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Article 1C and Article 1F of the 1951 Convention
Relating to the Status of Refugees*

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INTRODUCTION

This paper has been drafted to serve as a background for the discussions on the exclusion clauses for the participants at the ELENA International Course on the application of Article 1 C and 1 F of the 1951 Convention Relating to the Status of Refugees.

In Part A of this background paper, the main important documents concerning the exclusion clauses will be shortly outlined. Furthermore, