying protection, it is arguable that the refugee exhibits a willingness to entrust her welfare to the state of origin, and hence no longer requires protection under international law.[23]

Such an interpretation of this cessation clause represents a formal view of the notion of protection. As Atle Grahl-Madsen points out, ". . . a person may seldom have well-founded fear of being persecuted by the members of the foreign service of his home country; the pertinent fact is therefore that he fears persecution in the case of his return to his country of origin".[24] It is simply a legal fiction to assume that more than an exceedingly small percentage of persons who avail themselves of a state's consular facilities do so as a demonstration of either political loyalty or trust. Rather, the practical exigencies of life — travel, enrolment in school, professional accreditation, etc. — may simply require a person genuinely at risk of persecution to contact the external office of her state of origin to secure essential documentation. Too, many persons renew identity documents as a matter of routine, with no thought to the legal ramifications of their act. The disparity between the legal formalism familiar to the drafters of the Convention and the common understandings of most people has required the strict construction of this clause in order to avoid undercutting the protective mandate of refugee law.

Doc. HCR/INF/42, May 1958, at 10-11: "This provision is complementary to the concept of 'well-founded fear'. . . the decisive factor being [the adjudicating body's] judgment concerning the actual conditions in another country."

[20] *Convention, supra,* note 2, at Art. 1(C)(5)-(6).

[21] "This Convention shall cease to apply to any person falling under the terms of Section A if. . . [h]e has voluntarily re-availed himself of the protection of the country of his nationality. . .": *Convention, supra*, note 2, at Art. 1(C)(1). This provision parallels s. 2(2)(a) [re-en. 1985, c. 28 (4th Supp.), s. 1] of the *Immigration Act.*

[22] C. Wydrzynski, *Canadian Immigration Law and Procedure*, p. 337 (1983).

[23] *See*, e.g., G. Goodwin-Gill, *The Refugee in International Law*, p. 48 (1983): "In other cases of application for and obtaining a national passport or the renewal of a passport, it may be presumed, in the absence of evidence to the contrary, that reavailment of protection is intended. . . . Possession of a national passport and a visit to the country of origin would seem conclusive as to cessation of refugee status."

[24] 1 A. Grahl-Madsen, *The Status of Refugees in International Law*, p. 379 (1966).

First, the request for formal protection must be made voluntarily.[25] As noted by the French delegate who introduced the clause, ". . . a person lost his status of refugee only if he expressly wished to do so and, for that purpose, performed a number of voluntary acts. . .".[26] The request is not voluntary if, as in the case of *Wilfredo Alejandro Zubieta*,[27] the refugee is seeking only to comply with an administrative directive issued by the country of reception,[28] or indeed is under the mistaken impression that the maintenance of a valid passport or other status is expected of him.

Second, the diplomatic request must be made as an act of re-availment of protection, thus implying an intention to have one's interests defended by the issuing state.[29] In contrast, most ordinary, purely practical forms of diplomatic contact, such as requests for the certification of educational or occupational qualifications, or access to personal birth, marital, and other records, are dictated by practical necessity, rather than by a desire for protection.[30] Canadian decisions have usually acknowledged this principle, even if sometimes failing to apply it. A case in point is *Carlos Antonio Muñoz Munizaga*,[31] in which Chairman Scott explicitly juxtaposed principle and practice:

> Adopting the view of the [French] Commission des Recours that the motive for obtaining a passport must be examined — an eminently sensible approach since it relates directly to the aspect of "well-founded fear" which is an essential part of the definition of refugee — we ask, why did Muñoz obtain a Chilean passport in Vancouver? To go to Sweden. In the circumstances of this case, he was benefitting from his national status by applying for, obtaining, and using,

[25] P. Weis, "The concept of the refugee in international law" (1960), 87 J. de droit international 928, at 974-76.

[26] Statement of Mr. Rochefort of France, U.N. Doc. E/AC.7/SR.160, at 9, August 18, 1950.

[27] Immigration Appeal Board Decision 79-1034, C.L.I.C. Notes 14.10, October 31, 1979.

[28] *Accord* G. Goodwin-Gill, *supra*, note 23, at 48: "Sometimes, however, a refugee may be unwillingly obliged to seek a measure of protection from [his country of origin], as where a passport or travel document is essential to obtain the issue of a residence permit in the country of asylum. Being involuntary, the protection obtained should not bring refugee status to an end."

[29] "[W]hat seems to be determinative, as to whether there was a willingness on the part of the claimant to accept protection of the country of origin, is his motivation in obtaining or renewing the passport": C. Wydrzynski, *supra*, note 22, at 338. *Accord* A. Grahl-Madsen, "Protection of Refugees by Their Country of Origin" (1986), 11(2) Yale J. Intl. L. 362, at 393: "If the person still fears persecution and does not understand that obtaining a passport normally means availing oneself of the protection of the issuing state, it would obviously be difficult to withdraw refugee status on the basis of such a confused act."

[30] A. Grahl-Madsen, *supra*, note 24, p. 388.

[31] Immigration Appeal Board Decision 79-9358, C.L.I.C. Notes 13.11, November 1, 1979. *Accord Boguslawa Florkowski*, Immigration Appeal Board Decision 79-9375, C.L.I.C. Notes 19.6, April 14, 1980.

a document entitling him to the protection of his own country in his travels abroad. He has therefore lost any refugee status he may have had.[32]

Yet the reason Muñoz sought the passport was because he had been advised that his chances of securing asylum were better in Sweden than in Canada, in consequence of which he initially elected to travel onward — surely a motive which is the antithesis of a desire to secure Chile's protection! A similarly inappropriate application of the notion of re-availment is found in the decision of *Tarek Mohamed Shafey Wahba,*[33] involving an Egyptian claimant who reported the loss of his Egyptian passport to that country's embassy in Ottawa. Even though he did not apply for a replacement passport and secured a World Services Authority passport for his travel needs, the Board viewed the simple act of reporting the loss of the passport as indicating "that he was not unwilling to avail himself of the protection of his country".[34]

These decisions fail to come to grips with the *real* reasons which cause refugees to contact the diplomatic authorities of their country of origin. In particular, decision-makers have often relied on an inaccurate assumption that receipt of travel documentation is inherently a means of securing national protection:

> . . . it seems high time to dispel an idea that is all too prevalent — and, what is more, false — of exactly what a passport is. A passport is no more, in fact and in law, than a travel document issued by a country's proper authorities to allow one of its nationals to travel abroad and, if necessary, to call upon the services of its consular authorities in the foreign countries visited to provide the holder of the document with proper protection. The fact of holding a passport, even if it is valid and issued legally, in no way constitutes a guarantee that protection will be provided. . . .[35]

This position was acknowledged during the Convention's drafting,[36] and is generally recognized in public international law:

> . . . there is no duty on the part of a State to exercise protection over its citizens abroad; whether or not to exercise protection remains in the absolute discretion of the state. . . . The municipal law of the issuing state may provide that the issuance of a passport to one of its nationals will be a guarantee that the state will protect the bearer while abroad. Nevertheless, the state can breach that guarantee without violating international law.[37]

Since there is no automatic linkage between the issuance or renewal of a passport and the granting of protection, it is critical that the real reason it is being sought form part of the determination authority's considerations. Unless the refugee's motive is genuinely the entrusting of her interests to the protection of the state of her nationality, the requisite intent is absent.

Third, the clause does not apply unless diplomatic or consular protection is actually given. As originally introduced by the French delegate, the clause provided that any person who attempted to secure diplomatic or consular protection from her state of origin would lose her refugee status,[38] whether or not protection was actually granted.[39] This strict approach was forcefully rejected by the British,[40] American,[41] and Peruvian[42] delegates, leading to intervention by the Chairman in favour of an interpretation which would limit cessation to circumstances in which formal protection was in fact forthcoming:

> . . . the opening words. . . namely "This Convention shall not apply to any refugee enjoying the protection of a government", made it clear that whatever claims he had made, such claims had been successful, otherwise he would not be enjoying the protection of a government.[43]

An American amendment substituting the final language, "has voluntarily re-availed himself of", in place of the original French version, "he volun-

[32] *Id.*, at 15, *per* J. Scott.

[33] Immigration Appeal Board Decision V80-6033, C.L.I.C. Notes 17.9, February 14, 1980.

[34] *Id.*, at 7, *per* F. Glogowski.

[35] *Felix Salatiel Nuñez Veloso*, Immigration Appeal Board Decision 79-1017, C.L.I.C. Notes 11.15, August 24, 1979, at 4-5, *per* J.-P. Houle. *Accord Roberto Luciano Perez Medina*, Immigration Appeal Board Decision M80-1078, C.L.I.C. Notes 38.10, September 9, 1981; and *Wilfredo Alejandro Zubieta*, Immigration Appeal Board Decision 79-1034, C.L.I.C. Notes 14.10, January 31, 1979.

[36] "It was extremely difficult to determine what would constitute a claim for protection. . . . [A] passport might be needed only for the purpose of travelling to resettle in a third country, and application for a passport should not, therefore, be necessarily regarded as an indication that the person concerned was no longer afraid of persecution": Statement of Mr. Henkin of the U.S.A., U.N. Doc. E/AC.7/SR.165, at 19, August 19, 1950.

[37] D. Turack, *The Passport in International Law*, p. 232 (1972).

[38] "Cette Convention ne s'appliquera pas à tout réfugié qui jouit de la protection d'un gouvernement parce que: (1) il s'est volontairement réclamé à nouveau de la protection du gouvernement du pays dont il avait la nationalité. . .": U.N. Doc. E/L.82, July 29, 1950.

[39] "The French delegation considered that it was for a refugee to make up his mind. He could not run with the fox and hunt with the hounds by seeking to retain his refugee status and yet at the same time claim the protection of the government of his nationality. The very fact that a refugee asked his Consul for protection was proof that he could return to his own country without fear, and such a step should suffice to deprive him of the status of refugee, even if it did not meet with a favourable reception": Statement of Mr. Rochefort of France, U.N. Doc. E/AC.7/SR.160, at 22, August 18, 1950.

[40] "[T]he provision did not mean that the mere fact that a refugee sought the protection of his government should be sufficient to deprive him of the status of refugee. It would no doubt be necessary, in addition, for his request to have met with a favourable reception": Statement of Mr. Fearnley of the United Kingdom, U.N. Doc. E/AC.7/SR.160, at 22, August 18, 1950.

[41] "A person should not automatically lose his status as a refugee just because he had made a claim which might not be granted": Statement of Mr. Henkin of the U.S.A., U.N. Doc. E/AC.7/SR.165, at 18, August 19, 1950.

[42] "He thought that the words 'he voluntarily claims anew the protection' should be replaced by the words 'he has once more secured the protection', since the important point was, not the application for protection, but the fact of obtaining it": Statement of Mr. Cabada of Peru, U.N. Doc. E/AC.7/SR.165, at 19, August 19, 1950.

[43] Statement of the Chairman, U.N. Doc. E/AC.7/SR.165, at 20, August 19, 1950.

tarily claims anew", was then adopted to give effect to the Chairman's ruling that the receipt of protection is key.[44]

The requisite elements of voluntarism, specific intent, and consummation constrain the frequency with which cessation based on voluntary re-availment of protection is likely to occur. This cautious confining of the clause's application is, however, appropriate in view of the risk that a purely formal or practical contact with foreign diplomatic personnel might otherwise put a refugee at risk of return to persecution.

6.1.2 Voluntary Re-acquisition of Nationality

While the legal import of availing oneself of diplomatic or consular services may be ambiguous, the decision to secure anew the citizenship of the state in which persecution was feared raises more poignantly the refugee's continuing need for protection.[45] Because nationality is widely understood to imply a bond of allegiance between state and citizen,[46] the refugee who resumes the citizenship of her state of origin must rebut the presumption that she may return to that country in safety.[47] Specific intent, therefore, is not requisite to cessation under this clause, although the requirements of voluntarism and consummation discussed in the preceding part apply here as well:

> Like the provision of Article 1(C)(1), the provision presently considered has its principal *raison d'être* as a means to bring about the termination of refugee status for those who wilfully or for no good reason take a positive step in order to normalize their relations with the authorities of their country of origin or in order to reap the benefits due to nationals of that country under international law or comity. Article 1(C)(2) should be applied very reluctantly indeed to other categories of refugees, the continued existence of well-founded fear of persecution being the overriding consideration in cases of doubt.[48]

Thus, for example, re-acquisition of nationality through operation of law upon marriage or otherwise may fail to meet the requirement of voluntarism,[49] and hence not suffice to deprive a refugee of her status.[50] Nor is it enough to show that the refugee could have re-acquired her former citizenship but failed to do so, since there is no consummation of the act of protection.[51] The overriding concern is whether there is an act of re-acquisition of citizenship which is truly indicative of a normalization of relations between the refugee and her state of origin.

The scope of this cessation clause is also textually limited to a narrow subset of refugees. Persons who have continued to be formal citizens of their state of origin during their time as refugees are obviously not in a position to *acquire* the nationality of that country. Too, because it speaks to *re*-acquisition of nationality, this cessation clause does not apply to persons who are stateless from birth, but only to those who have at some point been denationalized or who have successfully renounced their citizenship, and who then go on to have their status as citizens reinstated.

6.1.3 Voluntary Re-establishment in the Country in Which Persecution was Feared

Re-establishment in the state of origin is perhaps the clearest indication that a refugee no longer views herself as being at risk.[52] In voluntarily taking up residence in the country which induced her flight, the refugee is in the most direct way possible signalling her willingness to entrust her welfare to that state.

The Convention requires freely chosen re-establishment, not mere return, before cessation ensues. The original draft of this clause, which would have revoked the refugee status of any person who "returns to his country of

[44] U.N. Doc. E/AC.7/SR.165, at 22, August 19, 1950. Some degree of ambiguity on this point remains, however, for two reasons. First, while there was agreement to change the French text from "se réclamer" to "se prévaloir" to reflect the amendment to the English text (U.N. Doc. E/AC.7/SR.165, at 22, August 19, 1950), the final version approved at the Conference of Plenipotentiaries maintained the original language. Second, the opening words upon which the Chairman relied to formulate his ruling were ironically deleted prior to adoption of the Convention at the Conference of Plenipotentiaries (*see* the report of an informal working party, U.N. Doc. A/C.3/L.131, at 2, November 30, 1950). Nonetheless, there was no further discussion of disfranchising refugees who were not in fact successful in securing the protection of their state of nationality.

[45] "The Convention shall cease to apply to any person falling under the terms of Section A if. . . [h]aving lost his nationality, he has voluntarily re-acquired it. . .": *Convention, supra*, note 2, at Art. 1(C)(2). The Canadian legislation refers simply to a "person [who] voluntarily reacquires his nationality", a more succinct formulation of the same principle, since *re*-acquisition implies that the nationality had been lost: *Immigration Act*, at s. 2(2)(b) [re-en. 1985, c. 28 (4th Supp.), s. 1].

[46] *See* R. Plender, *International Migration Law*, p. 39 (1988).

[47] "There is less scope for explanation or extenuating circumstances: the intention of the individual and the effectiveness of the act will suffice in most cases": G. Goodwin-Gill, *The Refugee in International Law*, p. 50 (1983).

[48] 1 A. Grahl-Madsen, *The Status of Refugees in International Law*, p. 395 (1966).

[49] "The granting of nationality by operation of law or by decree does not imply voluntary re-acquisition, unless the nationality has been expressly or impliedly accepted. . . . If such former nationality is granted by operation of law, subject to an option to reject, it will be regarded as a voluntary re-acquisition if the refugee, with full knowledge, has not exercised this option; unless he is able to invoke special reasons showing that it was not in fact his intention to re-acquire his former nationality": UNHCR, *supra*, note 16, p. 30.

[50] *See* A. Grahl-Madsen, *supra*, note 48, at 393-95.

[51] "A person does not cease to be a refugee merely because he could have re-acquired his former nationality by option, unless this option has actually been exercised": UNHCR, *supra*, note 16, p. 30.

[52] "This Convention shall cease to apply to any person falling under the terms of Section A if. . . [h]e has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution. . .": *Convention, supra,* note 2, at Art. 1(C)(4). The Canadian cessation clause is substantively identical: *Immigration Act*, at s.2(2)(d) [re-en. 1985, c. 28 (4th Supp.), s. 1].

former nationality",[53] was rejected by the Ad Hoc Committee on the ground that it might bar persons who had been forcibly repatriated to their state of origin, as well as those who had chosen to return to their country of origin only temporarily.[54] The substitute language which sets the cessation threshold at voluntary re-establishment in the country in which persecution was feared[55] was thus intended to ensure that only persons who have willingly resettled in their state of origin are subject to cessation of refugee status. As Paul Weis notes,

> If a person returns to his country of origin for a temporary stay without re-establishing himself, and then returns to the country where he was recognized as a refugee, this should not lead to *ipso facto* loss of refugee status.[56]

Re-establishment requires more than mere physical presence,[57] and a greater commitment to the country of origin[58] than is evinced, for example, by a temporary return to visit an ailing parent[59] or to bring out relatives, friends, or property.[60] Careful scrutiny of more prolonged and frequent visits for such purposes as holidays or business is warranted, however, since at some point the degree of attachment may qualify as re-establishment. While an occasional visit of up to a few weeks is too transitory to sustain the cessation of status,[61] a regular presence in the state of origin[62] for a significant part

[53] U.N. Doc. E/AC.32/L.4, at 3, January 18, 1950.

[54] *See*, e.g., Statement of the Director of the International Refugee Organization, U.N. Doc. E/AC.32/L.16, at 2, January 30, 1950.

[55] Statement of Mr. Henkin of the U.S.A., U.N. Doc. E/AC.7/SR.165, at 16, August 19, 1950. The amendment was adopted on a vote of 13-0-2: U.N. Doc. E/AC.7/SR.165, at 18, August 19, 1950, and was intended to speak to the situations of both persons with formal nationality and stateless persons.

[56] P. Weis, "The concept of the refugee in international law" (1960), 87 J. du droit international 928, at 978.

[57] A. Grahl-Madsen, *supra*, note 48, p. 371; G. Goodwin-Gill, *supra*, note 47, p. 51.

[58] "It is probably correct to define 're-establishment'. . . as residence with the explicit or implicit intention of remaining in the country, and to infer that a prolonged stay (a couple of years or more) implies such an intention": A. Grahl-Madsen, *supra*, note 48, p. 372.

[59] *But see* Immigration and Refugee Board Decision V89-00618, August 1989, R.L.R.U. Cat. Sig. 10395, at 5, *per* H. Neufeld, involving a Lebanese claimant who was summoned home due to his grandfather's illness. Notwithstanding this clearly valid reason for temporary return, the Board held that "[b]y returning to Lebanon and living there from June to August, 1987, it is reasonable to infer, in the absence of evidence to the contrary, that the claimant did not fear persecution at that time."

[60] P. Weis, *supra*, note 56, at 978; A. Grahl-Madsen, *supra*, note 48, p. 372.

[61] "Something more than a visit or mere presence is required; the individual must have settlement on a permanent basis in view, with no evident intention of leaving": G. Goodwin-Gill, *supra*, note 47, p. 51. *Accord* A. Grahl-Madsen, *supra*, note 48, p. 371: "A short visit abroad, for business or for pleasure, will not alter the picture." *But see* Immigration and Refugee Board Decision T89-00565, May 1989, R.L.R.U. Cat. Sig. 10016, in which a Salvadoran claimant returned to his country for a period of six months in order to visit his family and friends, and was held in consequence to have demonstrated a willingness to rely on El Salvador's protection. In view of the singular nature of this visit, it is questionable that the regularity of presence inherent in the notion of re-establishment was in fact present.

[62] *See*, e.g., *Jose Raul Morales*, Immigration Appeal Board Decision V86-6277, April 16, 1987, at 8, *per* D. Anderson: "[T]he frequent visits to Guatemala of Mr. Morales in 1983. . . [are] not consistent with his claimed fear at that time."

of the year is *prima facie* inconsistent with a continued need for protection.[63] The claimant should bear the onus in such circumstances to demonstrate that she is objectively unable to benefit from protection of basic human rights in her country of origin, and thus continues to be a refugee.

It is not appropriate, however, to construe this cessation clause effectively to penalize refugees who return to "test the waters" in their state of origin.[64] If refugees are to be encouraged to attempt voluntary repatriation, generally viewed as the most desirable solution to refugeehood,[65] they must have some assurance that they can resume refugee status in the event that actual conditions at home prove unsafe.[66] Before a finding of cessation based on voluntary re-establishment is made, therefore, both the facts underlying the original, successful claim to refugee status and post-re-establishment factors should be taken into account. If the totality of the evidence demonstrates a forward-looking, genuine risk of persecution, this cessation clause is not a bar to continued recognition as a refugee.

6.1.4 Change of Circumstances

Unlike the forms of cessation discussed thus far which are initiated by the voluntary act of a refugee, cessation due to change of circumstances is the prerogative of an asylum state which is satisfied that protection is once more viable in the refugee's state of origin.[67] The clause was intended to allow

[63] "Visiting an old or sick parent will have a different bearing on the refugee's relation to his former home country than regular visits to that country spent on holidays or for the purpose of establishing business relations": UNHCR, *supra*, note 16, at 29.

[64] To the contrary, Immigration and Refugee Board Decision V89-00618, August 1989, R.L.R.U. Cat. Sig. 10395, at 5, *per* H. Neufeld, held that ". . . to have any chance of success, this claim must be founded upon events occurring after the claimant's most recent departure from Lebanon. . .", thereby penalizing the claimant by estopping him from reliance on the facts of his initial claim.

[65] For example, at a recent meeting of international experts, it was "reaffirmed that voluntary repatriation was, in principle, the best solution to a refugee problem, and that it was desirable and opportune to emphasize the importance of this solution and to develop international cooperation in effecting it. . .": Executive Committee of the High Commissioner's Programme, "Note on Voluntary Repatriation", U.N. Doc. EC/SCP/41 (1985).

[66] "A refugee may return to his home country because he hopes that conditions have improved so that there is no need to fear persecution (for example following the promulgation of an amnesty law), or he may wish to participate in underground activities directed against the regime. Should his optimism prove unfounded, or should he be threatened with prosecution for his illegal work, he may find it advisable to flee the country for the second time": A. Grahl-Madsen, *supra*, note 48, p. 378.

[67] The Canadian legislation rephrases the international obligation in direct terms, providing that "[a] person ceases to be a Convention refugee when. . . the reasons for the person's fear of persecution in the country that the person left, or outside of which the person remained, cease to exist": *Immigration Act*, at s. 2(2)(e) [re-en. 1985, c. 28 (4th Supp.), s. 1]. *Cf. Convention, supra,* note 2, at Art. 1(C)(5) and (6): "This Convention shall cease to apply to any per-

a state to divest itself of the protection "burden" when the government of the home country is judged to have become an appropriate guardian of the rights of its involuntary expatriates:

> To take the case of the aged belonging to the "hard core" of refugees, it could hardly be agreed that the government of a country which had returned to democratic ways should fail to take over the burden of that category of refugees. . . . [France] was quite prepared to continue to assist such refugees so long as such assistance was necessary. But if their country reverted to a democratic regime, the obligation to assist them should not fall perforce upon the French Government. . . . France had merely said that she did not wish to be under an obligation to continue to provide assistance to refugees who could seek the protection of their country of origin.[68]

The drafters' focus on reversion to democracy highlights the magnitude of change which should exist before the consideration of cessation is warranted. First, the change must be of substantial political significance,[69] in the sense that the power structure under which persecution was deemed a real possibility no longer exists. The collapse of the persecutory regime, coupled with the holding of genuinely free and democratic elections,[70] the assumption of power by a government committed to human rights,[71] and a guarantee of fair treatment for enemies of the predecessor regime by way of amnesty or otherwise,[72] is the appropriate indicator of a meaningful change

son falling under the terms of Section A if. . . [h]e can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality. . . [or] [b]eing a person who has no nationality he is, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence. . . ."

[68] Statement of Mr. Rochefort of France, U.N. Doc. A/CONF.2/SR.28, at 12-14, July 19, 1951.

[69] *Accord* UNHCR, *supra*, note 16, p. 31; A. Grahl-Madsen, *supra*, note 48, p. 401; G. Goodwin-Gill, *supra*, note 47, p. 51.

[70] *See*, e.g., *Ruben Eduardo Val*, Immigration Appeal Board Decision T83-10592, October 15, 1985, at 5, *per* E. Teitelbaum (". . . Peru today has a democratically elected government. . ."); and *Carlos Anesetti*, Immigration Appeal Board Decision T84-9584, C.L.I.C. Notes 83.12, October 29, 1985, at 2, *per* J. Weisdorf (". . . democratic elections were held in Uruguay in late 1984. . .).

[71] "The Board notes. . . that President Belaunde stated in his inaugural address on 28th July, 1980, that he intends to implement fully the new constitution and to promote the full observance of human rights. . . on 3rd October, 1980 Peru ratified the Optional Protocol to the International Covenant on Civil and Political Rights which provides for individual complaints to be heard by the Human Rights Committee": *Ruiz Angel Jesus Gonzales*, Immigration Appeal Board Decision T81-9746, C.L.I.C. Notes 50.7, November 8, 1982, at 5, *per* U. Benedetti.

[72] *See*, e.g., *Carlos Anesetti*, Immigration Appeal Board Decision T84-9584, C.L.I.C. Notes 83.12, October 29, 1985, at 2, *per* J. Weisdorf (". . . all prohibited persons, including Tupamaros and urban guerillas have been freed and. . . all political parties are presently legal"); and Immigration and Refugee Board Decision M89-01323, R.L.R.U. Cat. Sig. 10200, November 1989, at 10-11, *per* M. Vo (". . . it is significant in this regard that the Polish Parliament, the Sejm, issued on May 30, 1989, a comprehensive pardon regarding all 'political crimes' committed since 1980").

of circumstances. It would, in contrast, be premature to consider cessation simply because relative calm has been restored in a country still governed by an oppressive political structure.[73] Similarly, the mere fact that a democratic and safe local or regional government has been established is insufficient insofar as the national government still poses a risk to the refugee.[74]

Second, there must be reason to believe that the substantial political change is truly effective.[75] Because, as noted in a dissenting opinion in *Ruiz Angel Jesus Gonzales,*[76] ". . . there is often a long distance between the pledging and the doing. . .",[77] it ought not to be assumed that formal change will necessarily be immediately effective:

> . . . there were free elections [in Uruguay] on March 1, 1985 that put an end to 12 years of military government. According to [the U.S. Country Reports], the reestablishment of democracy is complete. I may be permitted to express doubts that in a period of one or two years it would be possible to recover completely from the abuses of a military dictatorship. Good intentions may have existed, of course, but I refuse to believe that there were no chance mishaps.[78]

[73] "[A] less profound change should not affect a person's refugee status. . . [T]he present provision should clearly not be construed so as to force a person to accept, more or less at face value, any change of policy of such [an oppressive] regime. In fact, a refugee cannot be expected to submit himself to the very persons who have persecuted or threatened to persecute him": 1 A. Grahl-Madsen, *The Status of Refugees in International Law*, p. 401 (1966). *But see*, e.g., *Venkateswaran Nadarajah,* Immigration Appeal Board Decision T84-9662, March 18, 1986, at 4, *per* U. Benedetti: "The fear of the applicant to return to Colombo is not a well-founded fear as the situation in Colombo since July 1983 has been calm and the applicant's family has not encountered any difficulties."

[74] In *Baldev Saini Singh*, for example, the Board correctly considered the sufficiency of regional protection: "Mr. Saini acknowledged at the hearing that the Akali Dal Party following an election now governs in the Punjab. However, his stated belief is that all power is in the hands of the central Hindu-dominated Congress government and that therefore he is at risk because he is a Sikh and was politically active with the Akali Dal": Immigration Appeal Board Decision T83-9050, March 21, 1985, at 3, *per* G. Tisshaw. In examining the claimant's assertion, however, the Board found that the central government did not in fact pose a risk to the claimant's security. In contrast, the decision in *Nirmal Sagoo Singh* fails to consider the issue of the effectiveness of a change of local or regional government: "Despite the fact that the main Sikh party was elected to power in the Punjab in July, 1985, an event which one would have thought would reasonably have removed any fears which the applicant may have had of returning to the Punjab, he elected to remain in Canada and claim to be a Convention refugee one year after the occurrence": Immigration Appeal Board Decision T87-9841X, January 13, 1988, at 1-2, *per* J. Weisdorf.

[75] This issue was discussed in the decision of the House of Lords in *R. v. Secretary of State for the Home Department, ex parte Sivakumaran,* [1988] 1 All E.R. 193 (H.L.), at 196, *per* Lord Keith of Kinkel: "The question whether such circumstances have ceased to exist can only be one to be determined objectively, in the light of any new circumstances presently prevailing in the country of the person's nationality."

[76] Immigration Appeal Board Decision T81-9746, C.L.I.C. Notes 50.7, November 8, 1982.

[77] *Id.*, at 12, *per* E. Teitelbaum.

[78] *Juan Pedro Diaz*, Immigration Appeal Board Decision M87-1417X, July 27, 1987, at 3, *per* M. Durand.

The formal political shift must be implemented in fact, and result in a genuine ability and willingness to protect the refugee. Cessation is not warranted where, for example, *de facto* executive authority remains in the hands of the former oppressors:

> The fact that there were "above board" elections in Peru in 1980-81, which sent members of various parties and factions to the parliament, does not prove that the applicant does not have a well-founded fear of returning to his country, which is still, as far as executive authority is concerned, a military dictatorship which tolerates no opposition. It is just another case of old wine in new bottles.[79]

Nor can it be said that there has truly been a fundamental change of circumstances where the police or military establishments have yet fully to comply with the dictates of democracy and respect for human rights:

> It was argued that the applicant need no longer be afraid of returning to his homeland as there has been a change in the government since he left. The applicant, however, adduced evidence to show that although the government has changed, members of the Peruvian police and armed forces are still violating human rights and as yet do not appear to be under control by the new government.[80]

In other words, the refugee's right to protection ought not to be compromised simply because progress is being made toward real respect for human rights,[81] even where international scrutiny of that transition is possible.[82] Two mid-1989 judgments of the Immigration and Refugee Board, relating to Poland and Sri Lanka respectively, demonstrate an appropriate concern to see evidence of the real impact of a formal transition of power:

[79] *Raul Garcia Zavala*, Immigration Appeal Board Decision 81-1222, C.L.I.C. Notes 45.10, June 29, 1982, at 4, *per* J.-P. Houle.

[80] *Richard Cid Requena Cruz*, Immigration Appeal Board Decision T83-10559, April 8, 1986, at 6, *per* G. Vidal. *Accord Saad Uddin Ahmed*, Immigration Appeal Board Decision T86-10366, August 26, 1987, at 6, *per* E. Teitelbaum: "Having considered the evidence submitted. . . with respect to conditions in Bangladesh, . . . the Board does not find that there was any *significant* change in the behaviour of the military government prior to, during, or after, elections in 1986 which could reasonably be seen to change the claimant's attitude towards it"; and Immigration and Refugee Board Decision T89-00417, R.L.R.U. Cat. Sig. 10051, June 1989, at 8, *per* F. Kapasi: "The panel is of the view that, although the [Polish] accord appears to be a step towards democracy, it cannot be guaranteed that the state security apparatus will honour and accept these recent changes readily. . . ."

[81] *But see Mahibur Rahman Chowdhury*, Immigration Appeal Board Decision T83-10497, C.L.I.C. Notes 90.8, February 6, 1986, at 5, *per* G. Voorhees: "The applicant is a member of a recognized political party; a party that won the 1973 election, had forty members elected in the 1979 election and is still actively working towards an end to martial law. . . ."

[82] *But see* Immigration and Refugee Board Decision T89-01056, R.L.R.U. Cat. Sig. 10349, July 1989, at 10, *per* J. Goldman: "No doubt it will take some time before the State security apparatus accepts and honours the recent changes. As the expert witness stated, some of the abuses which took place prior to the [Polish] accord may continue in smaller, less visible places. However, [the claimant's home of] Gdansk is the birth-place of Solidarity. It is Solidarity's stronghold on which the eyes of the world will rest. We therefore do not believe that there is a valid basis for the claimant's fear of persecution because of his Solidarity activities."

> . . . Solidarity calculates that the Communist Party directly or indirectly controls about 900,000 appointments. . . the nomenklatura casts its own shadow. In other words, changing the government does not [necessarily] change much. The panel is of the view that the claimant's fear that the changes in Poland are still too uncertain is supported by the documentary evidence.[83]
>
> Although it is alleged that the scale of military confrontation between the Indian Peacekeeping Force and the Tigers has diminished in recent months, there is still an intense rivalry between the Tamil militant groups for the control of the territory and the population. We agree with the points made by counsel, that the normalization process has not yet achieved political stability and peace for Sri Lanka.[84]

Third, the change of circumstances must be shown to be durable. Cessation is not a decision to be taken lightly on the basis of transitory shifts in the political landscape,[85] but should rather be reserved for situations in which there is reason to believe that the positive conversion of the power structure is likely to last.[86] This condition is in keeping with the forward-looking nature of the refugee definition,[87] and avoids the disruption of protection in circumstances where safety may be only a momentary aberration.

The Convention provides for the exemption from cessation based on change of circumstances for pre-1951 refugees[88] who are able to make a case for not returning home based on "compelling reasons arising out of previous persecution".[89] The intention of the drafters was twofold: first, to recognize the legitimacy of the psychological hardship that would be faced by the victims of persecution were they to be returned to the country responsible

[83] Immigration and Refugee Board Decision T89-00903, R.L.R.U. Cat. Sig. 10287, September 1989, at 6, *per* G. Howson.

[84] Immigration and Refugee Board Decision M89-01026, R.L.R.U. Cat. Sig. 10379, June 1989, at 3, *per* S. Wolfe.

[85] UNHCR, *supra*, note 16, at 31. *But see Palwinder Kaur Gill*, Immigration Appeal Board Decision V86-6012, July 11, 1986, at 8, *per* dissenting member D. Anderson; affirmed by Federal Court of Appeal Decision A-476-86, January 22, 1987: "A person could meet the definition of Convention refugee one week, and the next, by reason of political events thousands of kilometres away, no longer meet that definition. Two weeks after that it is perfectly conceivable that the definition would be met once more." *Accord Darshan Lottay Singh,* Immigration Appeal Board Decision V86-6328, February 4, 1987.

[86] *But see Dorothy Robb,* Immigration Appeal Board Decision M84-1364, June 19, 1987, at 4, where the possibility of an adverse electoral result in one year's time was dismissed as irrelevant.

[87] *See* Section 3.1, *supra.*

[88] The exemption applies only to refugees defined by Art. 1(A)(1) of the *Convention, supra*, note 2. The purpose of the clause "was to avert the possibility that [Jewish] refugees of German or Austrian origin living in other countries might be deprived of their refugee status as a result of the restoration of a democratic regime in their country of origin. . . . France would adhere to that view, but was anxious to avoid the possibility that the texts in question might be interpreted in such a way as to give rise to an extension in favour of other groups of refugees. . .": Statements of Mr. Rochefort of France, U.N. Doc. A/CONF.2/SR.28, at 10, July 19, 1951. In contrast, the Canadian legislation in force as of January 1, 1989 extends the exemption to all refugees: *Immigration Act,* at s. 2(3) [en. 1985, c. 28 (4th Supp.), s. 1].

[89] *Convention, supra,* note 2, at Art. 1(C)(5) and (6).

for their maltreatment;[90] and second, to protect the victims of past atrocities from harm at the hands of private citizens, whose attitudes may not have reformed in tandem with the political structure.[91]

The exemption clause in the Convention is not, therefore, structured to provide general humanitarian relief based on factors such as family circumstances or infirmity,[92] but focuses squarely on compelling[93] circumstances which are linked to past persecution. Atle Grahl-Madsen suggests that the existence of a psychological distance between the refugee and her former home, the continued unpopularity in the country of origin of the views or personal characteristics of the refugee, or the severing of familial, social and other linkages between the refugee and her state of origin are the sorts of concerns which warrant exemption from return.[94] In contrast, essentially economic motivations or considerations of personal convenience are not sufficient.[95]

The Canadian legislation adopts these general principles, and extends them to modern day refugees.[96] Insofar as a formal, effective, and enduring change

[90] "[T]he framers of the Convention had to take into account the psychological factor connected with the existence of previous persecution: having been persecuted by the government of a certain country, the refugee may have developed a certain distrust of the country itself and a disinclination to be associated with it as its national": N. Robinson, *Convention relating to the Status of Refugees: Its History, Contents and Interpretation*, p. 60 (1953). *Accord* A. Grahl-Madsen, *supra*, note 73, p. 410: "What the drafters of the Convention had in mind was the situation of refugees from Germany and Austria, who were unwilling to return to the scene of the atrocities which they and their kin had experienced, or to avail themselves of the protection of a country which had treated them so badly."

[91] "Even though there may have been a change of regime in his country, this may not always produce a complete change in the attitude of the population, nor, in view of his past experiences, in the mind of the refugee": UNHCR, *supra*, note 16, p. 31. *Accord* N. Robinson, *supra*, note 90, p. 61.

[92] The predecessor IRO exemption clause, in contrast, focused on "compelling family reasons arising out of previous persecution": P. Weis, "The concept of the refugee in international law" (1960), 87 J. de droit international 928, at 980. This formulation was viewed as too liberal by some drafters of the Convention, as a result of which the exemption was reduced to its current form: "Could the family attachments which a refugee might have contracted in his country of residence be regarded as compelling reasons? And was separation from his family to be regarded for that purpose as a compelling family reason?. . . . He was not convinced that compelling family reasons provided sufficient justification": Statement of Mr. Rochefort of France, U.N. Doc. A/CONF.2/SR.28, at 10-11, July 19, 1951.

[93] This adjective was specifically introduced as a qualification to the Israeli proposal in order to constrain the scope of the exemption: Statement of Mr. Petren of Sweden, U.N. Doc. A/CONF.2/SR.28, at 10, July 19, 1951.

[94] A. Grahl-Madsen, *supra*, note 73, pp. 410-11.

[95] This is clear from the fact that the more narrowly defined exclusions in both the IRO Constitution ("purely economic reasons") and the UNHCR Statute ("reasons other than personal convenience") were rejected by the drafters of the Convention in favour of the current standard. *See* A. Grahl-Madsen, *supra*, note 73, pp. 407-10.

[96] "A person does not cease to be a Convention refugee. . . if the person establishes that there are compelling reasons arising out of any previous persecution for refusing to avail himself of the protection of the country that the person left, or outside of which the person remained, by reason of fear of persecution": *Immigration Act*, at s. 2(3) [en. 1985, c. 28 (4th Supp.), s. 1]. This extension coincides with a UNHCR recommendation: "The reference [in the Convention] to Article 1(A)(1) indicates that the exception applies to 'statutory refugees.' At the time when the 1951 Convention was elaborated, these formed the majority of refugees. The exception, however, reflects a more general humanitarian principle, which could also be applied to refugees other than statutory refugees": UNHCR, *supra*, note 16, p. 31.

of political structure is found to be in place in the country of origin, therefore, the Board must go on to consider whether the particular refugee continues to suffer the effects of past persecution,[97] in which case cessation should be withheld.

6.2 Persons Who Benefit from Surrogate National or International Protection

Because the Convention is designed to provide protection only to those who truly require it, persons who have successfully obtained surrogate international or national protection are not within the scope of the definition. Like those who have been restored to the protection of their state of nationality or former habitual residence, those with meaningful surrogate protection are deemed to be adequately provided for under international law.

This general category speaks to three distinct situations. First, there are persons who are in receipt of enduring protection or assistance from a specialized agency of the United Nations itself. Second, some refugees may go on to acquire the citizenship of a new state. Third, formally unprotected persons may nonetheless secure the *de facto* protection of a new country on terms substantively similar to those of its nationals. In each of these circumstances, refugee status may be denied or revoked on the basis of the sufficiency of subsisting entitlements.

6.2.1 United Nations Protection or Assistance

This clause of the Convention[98] derives from parallel discussions leading to the adoption of the Statute of the Office of the United Nations High Commissioner for Refugees.[99] At the time of the Statute's drafting, two specialized refugee relief agencies were already in existence: the United Nations Relief

[97] "The object of the exception to the effects of a change of circumstances is clearly the continuation of protection for those who have suffered most seriously in their country of origin. . . . [T]he continuing nature of the injuries often suffered by the persecuted is a reason for the exception to be liberally applied": G. Goodwin-Gill, *The Refugee in International Law*, p. 52 (1983).

[98] "This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance. When such protection has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall *ipso facto* be entitled to the benefits of this Convention": *Convention, supra*, note 2, at Art. 1(D).

[99] *Statute of the Office of the United Nations High Commissioner for Refugees,* Annex to General Assembly Res. 428(V), December 14, 1950 ("*Statute*").

and Works Agency for Palestine Refugees in the Near East (UNRWA),[100] and the United Nations Korean Reconstruction Agency (UNKRA).[101] In part, this exclusion clause was intended to prevent the overlapping of the mandates of UNHCR and these pre-existing agencies.[102] More profoundly, however, it resulted from the strongly held view of Arab states that because the plight of Palestinian refugees was the consequence of the establishment of Israel by the United Nations itself, the UN should bear a more direct and obvious responsibility for their well-being:[103]

> . . . the Palestine refugees. . . differed from all other refugees. In all other cases, persons had become refugees as a result of action taken contrary to the principles of the United Nations, and the obligation of the Organization toward them was a moral one only. The existence of the Palestine refugees, on the other hand, was the direct result of a decision taken by the United Nations itself with full knowledge of the consequences. The Palestine refugees were therefore a direct responsibility on the part of the United Nations and could not be placed in the general category of refugees without betrayal of that responsibility.[104]

The Arab states resisted any move which might decrease the distinct visibility of the Palestinians' predicament, and hence undercut the political will to effect their repatriation:

> If the General Assembly were to include the Palestine refugees in a general definition of refugees, they would become submerged and would be relegated to a position of minor importance. The Arab States desired that those refugees should be aided pending their repatriation, repatriation being the only real solution of their problem. To accept a general definition. . . would be to renounce insistence on repatriation.[105]

In the result, the Statute of the UNHCR provides for an interim suspension of eligibility, so long as the Palestinians' needs in exile are met by the UNRWA.[106]

[100] UNRWA was established by General Assembly Resolution 302(IV), December 8, 1949. Its territorial competence extends to Jordan, Syria, Lebanon, and the Gaza Strip.

[101] UNKRA was established by General Assembly Resolution 410(V), December 1, 1950.

[102] "[T]he High Commissioner should not deal with refugee situations under the competence of other agencies of the United Nations": Statement of Mrs. Roosevelt of the U.S.A., 5 UNGAOR at 363, November 29, 1950. *Accord* N. Robinson, *supra*, note 90, p. 64; D. Fowler, "The Developing Jurisdiction of the United Nations High Commissioner for Refugees" (1974), 7 Human Rts. J. 119, at 126; and S. Aga Khan, "Legal Problems Relating to Refugees and Displaced Persons", [1976] Recueil des cours 287, at 299. *But* it is noteworthy that the benefits of protection under the specialized agencies were not truly replicative of the proposed protection function of UNHCR: "The United Nations assistance to Arab refugees was material assistance and could not be compared with the legal protection of the High Commissioner": Statement of Mr. Rochefort of France, 5 UNGAOR at 391, December 4, 1950.

[103] "Political considerations associated with the politics of this area [have] necessitated the United Nations to establish and maintain [UNRWA]": S. Aiboni, *Protection of Refugees in Africa*, p. 31 (1978).

[104] Statement of Mr. Azkoul of Lebanon, 5 UNGAOR at 358, November 27, 1950.

[105] Statement of Mr. Baroody of Saudi Arabia, 5 UNGAOR at 359, November 27, 1950. *Accord* Statement of Mr. Azmi Bey of Egypt, 5 UNGAOR at 358, November 27, 1950.

[106] "[T]he competence of the High Commissioner shall not extend to a person. . . [w]ho continues to receive from other organs or agencies of the United Nations protection or assistance. . .": *Statute, supra*, note 99, at Chap. II(7)(c).

The drafters of the Convention were mindful of the Arab preoccupation that formal refugee status would imply mobility for Palestinian refugees, thus potentially undermining the repatriation of the Palestinian community.[107] The concerns of the Arab community[108] ironically coincided with a determination by some Western delegates to avert the prospect of claims to refugee status by Palestinians. The French representative, for example,

> . . . considered that the problems in their case were completely different from those of the refugees in Europe, and could not see how Contracting States could bind themselves to a text under the terms of which their obligations would be extended to include a new, large group of refugees. . . .[109]

Indeed, the American representative warned that the inclusion of Palestinians "would present Contracting States with an undefined problem, and so reduce the number of States in Europe that would find it possible to sign the Convention".[110] Reflecting these concerns, delegates were faced with a draft which provided for the permanent exclusion[111] from the Convention definition of "persons who are at present receiving from other organs or agencies of the United Nations protection or assistance".[112] Realizing that this clause would leave Palestinians completely without aid or protection if UNRWA were to

[107] The unbending focus on the propriety of repatriation is clear from the comments of Mr. Mostafa Bey, the delegate of Egypt: "[I]t should be noted. . . that the present situation of [Palestinian] refugees was a temporary one, and that the relevant resolutions of the General Assembly provided that they should return to their homes": U.N. Doc. A/CONF.2/SR.19, at 16, November 26, 1951.

[108] "The French representative had rightly recalled that the Arab refugees from Palestine had been excluded from the mandate of the High Commissioner for Refugees as a result of action taken by the delegations of the Arab States at the fifth session of the General Assembly": Statement of Mr. Mostafa Bey of Egypt, U.N. Doc. A/CONF.2/SR.20, at 8, November 26, 1951.

[109] Statement of Mr. Rochefort of France, U.N. Doc. A/CONF.2/SR.19, at 11, November 26, 1951.

[110] Statement of Mr. Warren of the U.S.A., U.N. Doc. A/CONF.2/SR.19, at 23, November 26, 1951. The contrary position of the United Kingdom is noteworthy: "Even if such an influx into Europe did occur, was it conceivable that European countries which had hitherto given refugees certain minimum rights would, even in the absence of a Convention, give the new arrivals less?": Statement of Mr. Hoare of the United Kingdom, U.N. Doc. A/CONF.2/SR.19, at 19, November 26, 1951.

[111] "Turning to the category of refugees who were excluded from the present Convention under paragraph [D], for example, the Palestinian Arabs, in his view the effect of the paragraph as drafted was to make the exclusion permanent. That was, indeed, why the Egyptian representative had submitted his amendment. . . since he wanted to provide for the possible future inclusion of that group within the Convention": Statement of Mr. Hoare of the United Kingdom, U.N. Doc. A/CONF.2/SR.19, at 18, November 26, 1951. *Accord* Mr. Habicht of the International Association of Penal Law, U.N. Doc. A/CONF.2/SR.19, at 27, November 26, 1951: "The phrase 'at present' implied that the Convention should not apply to those persons receiving at a specific time protection or assistance from organs or agencies of the United Nations; it did not imply that when such protection ceased the refugees concerned would come under the protection of the Convention."

[112] U.N. Doc. A/1751, December 19, 1950.

cease operations,[113] the Arab states secured their automatic "deferred inclusion"[114] at such time as specialized relief operations in Palestine might come to an end. It is nonetheless clear from the drafting history that the shared intention of the Arab and Western states was to deny Palestinians access to the Convention-based regime so long as the United Nations continues to assist them in their own region.

More specifically, this exclusion clause applies to all Palestinians eligible to receive UNRWA assistance in their home region.[115] It does not exclude only those who remain in Palestine, but equally those who seek asylum abroad.[116] It affects only Palestinians, since its scope is limited to persons in receipt of UN assistance or protection from a specialized agency (other than UNHCR) in existence in 1951.[117] Under the terms of the Convention, exclusion is automatic once UNRWA eligibility is established.

[113] "It was only right and proper that, as soon as the Palestine problem had been settled and the refugees no longer enjoyed United Nations assistance and protection, they should be entitled to the benefits of the Convention. . .": Statement of Mr. Mostafa Bey of Egypt, U.N. Doc. A/CONF.2/SR.20, at 8, November 26, 1951. "It was obvious that, if the Egyptian amendment was rejected, the refugees it was designed to protect might eventually find themselves deprived of any status whatsoever": Statement of Mr. Al Palchachi of Iraq, U.N. Doc. A/CONF.2/SR.29, at 8, July 19, 1951.

[114] Statement of Mr. Rochefort of France, U.N. Doc. A/CONF.2/SR.3, at 10, November 19, 1951. "The object of the Egyptian amendment was to make sure that Arab refugees from Palestine who were still refugees when the organs or agencies of the United Nations at present providing them with protection or assistance ceased to function would *automatically* come within the scope of the Convention" [Emphasis added]: Statement of Mr. Mostafa Bey of Egypt, U.N. Doc. A/CONF.2/SR.29, at 6, July 19, 1951, referring to his amendment, U.N. Doc. A/CONF.2/13. *Accord* 1 A. Grahl-Madsen, *The Status of Refugees in International Law*, p. 263 (1966), p. 263.

[115] "There is reason to believe that Article 1(D) applies not only to those individuals who were actually receiving protection or assistance from UNRWA on 28 July 1951, but also to those individuals who became the concern of UNRWA at any later date, including those born after the signing of the Convention; or, in other words, that Article 1(D) applies to persons within the mandate of UNRWA as a class or category, and not to individual persons": A. Grahl-Madsen, *supra*, note 114, p. 265.

[116] "It would be noted that, whereas in paragraph [D] of article 1 of the draft Convention reference was made to 'persons who are at present receiving. . . protection or assistance', the parallel clause in the Statute of his Office referred to refugees 'who continue to receive. . .'. That difference in wording implied a difference in consequences": Statement of Mr. van Heuven Goedhart, High Commissioner for Refugees, U.N. Doc. A/CONF.2/SR.21, at 12, July 14, 1951. *But see* UNHCR, *supra*, note 16, p. 34: "[A] refugee from Palestine who finds himself outside [the UNRWA operational] area does not enjoy the assistance mentioned and may be considered for determination of his refugee status under the criteria of the 1951 Convention." *Accord* A. Grahl-Madsen, *supra*, note 114, p. 265; G. Goodwin-Gill, *supra*, note 97, p. 57.

[117] "[P]aragraph [D] [is intended] to exclude persons who were defined as those who at the time when the convention came into force were receiving protection or assistance from United Nations organs or agencies. . .": Statement of Mr. Hoare of the United Kingdom, U.N. Doc. A/CONF.2/SR.19, at 20, November 26, 1951. *Accord* Committee of Churches on International Affairs, U.N. Doc. A/CONF.2/NGO/10, at 1, July 6, 1951; A. Grahl-Madsen, *supra*, note 114, p. 264. The clause is not meaningful in relation to those within the mandate of UNKRA (*supra*, note 101): "Since Korean war refugees are regarded in South Korea as citizens and are accordingly outside the Convention, paragraph D thus applies in fact only to Palestine refugees in the Near East": C. Pompe, "The Convention of 28 July 1951 and the International Protection of Refugees", published in English as U.N. Doc. HCR/INF/42, May 1958, at 12.

While not all Palestinian refugees could meet the criteria of the Convention definition,[118] their wholesale exclusion is inconsistent with a commitment to a truly universal protection system.[119] Happily, Canada has chosen not to apply this part of the Convention definition,[120] as a result of which Palestinian claims in Canada are to be assessed without differentiation of any kind.

6.2.2 Acquisition of a New Nationality

If a refugee cannot resume the protection of her own state, the preferred surrogate is surely the acquisition of citizenship in another country which can effectively ensure her welfare. As was remarked during the drafting of the Convention,

> Both in theory and in practice, naturalization had always been considered as bringing refugee status to an end. . . . [R]efugee status, being abnormal, should not be granted for a day longer than was absolutely necessary, and should come to an end (or, possibly, should never even come into existence) if. . . [the refugee] really had the rights and obligations of a citizen of a given country.[121]

Thus, the Convention provides for the cessation of status when the refugee becomes a citizen of her asylum state or of some other country which is able effectively to protect her.[122]

[118] "[T]he obstacle to [the Palestinians'] repatriation was not dissatisfaction with their homeland, but the fact that a Member of the United Nations was preventing their return": Statement of Mr. Azkoul of Lebanon, 5 UNGAOR at 358, November 27, 1950. Under the UNRWA eligibility criteria, a Palestinian need only have lost his home to qualify for assistance; it is not necessary that she show a "well-founded fear of persecution." *See* G. Coles, "Some Reflections on the Protection of Refugees from Armed Conflict Situations" (1984), 7 In Defense of the Alien 78, at 83-84.

[119] *See*, e.g., S. Aiboni, *supra*, note 103, at 32-33; J. Hathaway, "A Reconsideration of the Underlying Premise of Refugee Law" (1990), 31(1) Harvard Intl. L.J. 129. *Accord* Statement of Mr. Warren of the U.S.A., U.N. Doc. A/CONF.2/SR.19, at 21, November 26, 1951: "He had listened with great interest to the United Kingdom representative's lucid explanation of the reasons why he supported the more universal definition of the term 'refugee'. . . unfortunately, the United States delegation could not share it. The United States approach was much more limited." As Gervase Coles has noted, "UNRWA's mandate extends only to assisting [Palestinian refugees], not to protecting them. The Palestinian refugees, therefore, have the unfortunate distinction of being the only group of refugees in the world who are excluded formally from any international protection. . .": *supra*, note 118, at 105.

[120] While the Report to the Minister outlining the new determination system did recommend that Canada apply Art. 1(D) of the Convention (W. Plaut, *Refugee determination in Canada: Proposals for a new system*, p. 60 (1985)), the amended legislation did not incorporate this exclusion clause.

[121] Statement of Mr. van Heuven Goedhart, U.N. High Commissioner for Refugees, U.N. Doc. A/CONF.2/SR.23, at 11, July 16, 1951.

[122] "This Convention shall cease to apply to any person. . . [who] has acquired a new nation-

It is a matter of some dispute whether cessation may result from the involuntary acquisition of a new nationality. On the one hand, this was not the intention of the drafters of the Convention. The representative of the Netherlands moved an amendment expressly to recognize the importance of voluntarism in the choice of a new nationality,[123] but was persuaded that the change was not required[124] since the cessation clause

> . . . was not concerned with the imposition of nationality by an outside authority, but related to the acquisition by a refugee of a new nationality other than that of the country of persecution. Sub-paragraph 3 was designed to meet the case where a refugee in a particular country of refuge paid a brief visit to another country and took advantage of the facilities available there to acquire the nationality of that country. When such a person returned to the country of refuge, the latter would be faced with the situation of his having acquired a new nationality.[125]

It is clear that delegates to the Conference of Plenipotentiaries did not agree that involuntarily acquired citizenship was cause for cessation,[126] and adopted the clause on the understanding that it was restricted to voluntarily secured nationality.

On the other hand, it is true that this clause, unlike the surrounding paragraphs of Article 1(C),[127] does not expressly condition cessation on a voluntary act. Too, substantive symmetry with the dual and multiple nationality provisions of Article 1(A)(2) would argue against considerations of voluntarism. Thus, both scholarly opinion[128] and UNHCR recommendations[129]

ality, and enjoys the protection of the country of his new nationality. . .": *Convention, supra*, note 2, at Art. 1(C)(3).

[123] "Substitute for paragraph (3) of Section [C] the following two paragraphs: (3a) Having voluntarily acquired a new nationality; [or] (3b) Having involuntarily acquired a new nationality, he nevertheless avails himself of the protection of the country of his new nationality": U.N. Doc. A/CONF.2/73, July 12, 1951.

[124] Statement of Baron van Boetzelaer of the Netherlands, U.N. Doc. A/CONF.2/SR.23, at 19, July 16, 1951.

[125] Statement of Mr. Hoare of the United Kingdom, U.N. Doc. A/CONF.2/SR.23, at 19, July 16, 1951.

[126] "Automatic acquisition of a new nationality might indeed constitute a form of persecution compelling the person against whom it was directed to seek refuge in another country. . . in his opinion, therefore, an individual could not be compelled to acquire a new nationality": Statement of Mr. Rochefort of France, U.N. Doc. A/CONF.2/SR.23, at 17, July 16, 1951. *Accord* Mr. Herment of Belgium, U.N. Doc. A/CONF.2/SR.23, at 18, July 16, 1951, who ". . . thought it desirable to provide for the case of a refugee in a receiving country who. . . found himself saddled with a nationality he did not wish to possess." *See also* N. Robinson, *Convention relating to the Status of Refugees*, p. 59, (1953).

[127] *See Convention, supra*, note 2, at Art. 1(C)(1), (2) and (4).

[128] "Article 1(C)(3) differs from the previously discussed provisions of Article 1(C) in that its applicability is not subject to the proviso of voluntariness. Consequently, the present provision applies irrespective of the way in which the person concerned acquires a new nationality, whether by naturalization in the strict sense (grant on application), by marriage, or by operation of law in any manner whatsoever": A. Grahl-Madsen, *supra*, note 114, pp. 395-96.

[129] German nationality was conferred on various categories of refugees of German ethnic

urge that the only relevant issue is the effectiveness of the new nationality, however it came to be acquired. Specifically, the refugee must be able to enter her new state of citizenship, reside there with protection against deportation or expulsion,[130] and enjoy a reasonable expectation that her basic human rights will be fully respected. In such circumstances, adequate surrogate protection exists, and refugee status should logically come to an end.

6.2.3 Residence with the Rights and Obligations of a National

This exclusion clause[131] was originally intended simply to bar from international protection all ethnic German refugees from Central and Eastern Europe who had taken up residence in Germany during or following the Second World War.[132] The provision reflected the view that Germany was morally responsible for these migrants,[133] and was in fact meeting their needs by assimilation to its own population,[134] even if they were not always granted formal German nationality. Concern about the diplomatic wisdom of a specific reference to Germany in the Convention[135] led to the formulation

origin in Austria by a law of the Federal Republic of Germany on February 22, 1955. Such persons were given one year within which to renounce German citizenship, failing which their citizenship was deemed to be settled in accordance with the law. The UNHCR Executive Committee rendered an advisory opinion that such persons had ceased to be refugees by virtue of the German citizenship thus acquired: U.N. Doc. A/AC.79/37, at para. 129, cited in P. Weis, "The concept of the refugee in international law" (1960), 87 J. du droit international 928, at 978.

[130] G. Goodwin-Gill, *The Refugee in International Law*, p. 50 (1983).

[131] "The Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country": *Convention, supra,* note 2, at Art. 1(E).

[132] "This provision was primarily designed to exclude refugees and expellees of German ethnic origin in the Federal Republic of Germany who by virtue of Article 116 of the Basic Law were 'Germans within the meaning of the Basic Law' and, although not possessing German nationality, were treated as if they were German nationals": P. Weis, *supra*, note 129, at 982.

[133] "He did not think that the German Government should be encouraged to shift all responsibility for them to the United Nations": Statement of Mr. Henkin of the U.S.A., U.N. Doc. E/AC.32/SR.3, at 9, January 26, 1950. The Israeli delegate went so far as to characterize the exclusion as a matter of retribution: "It was known that a number of such persons had helped to carry out Hitler's policy even more than the Germans residing in Germany, as they had been able to act under the cover of their new nationality, while preserving their original German nationality. When called upon, they had not hesitated to join the German army, and it was perhaps among them that the most fanatical Nazis had been found. There was no need, therefore, to invoke humanitarian principles in favour of that type of individual who in no way deserved to be granted the status of international refugee": Statement of Mr. Robinson of Israel, U.N. Doc. E/AC.32/SR.15, at 10, January 30, 1950.

[134] "This paragraph is intended to exclude from the benefits of the Convention members of former German minorities outside of Germany who returned to, sought refuge in, or were expelled to Germany, and who are living there. This paragraph reflects the view that these individuals should be and are being assimilated into the German community and are not properly refugees": U.N. Doc. E/AC.32/L.38, at 16, February 15, 1950.

[135] *See*, e.g., Statement of Mr. Rochefort of France, U.N. Doc. E/1703/Add.5, at 5, June

of a generally phrased exclusion of ethnically or culturally affiliated residents of a country who receive the same protection as that provided to nationals.[136]

Ironically, this "politically sensitive" use of general language led to substantial debate in the General Assembly. The Mexican representative opposed the apparent exclusion of Spanish refugees admitted to his country, or of Spanish Basques in France;[137] the delegate of Saudi Arabia argued more generally that "persons forced to flee to a neighbouring State, the inhabitants of which might have similar racial and cultural characteristics, would be denied the protection both of the Convention and of the High Commissioner's Office".[138] French assurances that the clause was aimed only at the German minorities notwithstanding,[139] the original wording was voted down.[140] The revised proposal presented to the Assembly was represented to exclude only "persons involved in mass movements of population due to frontier changes, who possessed the same rights as the inhabitants of the country in which they were currently living",[141] and was further amended to delete any reference to ethnic or cultural kinship, and to focus squarely on the existence of protection genuinely equivalent to that afforded nationals.[142]

Read in this context, exclusion based on *de facto* nationality is truly an exceptional occurrence which implies the effective legal assimilation of the refugee to her host population.[143] Because the clause requires residence in the state willing to confer effective nationality, neither an inchoate right to protection, nor indeed physical presence short of continued residence, is sufficient to warrant exclusion.[144]

Moreover, *de facto* nationality is qualitatively distinct from even long-term

26, 1950, who noted that the exclusion clause ". . . would still serve its purpose if. . . [one were to avoid] reference by name to a Government with which, incidentally, a number of states entertain diplomatic relations." *Accord* Statement of Mr. Perez Perozo of Venezuela, U.N. Doc. E/AC.32/SR.43, at 4, September 28, 1950.

[136] The clause considered by the General Assembly provided for the exclusion of ". . . a person who has entered a country with whose nationals he has close ties of ethnic and cultural kinship and, because of such kinship, enjoys the rights and privileges usually attached to the possession of the nationality of such country": U.N. Doc. A/C.3/L.131, at 2, November 30, 1950.

[137] Statement of Mr. Noriega of Mexico, 5 UNGAOR at 376-77, December 1, 1950.

[138] Statement of Mr. Baroody of Saudi Arabia, 5 UNGAOR at 376, December 1, 1950.

[139] Statement of Mr. Rochefort of France, 5 UNGAOR at 376, December 1, 1950.

[140] 5 UNGAOR at 380, December 1, 1950.

[141] Statement of Mrs. Roosevelt of the U.S.A., 5 UNGAOR at 389, December 4, 1950. *Accord* Statement of Mr. Noriega of Mexico, 5 UNGAOR at 390, December 4, 1950; and Statement of Mr. Lequesne of the United Kingdom, 5 UNGAOR at 390, December 4, 1950.

[142] In moving the final language, the representative of New Zealand acknowledged his desire to meet the Saudi Arabian delegate's concern regarding genuine equivalency of rights and obligations: Statement of Mr. Davin of New Zealand, 5 UNGAOR at 394, December 4, 1950, referring to the Statement of Mr. Baroody of Saudi Arabia, 5 UNGAOR at 392, December 4, 1950.

[143] While official naturalization is not required, *de facto* citizens possess the rights and obligations of nationals: N. Robinson, *supra*, note 126, p. 65. *Accord* UNHCR, *supra*, note 16, p. 34.

[144] "The clause refers to a person who has 'taken residence' in the country concerned. This implies continued residence and not a mere visit": UNHCR, *supra*, note 16, p. 34.

residence in a state,[145] since it requires a consequential guarantee of rights to the refugee on terms at least as favourable as those which follow from Convention refugee status.[146] Most critically, the rights of entry and of freedom from removal or expulsion must be clearly conferred and respected,[147] a point emphasized by the Federal Court of Appeal in both *Waclaw Antoni Mihael Hurt v. Minister of Manpower and Immigration*[148] and *Kammy Boun-Leua v. Minister of Employment and Immigration.*[149] As noted in a recent decision to exclude an Iranian with *de facto* refugee status in Denmark, it must also be determined whether "the claimant enjoys the kinds of rights and protection in [the country of effective nationality] which would bring him within the purview of Section E of Article 1".[150] The Board has since

[145] This has been confirmed by a series of decisions of the Immigration and Refugee Board. *See*, e.g., Immigration and Refugee Board Decisions M89-01318, in which the Somalian claimant had spent three years in the United States (July 1989, R.L.R.U. Cat. Sig. 10262); M89-00697, involving six years' residence in Nigeria by a Sri Lankan (July 1989, R.L.R.U. Cat. Sig. 10218); M89-00436, dealing with a Ghanaian who spent five years in Israel (April 1989, R.L.R.U. Cat. Sig. 10396); T89-00190, concerning a Somalian who spent eight years in Ethiopia (April 1989, R.L.R.U. Cat. Sig. 10092); and V89-00866, dealing with a refugee from Afghanistan who had lived and worked illegally in Saudi Arabia for six years (March 1990, R.L.R.U. Cat. Sig. 10462). In none of these cases was the long-term residence in another country considered as adverse to the claim.

[146] "The provision contained in Article 1(E) defends its place in the Convention, because persons who enjoy so extensive rights. . . are in no need of the status which the Convention might have given them. . . . In order to be excludable under Article 1(E), a person must be granted a status which in no respect is inferior to that of a Convention 'refugee.' Otherwise the provision may be open to abuse": 1 A. Grahl-Madsen, *The Status of Refugees in International Law*, p. 270 (1966). This test was adopted by Immigration and Refugee Board Decision T89-00374, R.L.R.U. Cat. Sig. 10047, June 1989. However, not even Convention status guarantees full rights to political participation. UNHCR, for example, took the view that ethnic Turks from Bulgaria admitted to Turkey, who were granted all of the civil rights of Turkish citizens but no political participation rights pending nationalization, were excluded under this clause: P. Weis, *supra*, note 129, at 982-84, citing U.N. Docs. A/AC.36/Rev. 1 and A/AC.36/20, at para. 31.

[147] G. Goodwin-Gill, *The Refugee in International Law*, p. 58 (1983); UNHCR, *supra*, note 16, p. 34.

[148] In this case, the Minister argued for denial of refugee status based on Article 1(E), since the Polish claimant had resided in West Germany for five years. The Federal Court noted that ". . . the appellant alleges that he was only able to stay in West Germany by virtue of temporary visas, that he had been unable to obtain status as a permanent resident, that he had been advised the Germans wished to deport him back to Poland and that his temporary visa. . . would not be renewed. In my opinion, this evidence serves to negate, rather than to affirm, the allegation that the appellant had any rights similar to those attached to West German nationality": (1978), 21 N.R. 525 (F.C.A.), at 529, *per* Heald J.; setting aside Immigration Appeal Board Decision T77-9105, March 29, 1977.

[149] "In this case the applicant as a refugee admitted to France can return at least as long as his travel permit, issued by that country to him, is valid. . . . Since he can return to France, which is not the country of his nationality, or where his life or freedom would be threatened, there is no obligation on the Minister to permit him to remain in Canada": Federal Court of Appeal Decision A-578-79, June 17, 1980, at 7, *per* Urie J.

[150] Immigration and Refugee Board Decision T89-00919, August 1989, at 11, *per* E. Rotman.

elaborated this requirement to include respect for the claimant's rights under the Convention and the International Bill of Rights, and even "the *potential* to become a citizen and thus vote in national elections and run for public office".[151] Where these stringent criteria are satisfied, the substance if not the form of a new, surrogate nationality is present, and protection through refugee law is not required.

6.3 Persons Who Do Not Deserve Protection

The drafters of the Convention were preoccupied to avoid the granting of refugee status to both war criminals and individuals who might jeopardize the internal security of asylum countries. The decision to exclude such persons, even if they are genuinely at risk of persecution in their state of origin, is rooted in both a commitment to the promotion of an international morality[152] and a pragmatic recognition that states are unlikely to agree to be bound by a regime which requires them to protect undesirable refugees.[153] Relying on the Universal Declaration of Human Rights'[154] prohibition on the granting of asylum to persons liable to prosecution for "non-political crimes or. . . acts contrary to the purposes and principles of the United Nations",[155] the Convention provides for the mandatory exclusion of three classes of persons: those who have committed crimes against peace and security; serious common law criminals; and individuals who have acted in contravention of the principles and purposes of the United Nations.

While the proscription is not subject to any exceptions,[156] it falls to each

[151] Immigration and Refugee Board Decision M90-01972, August 1990, *per* L. Gilad; leave to appeal granted by Federal Court of Appeal Decision 90-A-2406, October 12, 1990. This decision explicitly considers the views of both Grahl-Madsen and Goodwin-Gill, and thoroughly canvasses the range of rights guaranteed to a Sri Lankan *de facto* refugee residing in Denmark.

[152] Statement of Mr. Rochefort of France, 11 UNESCOR (406th mtg.), at 276 (1950). He argued further that ". . . it must be made quite clear that the object was not to specify in the Convention what treatment each country must mete out to individuals who had placed themselves beyond the pale, but only to state whether a country was entitled, in granting refugee status to such individuals, to do so on the responsibility of the High Commissioner and of the United Nations": U.N. Doc. E/AC.7/SR.166, at 4, August 22, 1950.

[153] "The rights of countries of refuge should be safeguarded, as well as the rights of refugees": *Id.*

[154] Indeed, an early formulation of the clause provided that "[n]o person to whom Article 14, paragraph 2 of the aforesaid Declaration is applicable shall be recognized as a refugee": U.N. Doc. E/AC.32/L.3/Corr. 1.

[155] *Universal Declaration of Human Rights*, G.A. Res. 217A (III), December 10, 1948 ("*UDHR*"), at Art. 14(2).

[156] While the United States argued in favour of state discretion to admit or refuse serious criminals (*see* Statement of Mr. Henkin, U.N. Doc. E/AC.32/SR.17, at 9, February 6, 1950), Israel and France (*see* Statement of Mr. Robinson of Israel, U.N. Doc. E/AC.32/SR.17, at 9, February 6, 1950; and Statement of Mr. Rain of France, U.N. Doc. E/AC.32/SR.18, at 3, February 8, 1950) successfully advanced the view that exclusion should be mandatory (*see* Report of the Working Group, U.N. Doc. E/AC.32/L.32, at 3, February 9, 1950). *Accord*

contracting state to decide for itself when a refugee claimant is within the scope of an exclusion clause:

> . . . in the absence of a world government and of a sovereign international court of justice, that power of discretion, which was an essential safeguard both for the real refugee and for the country of refuge, must, perforce, be left to States. The only practical solution was to trust the countries which were willing to grant hospitality.[157]

The asylum state need have only "serious reasons for considering"[158] that the applicant is a criminal described in the exclusion clause; there is no requirement that she have been formally charged or convicted,[159] or even that her criminality be capable of establishment "beyond a reasonable doubt" by a judicial procedure.[160] It is enough that the determination authority have "sufficient proof warranting the assumption of [the claimant's] guilt of such a crime".[161]

6.3.1 Crimes Against Peace and Security

While the drafters of the Convention were unanimously of the view that war criminals should not be entitled to claim refugee status,[162] there was disagreement on two points. First, the United States argued that countries should be allowed to treat war criminals as refugees, although they should not be compelled to do so.[163] Most representatives, however, were strongly of the

N. Robinson, *Convention relating to the Status of Refugees*, p. 67 (1953): "Section F is couched in categorical language. . . . It follows that, once a determination is made that there are sufficient reasons to consider a certain person as coming under this section, the country making the determination is barred from according him the status of a refugee."

[157] Statement of Mr. Rochefort of France, U.N. Doc. E/AC.7/SR.166, at 6, August 22, 1950. No response was made to a non-governmental intervention which advocated the determination of exclusion by UNHCR: *see* Statement of the Friends' World Committee, U.N. Doc. A/CONF.2/NGO.7, at 3, July 6, 1951.

[158] The vagueness of this standard was criticized by Mr. Lequesne of the United Kingdom: "The term 'serious reasons' was too vague to justify an important decision. The choice was difficult: it was necessary either to allow governments to take an administrative decision when a judicial decision was called for, or to run the risk of including. . . criminals": 5 UNGAOR (334th mtg.) at 390, December 4, 1950.

[159] A. Grahl-Madsen, *supra*, note 146, p. 277.

[160] As noted by Lord MacDonald of the United Kingdom, this clause "gives to the executive organs of government a power to take what are essentially judicial decisions. . . . [I]t is dangerous to entrust such a power to the executive organs of a government": 5 UNGAOR (325th mtg.) at 670, December 14, 1950. *Accord* Statement of Mr. Bernstein of Chile, U.N. Doc. E/AC.7/SR.165, at 24, August 19, 1950.

[161] N. Robinson, *supra*, note 156, p. 67.

[162] *See*, e.g., Statements of Mr. Rain of France, U.N. Doc. A/AC.32/SR.4, at 8, January 26, 150; of Mr. Makiedo of Yugoslavia, U.N. Doc. A/CONF.2/SR.3, at 7, July 13, 1951; and Mr. von Trutzschler of the Federal Republic of Germany, U.N. Doc A/CONF.2/SR.24, at 8, July 17, 1951.

[163] Indeed, the United States initially argued that "there were no longer any war criminals who had not been punished and there was therefore no need to except them": Statement of

view that discretion of this kind could undermine the integrity of refugee status.[164] Second, Germany opposed incorporation of the definition of war criminals derived from the Charter of the International Military Tribunal (the "Nurnberg Principles"), and advocated reference to the "grave breaches" standard of common Article 147 of the Geneva Conventions instead.[165] This met with opposition based on the importance of safeguarding the jurisprudential clarity already achieved by practice under the Nurnberg Principles.[166]

The compromise which emerged consisted of the mandatory exclusion of an undefined category of persons who had 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".[167] This satisfied the majority of delegates who wanted a strong stand against the sheltering of war criminals;[168] the United States was content that the definition was sufficiently vague to allow for the injection of domestic discretion;[169]

Mr. Henkin, U.N. Doc. E/AC.32/SR.5, at 5, January 30, 1950. As a fall-back position, Mr. Henkin suggested that there ought to be "nothing to prevent a State from sheltering war criminals. The basic issue was to determine who would decide that a person was a war criminal. It might be left to the discretion of the receiving country": U.N. Doc. E/AC.32/SR.17, at 9, February 6, 1950.

[164] "A signatory State which extended protection to a war criminal would be going beyond its obligations under the convention. It would, however, be granting special benefits to a category of undesirable persons. . .": Statement of Mr. Robinson of Israel, U.N. Doc. E/AC.32/SR.17, at 9, February 6, 1950. *Accord* Statements of Mr. Cuvelier of Belgium, U.N. Doc. E/AC.32/SR.18, at 2, February 8, 1950; and Mr. Rain of France, U.N. Doc. E/AC.32/SR.18, at 3, February 8, 1950.

[165] "That charter had been approved in 1944 by a limited number of states which had taken part in the last war, and a considerable number of states attending the present conference had not signed it or taken [a] position on it. Reference to that document therefore appeared inappropriate in the draft Convention. . . . By associating the Geneva Conventions with the work of the Conference the humanitarian aims which should govern the convention would be stressed": Statement of Mr. von Trutzschler of the Federal Republic of Germany, U.N. Doc. A/CONF.2/SR.19, at 26, July 13, 1951.

[166] "[N]either the Geneva Conventions nor the Convention on Genocide possessed the solid foundation which the jurisprudence of the International Military Tribunal, and other tribunals which had applied the provisions of article 6 of the Nurnberg Charter, conferred on the 'Nurnberg Principles'": Statement of Mr. Herment of Belgium, U.N. Doc. A/CONF.2/SR.21, at 10, July 14, 1951.

[167] *Convention, supra,* note 2, at Art. 1(F)(a).

[168] "[I]t would be excessively optimistic to state, as did the United States representative, that no more war criminals remained to be dealt with. He was convinced that that was not the case, and it would be intolerable that they should be given the protection of the convention": Statement of Mr. Rain of France, U.N. Doc. E/AC.32/SR.5, at 16, January 30, 1950.

[169] "The object of the provision was to deny the United Nations mantle and international refugee status to war criminals, but as war criminals were difficult to define, and some countries used the term loosely, the determination was left open to the Contracting States in question": Statement of Mr. Henkin of the U.S.A., U.N. Doc. E/AC.7/SR.159, at 13, August 16, 1950.

and Germany was placated by the adoption of a politically neutral formulation.[170]

As customarily interpreted, this exclusion clause therefore bars those who commit three distinct types of crime.[171] First, a "crime against peace" comprises the planning of or participation in an unlawful war. Second, a "war crime" involves the violation of a law of war, including the mistreatment of civilians and prisoners of war, or the infliction of unjustified property damage during wartime. Third, a "crime against humanity" consists of fundamentally inhumane conduct, often grounded in political, racial, religious or other bias. Genocide,[172] slavery, torture, and apartheid[173] are examples of crimes within this category.

An alternative to the plethora of international instruments[174] which now define and describe these crimes against international peace and security has been under construction by the International Law Commission since 1947. Indeed, the drafters of the Convention chose not to elaborate a detailed definition of these crimes partly in deference to the anticipated release of the Commission's *Code of Offences Against the Peace and Security of Mankind*.[175] While still not complete, the draft Code offers a conceptual framework to define crimes within this exclusion clause,[176] and the limited scope of the explanations which may be invoked in relation to them.[177]

The essential nature of a crime against peace and security was elaborated by the Commission in 1987, focusing on the criterion of seriousness:

> These are crimes which affect the very foundations of human society. Seriousness can be deduced either from the nature of the act in question (cruelty, monstrousness, barbarity, etc.), or from the extent of its effects (massiveness, the victims being peoples, populations or ethnic groups), or from the motive of the perpetrator (for example, genocide), or from several of these elements.[178]

[170] "[T]he London Charter expressly dealt with crimes against humanity committed 'before or during the war', thus excluding such crimes committed at a later date. It would therefore seem logical that the Convention should not include a reference to an instrument of incontestably limited scope": Statement of Mr. von Trutzschler of the Federal Republic of Germany, U.N. Doc. A/CONF.2/SR.24, at 7, July 17, 1951.

[171] *See*, e.g., 1 A. Grahl-Madsen, *The Status of Refugees in International Law*, p. 274 (1966); UNHCR, *supra*, note 16, pp. 35-36.

[172] A. Grahl-Madsen, *supra*, note 171, p. 276.

[173] G. Goodwin-Gill, *The Refugee in International Law*, p. 60 (1983).

[174] UNHCR advocates reference to *inter alia*, the Charter of the International Military Tribunal, the Genocide Convention, and the Geneva Conventions: *supra*, note 16, p. 89. The *Criminal Code*, R.S.C. 1985, c. C-46, also expressly defines "crime against humanity" and "war crime" at s. 7 (3.76) [en. 1985, c. 30 (3rd Supp.), s. 1].

[175] A. Grahl-Madsen, *supra*, note 171, p. 276; N. Robinson, *supra*, note 156, p. 66.

[176] *See* draft Article 1, provisionally adopted by the International Law Commission in 1987: *Report of the International Law Commission to the General Assembly on the Work of its Thirty-Ninth Session* II(2), U.N. Doc. A/CN.4/SER.A/1987/Add.1 (Part 2), at 13 (1987).

[177] Draft Article 9, entitled "Exceptions to the principle of responsibility", had been discussed but not yet adopted by the International Law Commission as of 1987. *See id.* at Part 1, at 7-9.

[178] *Supra,* note 176, at 13.

Intention is a necessary element of such an offence, although some legal experts hold that it may be implied in the case of massive and systematic crimes, such as genocide or apartheid.[179] Because of this *mens rea* requirement, the Commission's draft suggests that three limited exceptions to the general principle of responsibility are available.

First, the leaders of a state may argue self-defence "in respect of acts whose performance was ordered by them or which they carried out in response to an act of aggression directed against their State".[180] This exception should be construed to relate only to offences within the traditional "crimes against peace" category, and recognizes that there is no genuine design to violate the rules against use of force in the context of a strictly defensive engagement in conflict.[181]

Second, it is possible to invoke coercion, state of necessity, or *force majeure*.[182] Essentially, this exception recognizes the absence of intent where an individual is motivated to perpetrate the act in question only in order to avoid grave and imminent peril. The danger must be such that "a reasonable man would apprehend that he was in such imminent physical peril as to deprive him of freedom to choose the right and refrain from the wrong".[183] Moreover, the predicament must not be of the making or consistent with the will of the person seeking to invoke this exception.[184] Most important, the harm inflicted must not be in excess of that which would otherwise have been directed at the person alleging coercion.[185]

These constraints would suggest that the Immigration Appeal Board's exoneration of Chilean torturer *Felix Salatiel Nuñez Veloso*[186] may have been unwarranted. Under pain of execution, the claimant had participated in crimes against humanity which were "totally opposed to his moral, religious and political convictions".[187] Because these actions were committed under duress, it was held that exclusion under Article 1(F) should not follow. Yet the Board failed to inquire whether the human suffering induced by Mr. Nuñez Veloso's actions outweighed the risk to his own well-being, an essential finding for exculpation under the doctrine of coercion.

Third, one may plead an error of law, in the sense of a lack of knowledge of the wrongfulness of the act committed.[188] Clearly, this is not possible in the case of most "crimes against humanity", since actions such as slavery

[179] *Id.*

[180] *Supra*, note 177, at 7.

[181] This is consistent with Article 51 of the *Charter of the United Nations*, signed June 25, 1945, entered into force October 24, 1945, 59 Stat. 1031 ("*Charter*").

[182] *Supra*, note 177, at 7.

[183] *Id.*, at 8, citing the *High Command* case, American Military Tribunals, case no. 12, vol. XI, at 509.

[184] *Id.*, at 8, citing the *Krupp* case, American Military Tribunals, case no. 10, vol. IX, at 1439.

[185] *Id.*, at 1445-446.

[186] Immigration Appeal Board Decision 79-1017, C.L.I.C. Notes 11.5, August 24, 1979.

[187] *Id.*, at 3, *per* J.-P. Houle.

[188] *Supra*, note 177, at 8.

or extermination may be classified as obviously wrongful. The specific application of the laws of war, on the other hand, is potentially ambiguous. If, notwithstanding "exertion of the conscience", the individual could not have ascertained the wrongfulness of the actions in question, the requisite intention is absent.[189]

In *Zacarias Osorio Cruz*[190] the Immigration Appeal Board allowed the claim of a deserter from the Mexican army, who admitted active participation in approximately twenty politically motivated executions over a five-year period. He eventually made a daring escape from his unit due to his "awakening political and moral conscience",[191] and claimed refugee status in Canada. In allowing his claim, the Board did not address the question of whether a crime of this sort could admit of a mistake of law, much less whether the claimant had genuinely "exerted his conscience" prior to engagement in actions properly characterized by the Board as "contrary to the most basic international rules of conduct".[192]

However, this case raises quite poignantly the issue of whether an additional form of exculpation rooted in utilitarianism is not warranted. The Board placed emphasis on the fact that Osorio Cruz was the first person to shed light on the crimes against humanity being committed by the Mexican army:

> In deserting from the army and telling the whole world, as it had never been told before, the story of the atrocities committed by officers of the Government of Mexico, Mr. Osorio Cruz betrayed his oath of obedience, became a traitor in the eyes of some Mexican authorities by displaying his strong political disagreement and, without a doubt, the worst punishment reserved for prisoners holding unpopular political opinions awaited him. This is the reason for his fear.[193]

While Osorio Cruz' protracted involvement with crimes against humanity may be too egregious to warrant exculpation on any basis, in the case of a less confirmed criminal one might reasonably consider whether the value of disclosure of previously covert inhumane conduct does not offset the general rule against sheltering an admitted criminal. Since the enforcement of international human rights law is dependent on publicity and moral probation, it may be wise judiciously to exonerate individuals who, though culpable themselves, make it possible to end or curtail crimes against peace and security. This position is not, however, thus far accepted in law.

The commentary which accompanies the International Law Commission draft also fails to suggest a specific "superior order" exception, although

[189] *Id.*, at 8, citing *Entscheidungen des Bundesgerichstofes in Strafsachen*, judgment of the German Federal Court, vol. 3 (1953), at 365-66.

[190] Immigration Appeal Board Decision M88-20043X, C.L.I.C. Notes 118.6, March 25, 1988.

[191] *Id.*, at 10, *per* P. Arsenault.

[192] *Id.*, at 11.

[193] *Id.*, at 10.

it notes that soldiers or others following commands may invoke the notions of coercion or error of law, as defined above.[194] In contrast, the Immigration and Refugee Board accepted the claim of a member of a Ghanaian firing squad involved in politically motivated executions under colour of judicial authority, noting that "the claimant is not a person described in Section F [of] Article 1, because he was a private in the Ghanaian Army and killed people in the line of duty".[195] Because criminal responsibility for actions against peace and security is intended to compel subordinates to question the illegitimate exercise of authority, a "superior order" defence would be counterproductive.[196]

In sum, a crime against peace and security is defined by its seriousness, whether based on the nature of the act itself, the extent of its effects, or the motive of the perpetrator. A person who commits such an act is culpable unless a strictly construed exception based on self-defence, coercion, or error of law can be established. Moreover, all of the recognized exceptions to responsibility for crimes against peace and security are inoperative if the facts invoked constitute a breach of a peremptory norm of international law, originate in a fault of the perpetrator, or result in the sacrifice of a greater interest than that protected.[197]

The last question to be addressed is the degree of involvement required to justify criminal liability. While mere presence at the scene of a crime may not be actionable,[198] exclusion is warranted "when the evidence establishes that the individual in question personally ordered, incited, assisted or otherwise participated in the persecution. . . ."[199] In *Fernando Alfonso Naredo Arduengo,*[200] for example, the Immigration Appeal Board disqualified the Chilean applicants who had been employed by that country's secret police:

> Mr. and Mrs. Naredo were members of different four or five mean teams engaged in surveillance, arrests and interrogations, which involved torture and beatings. Both claimed to have been assigned to stand guard and take notes, denying that they personally beat or tortured their victims. Mr. Naredo claims to have participated in eighteen to twenty such operations, ten leading to death. . . . [T]heir actions so clearly an abuse of human rights, set them outside those who can properly seek asylum.[201]

The same holds true for those who make it possible for others to engage in crimes against peace and security:

[194] *Supra*, note 177, at 9.

[195] Immigration and Refugee Board Decision T89-00198, July 1989, at 6, *per* J. Gilberger.

[196] A recent Board decision helpfully recognized that ". . . participation — albeit unwilling — in war crimes, could exclude [a claimant]. . . under Article 1(F)(a). . .": Immigration and Refugee Board Decision T89-01690, January 1990, at 11, *per* I. Liebich.

[197] *Supra*, note 177, at 7.

[198] *Fedorenko v. United States*, 449 U.S. 490 (U.S.S.C. 1981).

[199] *Laipenicks v. I.N.S.*, 750 F. 2d 1427, at 1431 (U.S.C.A. 9th Cir. 1985).

[200] Immigration Appeal Board Decision T80-9159, C.L.I.C. Notes 27.13, November 20, 1980.

[201] *Id.*, at 11-14, *per* D. Davey.

> That Mr. Giraud did not kill anyone directly is not to his credit. He prepared them for death, which in my view makes him culpable. . . . Mr. Giraud has, in my view, committed a. . . crime against humanity.[202]

6.3.2 Serious Non-Political Crimes

The common law criminality exclusion[203] disallows the claims of persons who are liable to sanctions in another state for having committed a genuine, serious crime, and who seek to escape legitimate criminal liability by claiming refugee status. This exclusion clause is not a means of bypassing ordinary criminal due process for acts committed in a state of refuge,[204] nor a pretext for ignoring the protection needs of those whose transgressions abroad are of a comparatively minor nature.[205] Rather, it is simply a means of bringing refugee law into line with the basic principles of extradition law,[206] by ensuring that important fugitives from justice are not able to avoid the jurisdiction of a state in which they may lawfully face punishment:

> Article 14 of the Universal Declaration of Human Rights was concerned with the right of asylum, and its second paragraph constituted a proviso to the general provision of the first paragraph. That second paragraph seemed. . . to be intended to apply to persons who were fugitives from prosecution in another country for non-political crimes, and the effect would seem to be that the provisions of article 14 would not override specific extradition obligations. . . . [T]he Convention mentioned neither the right of asylum nor the principle of extradition. In that connexion, the action of States was governed by treaties

[202] *St. Gardien Giraud*, Immigration Appeal Board Decision T81-9669, C.L.I.C. Notes 48.10, October 28, 1982, at 5, *per* E. Teitelbaum; set aside on other grounds by Federal Court of Appeal Decision A-1080-82, September 30, 1983.

[203] "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that. . . he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee": *Convention, supra*, note 2, at Art. 1(F)(b).

[204] "[T]here was no case for denying them the rights envisaged in the Convention, which included all the usual personal rights, such as the right to appear before the courts or to own property. It was wrong that a person whom it might ultimately be necessary to expel should be regarded as a pariah in the meantime": Statement of Mr. Hoare of the United Kingdom, U.N. Doc. A/CONF.2/SR.3, at 15, July 13, 1951.

[205] "He was most anxious that refugees who had committed such crimes as petty thefts in their camp should not thereby be placed once and for all beyond the reach of the Convention. It had been argued that as a matter of civilized treatment that would not occur; if so, he could see no objection to giving the principle legal recognition in the Convention": Statement of Mr. Hoare of the United Kingdom, U.N. Doc. A/CONF.2/SR.24, at 8, July 17, 1951.

[206] "[T]he exception of common law criminals subject to extradition would naturally continue to be applicable": Statement of Mr. Henkin of the U.S.A., U.N. Doc. A/AC.32/SR.5, at 5, January 30, 1950. *Accord* Statement of Mr. Rochefort of France, U.N. Doc. E/AC.7/SR.166, at 4, August 22, 1950. Indeed, the text of the clause adopted by the Economic and Social Council explicitly excluded a person "[i]n respect of whom there are serious reasons for considering that he has committed a crime covered by the provisions of treaties of extradition": 11 UNESCOR (325th mtg.) at 670, December 14, 1950. *See also* A. Grahl-Madsen, *supra*, note 2, at 272-73.

relating specifically to extradition, and it would therefore be for states to take appropriate action in any given case in the light of their obligations under such treaties.[207]

In view of this narrow purpose, the common law criminality clause is subject to several important constraints.

First, it follows from the linkage to extradition that the only allegations of criminality which are relevant to the application of this clause are those which involve acts committed outside a country of refuge,[208] whether in the country of origin[209] or while in transit to an asylum state.[210] As noted by the Canadian representative just prior to the vote on this clause,

> . . . the issue turned on the temporal element, namely, whether a person had committed a crime outside the territory of the receiving country before he had applied for the status of refugee.[211]

Criminal activity in a state of refuge, on the other hand, is appropriately adjudicated through due process of law,[212] with recourse to expulsion or return if the refugee is consequently found to pose a security risk.[213]

Second, the extradition-based rationale for the exclusion clause requires that the criminal offence be justiciable in the country in which it was committed.[214] Insofar as the claimant has served her sentence, been acquitted

[207] Statement of Mr. Hoare of the United Kingdom, U.N. Doc. A/CONF.2/SR.29, at 14, July 19, 1951. *Accord* Statement of Mr. Herment of Belgium: "[I]t was possible that, under international law, a refugee convicted of, or charged with, a common-law crime would have necessarily to be handed over to the authorities of his country of origin. Inclusion of the provision in question was therefore imperative": U.N. Doc. A/CONF.2/SR.24, at 9, July 17, 1951.

[208] "His particular preoccupation was that persons who committed crimes in their country of refuge should not be excluded from the application of the Convention": Statement of Mr. Hoare of the United Kingdom, U.N. Doc. A/CONF.2/SR.24, at 13, July 17, 1951. *Accord* Statements of Mr. Petren of Sweden, U.N. Doc. A/CONF.2/SR.29, at 16, July 19, 1951; Mr. Rochefort of France, U.N. Doc. A/CONF.2/SR.29, at 18, July 19, 1951; and Mr. Herment of Belgium, U.N. Doc. A/CONF.2/SR.29, at 24, July 19, 1951. The specific incorporation of this principle was introduced by the representative of Yugoslavia: U.N. Doc. A/CONF.2/SR.29, at 20, July 19, 1951.

[209] Exclusion, of course, does not follow if the criminal law is subverted to attainment of a persecutory end: *see* Section 5.6.1, *supra*. *Accord* Mr. Herment of Belgium, U.N. Doc. A/CONF.2/SR.29, at 14, July 19, 1951: "[T]he Belgian delegation did not consider that the status of refugee could be denied to a person simply because he had been convicted of a common law offence in his country of origin. In any case, the countries of origin concerned, and their methods of dispensing justice, were well enough known."

[210] In response to a question from the conference president on this issue (U.N. Doc. A/CONF.2/SR.29, at 21, July 19, 1951), the representative of the Netherlands suggested that all crimes committed prior to admission to a country of asylum were relevant: *id.*

[211] Statement of Mr. Chance of Canada, U.N. Doc. A/CONF.2/SR.29, at 26, July 19, 1951. *Accord* Statement of Mr. Bozovic of Yugoslavia, *id.*

[212] "[P]aragraph E would cover any crime committed by a refugee abroad, and its provisions would cease to apply once the refugee had been assimilated into the country of asylum": Statement of Mr. Hoare of the United Kingdom, U.N. Doc. A/CONF.2/SR.29, at 24, July 19, 1951. *See also* UNHCR, *supra*, note 16, at 36.

[213] *See* text at note 233 ff., *infra*.

[214] 1 A. Grahl-Madsen, *The Status of Refugees in International Law*, pp. 291-92 (1966).

of the charges, benefited from an amnesty or otherwise met her obligations under the criminal law, she would be at no risk of extradition, and should not be excluded from refugee status. As Paul Weis has observed,

> It is. . . difficult to see why a person who before becoming a refugee, has been convicted of a serious crime and has served his sentence should forever be debarred from refugee status. Such a rule would seem to run counter to the generally accepted principle of penal law that a person who has been punished for an offence should suffer no further prejudice on account of the offence committed.[215]

Indeed, delegates to the Conference on Territorial Asylum were able to agree that the criminality exclusion should bar only the claims of persons believed to be "still liable to prosecution or punishment".[216]

Third, the drafters recognized the seriousness of refusing to protect a person at risk of persecution, and therefore chose to limit the criminality exception to persons at risk of prosecution or punishment for a serious crime within the realm of extraditable offences.[217] In pressing for a narrowly interpreted exclusion, the British delegate argued against simple incorporation of the non-political crime exclusion from the Universal Declaration of Human Rights:

> But what was meant by considering that a person fell within a category of prosecutions? A person who was prosecuted and convicted would certainly seem to fall within that category. As it stood, therefore, clause (b) would include refugees who had committed a crime, no matter how trivial. . . provided it was not a political crime, and would thus automatically exclude them from the benefits of the Convention. It must be obvious to all that such a proposition was untenable.[218]

This concern that some treaties of extradition envisage removal for insufficiently serious offences convinced the delegates to constrain exclusion to cases of apparently "serious" criminality.[219] The Belgian representative, for example,

> . . . preferred the words "serious crimes". . . to mention of crimes "covered by the provisions of treaties of extradition". . . . Some crimes in respect of

[215] P. Weis, "The concept of the refugee in international law" (1960), 87 J. du droit international 928, at 984-86.

[216] U.N. Doc. A/CONF.78/12, February 4, 1977, cited in A. Grahl-Madsen, *Territorial Asylum*, p. 209 (1980).

[217] The French delegate, Mr. Rochefort, ". . . pointed out that a crime was not the same thing as a misdemeanour, and that the term 'crime', in which sense it was used in the Universal Declaration of Human Rights, meant serious crimes": U.N. Doc. A/CONF.2/SR.29, at 18, July 19, 1951. This characterization is particularly important, since the final language of the clause was adopted on the basis of the French formulation, and then translated to English: U.N. Doc. A/CONF.2/L.1/ADD.10, at 3, July 20, 1951.

[218] Statement of Mr. Hoare of the United Kingdom, U.N. Doc. A/CONF.2/SR.29, at 11, July 19, 1951.

[219] This amendment was suggested by the Swiss delegate, Mr. Schurch: U.N. Doc. A/CONF.2/SR.29, at 17, July 19, 1951; and formally moved by Mr. Rochefort of France: U.N. Doc. A/CONF.2/SR.29, at 20, July 19, 1951.

> which the offender could be extradited were punishable by only three months' imprisonment, and were obviously not serious.[220]

Atle Grahl-Madsen interprets this clause to mean that only crimes punishable by several years' imprisonment are of sufficient gravity to offset a fear of persecution.[221] UNHCR defines seriousness by reference to crimes which involve significant violence against persons, such as homicide, rape, child molesting, wounding, arson, drugs traffic, and armed robbery.[222] These are crimes which ordinarily warrant severe punishment, thus making clear the Convention's commitment to the withholding of protection only from those who have committed truly abhorrent wrongs.

Fourth, the crime must be an ordinary, common law offence,[223] prosecuted and punished in a non-discriminatory way. As noted in Chapter 5,[224] if the "crime" is an absolute or relative political offence, or if there is evidence of political interference with an otherwise legitimate criminal process by selective prosecution, punitive denial of procedural fairness, or politically inspired sentencing, it cannot accurately be said that the claimant faces a risk of ordinary application of the criminal law.

Finally, and perhaps most important, the risks associated with exclusion from refugee status must not outweigh the harm that would be done by returning the claimant to face prosecution or punishment. Even though a claimant may be a serious criminal, it is possible that the heinous nature of the persecution anticipated in her state of origin counters the extradition-derived logic of her return.[225] The drafters of the Convention were keenly aware of this possibility:

> . . . States which received a request for the extradition of a refugee who had committed a crime of no great consequence from the very government that was likely to persecute him, would be faced with a very difficult decision. On the other hand, States could not be expected to grant asylum to persons committing capital crimes merely because they happened to be exposed at the same time to relatively minor dangers on account of some unimportant political activity. A proper balance must be struck between all the considerations involved.[226]

This requirement to balance harms is echoed in the conference president's summary of the approach to be followed in excluding common law criminals:

[220] Statement of Mr. Herment of Belgium, U.N. Doc. A/CONF.2/SR.29, at 20, July 19, 1951.

[221] A. Grahl-Madsen, *supra*, note 214, p. 297.

[222] G. Goodwin-Gill, *The Refugee in International Law*, p. 62 (1983).

[223] *See*, e.g., Statements of Mr. Bozovic of Yugoslavia and Mr. Rochefort of France, U.N. Doc. A/CONF.2/SR.29, at 17, July 19, 1951.

[224] *See* Section 5.6.1, *supra*.

[225] "[I]f, for political reasons, a person is threatened with certain death, imprisonment for life, serious bodily harm or the like upon his eventual return to his country of origin; it would, indeed, seem equitable to recognize him as a refugee, even if he were considered guilty of a truly serious non-political crime. . .": A. Grahl-Madsen, *supra*, note 214, p. 298.

[226] Statement of Mr. Larsen of Denmark, U.N. Doc. A/CONF.2/SR.24, at 13, July 17, 1951.

> When a person with a criminal record sought asylum as a refugee, it was for the country of refuge to strike a balance between the offences committed by that person and the extent to which his fear of persecution was well-founded.[227]

To achieve this end, the decision-maker needs to consider the facts of the claim.[228] If the gravity of harm feared by the claimant outweighs the significance of her criminal activity, she is not appropriately excluded under this clause.[229]

There is frequently a confusion between the exclusion of serious, common law criminals under Article 1(F) of the Convention, and the right of a state to expel or return dangerous refugees pursuant to Article 33(2).[230] Article 1(F), inserted at the insistence of countries which perceived themselves to be vulnerable to large flows of refugees,[231] is designed to afford the possibility of pre-admission exclusion on the basis of a relatively low standard of proof[232] ("serious reasons for considering"), and without recourse to a formal trial to assess the criminal charge. The expediency of this recourse is balanced against its very narrow scope: it applies only to persons believed to have committed serious, pre-entry crimes which remain justiciable and the gravity of which outweighs that of the anticipated persecution.

[227] Statement of the President, U.N. Doc. A/CONF.2/SR.29, at 23, July 19, 1951.

[228] "In practice, the claim to be a refugee can rarely be ignored, for a balance must also be struck between the nature of the offence presumed to have been committed and the degree of persecution feared": G. Goodwin-Gill, *supra*, note 222, pp. 61-62. While there is authority for this balancing doctrine in the American jurisprudence (*see* M. McAndrew, "The Dictator Dilemma: A Comparison of United States and French Asylum Procedures" (1986), 19 N.Y.U.J. Intl. L. and Policy 1087, at 1089-090), decisions of the Board of Immigration Appeals reject such an approach: *see*, e.g., *Matter of Rodriguez-Coto*, Interim Decision 2985, February 21, 1985, at 3.

[229] UNHCR, *supra*, note 16, at 37; P. Weis, *supra*, note 215, at 986.

[230] "The benefit of the [non-refoulement] provision 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 judgement of a particularly serious crime, constitutes a danger to the community of that country": *Convention, supra,* note 2, at Art. 33(2). *See*, e.g., Immigration and Refugee Board Decision T89-0245, September 1989, in which the Board inappropriately employed the exclusion clause in Article 1(F)(b) to bar a claimant on the basis of a combination of pre-entry and Canadian criminality for which sentence had been served. This case ought reasonably to have been assessed against the standards of Article 33(2); if met, the claimant would retain refugee status, but lose the benefit of protection against refoulement.

[231] "France's reason for taking such a firm stand on the subject lay in the fact that she had to administer the right of asylum under much more difficult conditions than did countries which were in a position to screen immigrants carefully at their frontiers": Statement of Mr. Rochefort of France, U.N. Doc. A/CONF.2/SR.24, at 13, July 17, 1951. *Accord* Mr. Makiedo of Yugoslavia, U.N. Doc. A/CONF.2/SR.24, at 18, July 17, 1951. These states were concerned not to undermine the possibilities for resettlement of the refugees admitted: "If refugee status was to be granted to criminals, immigration countries could not fail to question its value": Statement of Mr. Rochefort of France, U.N. Doc. A/CONF.2/SR.19, at 7, July 13, 1951.

[232] 1 A. Grahl-Madsen, *The Status of Refugees in International Law*, p. 289 (1966).

Article 33(2), on the other hand, is the original[233] and more broadly applicable criminality provision. It provides the means for states to expel or return refugees who, for example, commit crimes in a state of refuge,[234] or whose past record of criminality in that country or elsewhere is believed to make them undesirable residents, even if they may face extremely serious forms of persecution.[235] Its standard of proof, however, is more exacting: it requires conviction by a final judgment of a particularly serious crime, rather than simply "serious reasons for considering" that a person may be a criminal.[236] Too, it is not enough that the crime committed have been "serious", but it must rather be "particularly serious" and sustain the conclusion that the offender "constitutes a danger to the community".[237]

6.3.3 Acts Contrary to the Principles and Purposes of the United Nations

This last exclusion clause[238] was originally part of the draft provision relating to persons who commit crimes against peace and security.[239] When that exclusion was reformulated in generic terms,[240] the reference to principles and purposes of the United Nations was moved forward to form part of the common law criminality clause modelled on Article 14(2) of the Universal Declaration of Human Rights.[241] The phrase was ultimately detached from this provision as well,[242] resulting in the establishment of failure to abide

[233] Indeed, it was argued by the United Kingdom that there was no need for a criminality exclusion in view of Article 33(2): Statement of Mr. Hoare, U.N. Doc. A/CONF.2/SR.24, at 4, July 17, 1951. *Accord* Baron von Boetzelaer of the Netherlands, U.N. Doc. A/CONF.2/SR.29, at 12, July 19, 1951: "Common criminals should not enjoy the right of asylum; but that consideration had already been taken care of in article [33] of the draft Convention. . . ."

[234] *See*, e.g., *I. v. Belgium* (1987), 46 Revue du droit des étrangers 200, in which Belgium relied on Article 33(2) to expel a refugee sentenced to three years' imprisonment in respect of a major theft, cited in (1989), 1(3) I.J.R.L. 392. *Quaere* whether theft is appropriately considered to be a "particularly serious crime", since it would not qualify as even a "serious crime" for purposes of exclusion under Article 1(F)(b): *see* text *supra* at notes 221-222.

[235] "The exclusion clause now refers to crimes committed 'prior to his (the refugee's) admission to that country (i.e. the country of asylum) as a refugee' while persons who have committed a serious crime *in* the country of residence remain refugees, but may in certain conditions be denied asylum and returned to their country of origin (Article 33(2) of the Convention)": P. Weis, *supra*, note 215, at 984.

[236] *Supra*, note 230.

[237] *Id.*

[238] "The provisions of this Convention shall not apply to any 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": *Convention, supra*, note 2, at Art. 1(F)(c).

[239] *See* draft of the Working Group, U.N. Doc. E/AC.32/L.32, at 3, February 9, 1950: "No Contracting State shall apply the benefits of this convention to any person who in its opinion has committed a crime specified in article VI of the London Charter of the International Military Tribunal or any other act contrary to the purposes and principles of the Charter of the United Nations."

[240] *See* text *supra* at note 167.

[241] *Supra*, note 155.

[242] This was proposed by Mr. Bozovic of Yugoslavia: U.N. Doc. A/CONF.2/SR.29, at 20, July 19, 1951.

by the principles and purposes of the United Nations as a free-standing exclusion clause.

The interpretations of this provision mirror its confused drafting history. One position is that the clause was intended to bar enemy collaborators from the Second World War,[243] and is therefore of little contemporary relevance. Some argue that violation of the principles and purposes of the United Nations is essentially coterminous with crimes against peace and security,[244] such as genocide[245] or a war crime.[246] Others take the view that the clause implies a duty to refrain from the subversion of an asylum state,[247] or even of the refugee's state of origin.[248] A fourth theory is that the barring of persons who fail to respect the principles and purposes of the United Nations is intended to exclude any person who acts in a manner inconsistent with basic human rights,[249] for example by engaging in acts of discrimination[250] or opposing the right to self-determination.[251] Finally, it is argued that the clause

[243] Statement of Mr. Henkin of the U.S.A., U.N. Doc. E/AC.7/SR.160, at 16, August 18, 1950. *Accord* P. Weis, *supra*, note 215, at 986.

[244] "His delegation held that the phrase in question applied to — and hence excluded — war criminals, ordinary criminals and certain individuals who, though not guilty of war crimes, might have committed acts of similar gravity against the principles of the United Nations, in other words, crimes against humanity": Statement of Mr. Rochefort of France, U.N. Doc. E/AC.7/SR.166, at 4, August 22, 1950.

[245] Statement of Mr. Rochefort of France, U.N. Doc. E/AC.7/SR.160, at 15, August 18, 1950.

[246] Statement of Mr. Schurch of Switzerland, U.N. Doc. A/CONF.2/SR.29, at 17, July 19, 1951. *Accord* C. Pompe, "The Convention of 28 July 1951 and the International Protection of Refugees", published in English as U.N. Doc. HCR/INF/42, May 1958, at 13: "What is to be understood by this last expression — over and above war crimes which are separately mentioned — is not made clear by the authors of the Convention."

[247] Statements of Mr. Hoare of the United Kingdom, U.N. Doc. A/CONF.2/SR.24, at 4, July 17, 1951; and of Mr. Chance of Canada, U.N. Doc. A/CONF.2/SR.24, at 16, July 17, 1951.

[248] "[E]ach state is obligated under international laws to prevent any act which may endanger the security of other nations from being committed in its jurisdictional territory. [It] naturally flows that each state is obligated to prevent refugees in its territory from engaging in political activities against the government of their country": K. Kawahara, "Analysis of Results of the First Session of the International Conference on Territorial Asylum" in International Institute of Humanitarian Law, ed., *Round Table on Some Current Problems of Refugee Law*, p. 26 (1978).

[249] "The general principle of respect for human rights has been developed specifically through the Universal Declaration and the 1966 Covenants, so that an individual who has denied or restricted the human rights of others may thus be argued to fall within the exception": G. Goodwin-Gill, *The Refugee in International Law*, pp. 63-64 (1983).

[250] The Indian delegate, Mr. Desai, noted that he knew of ". . . one case where a refugee running a licensed hotel had refused to admit coloured people. In such cases, the individual refugee would be acting contrary to the purposes and principles of the Charter and should not enjoy the protection of the Convention": U.N. Doc. E/AC.7/SR.160, at 17, August 18, 1950. *Accord* Statement of Mr. Rochefort of France, U.N. Doc. E/AC.7/SR.160, at 20, August 18, 1950: "A refugee who, as in the case cited by the Indian representative, practised racial discrimination, would be thereby abusing the hospitality of the country of refuge."

[251] This possibility was raised by the Chilean representative, Mr. Bernstein: U.N. Doc. E/AC.7/SR.160, at 18, August 18, 1950. *See also* G. Goodwin-Gill, *supra*, note 249, p. 65.

disfranchises those who fail to respect any major initiative of the United Nations, including not only respect for human rights, but also such causes as the fights against hijacking and hostage-taking.[252]

The multiplicity of possible interpretations bears witness to the concern of several delegates that the vagueness of the clause left it open to misconstruction or abuse.[253] Moreover, all of these interpretations are substantively problematic. The exclusion of collaborators, war criminals and persons guilty of crimes against humanity can be achieved under Article 1(F)(a),[254] thus rendering the "principles and purposes" exclusion redundant. Concern with persons intending to subvert the asylum state can be addressed under Article 33(2),[255] while exclusion on the basis of efforts to topple the regime of a refugee-producing state seems misplaced in view of the United Nations' commitment to human rights and self-determination.[256] The exclusion of those who breach human rights standards or who fail to support other goals of the world community is more compelling,[257] but 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.

The Charter of the United Nations lists four purposes of the organization: to maintain international peace and security; to develop friendly and mutually respectful relations among nations; to achieve international cooperation in solving socio-economic and cultural problems, and in promoting respect for human rights; and to serve as a centre for harmonizing actions directed to these ends.[258] These basic purposes bind member states through a series of principles set out in Article 2, including respect for sovereign equality; good faith fulfilment of obligations; peaceful settlement of disputes;

[252] *Id.*

[253] "[W]hile not questioning the good faith of the representative of France, [he] recalled that there had been instances in which tyrants had imprisoned their political enemies on the pretext that they were enemies of the United Nations and of democracy. . . . [T]he Committee should avoid restrictive language, which would be open to abuse": Statement of Mr. de Alba of Mexico, U.N. Doc. E/AC.7/SR.160, at 19, August 18, 1950. *Accord* Statements of Mr. Brohi of Pakistan, U.N. Doc. E/AC.7/SR.160, at 16, August 18, 1950; of Miss Meagher of Canada, U.N. Doc. E/AC.7/SR.165, at 23, August 19, 1950; and of Mr. Bernstein of Chile, *id.*

[254] *See* Section 6.3.1, *supra.*

[255] *Supra*, note 230.

[256] Citing the various United Nations resolutions in support of freedom fighters, Sam Aiboni concludes, "It can therefore hardly be held that the activities of these Movements are contrary to the purposes and principles of the United Nations. Rather the opposite is true": S. Aiboni, *Protection of Refugees in Africa*, p. 141 (1978).

[257] "The principles referred to were defined in the United Nations Charter and the Universal Declaration of Human Rights. An individual who, without having committed a crime against humanity, had violated human rights, for instance, by the exercise of discrimination, could be considered to have committed 'acts contrary to the purpose and principles of the United Nations'": Statement of Mr. Giraud of the Secretariat, U.N. Doc. E/AC.7/SR.166, at 9, August 22, 1950.

[258] *Charter, supra,* note 181, at Article 1.

refraining from use of force against the territorial integrity or political independence of another state; and promotion of the work of the United Nations.[259] It is clear that these principles speak essentially to governments,[260] and that most individuals can violate even the spirit of the purposes and principles only through the commission of a crime against peace and security, or of a serious criminal offence. The independent utility of this exclusion clause is thus somewhat elusive.

During the drafting of the Convention, however, it was suggested that this exclusion clause is a response to those who have "abused positions of authority"[261] by failing to exercise political power in a manner which is respectful of the requirements of the Charter:

> The provision was not aimed at the man-in-the-street, but at persons occupying government posts, such as heads of States, ministers and high officials. . . . By a turn of events, the persecutor might himself become a refugee. . . [in which case] there could be no compulsion on a State to provide asylum and in no case could it be provided in the name of the Charter or of the Universal Declaration of Human Rights. . . .[262]

More specifically, the concern was that

> [i]t was possible that a petty tyrant, after committing a crime against humanity, might not be prosecuted by his country of origin, where his crime against the United Nations might be considered as a normal act. . . . [I]n the absence of a world government and of a sovereign international court of justice, that power. . . must, perforce, be left to States.[263]

A sensible and purposeful interpretation of this exclusion clause, advocated by the United Nations,[264] is therefore that it is intended to enable states effectively to act as agents of the international community in bringing to bear basic norms of acceptable international conduct against government officials who ought reasonably to understand and respect them, and to avoid tarnishing refugee status by the admission to protection of those who have exploited their political authority to jeopardize the well-being of individuals, their nation, or the world community.[265]

[259] *Id.*, at Article 2.

[260] "It was difficult to see how an individual could commit acts contrary to the purposes and principles of the Charter of the United Nations, membership of which was confined to sovereign States": Statement of Mr. Bernstein of Chile, U.N. Doc. E/AC.7/SR.160, at 15, August 18, 1950. *But see* Statement of Mr. Rochefort of France, U.N. Doc. E/AC.7/SR.166, at 5, August 22, 1950: "So far as acts contrary to the purposes and principles of the United Nations were concerned, the first question which arose was whether such acts could be committed by individuals. An affirmative reply to that question was given by articles 14 and 30 of the Universal Declaration of Human Rights." *Accord* Statement of Mr. Giraud of the Secretariat, who relied on individual liability under international criminal law: U.N. Doc. E/AC.7/SR.166, at 8, August 22, 1950.

[261] Statement of Miss Meagher of Canada, U.N. Doc. E/AC.7/SR.166, at 10, August 22, 1950.

[262] Statement of Mr. Rochefort of France, U.N. Doc. E/AC.7/SR.166, at 6, August 22, 1950.

[263] *Id.*

[264] UNHCR, *supra*, note 16, p. 38.

[265] *See* 1 A. Grahl-Madsen, *The Status of Refugees in International Law*, p. 286 (1966).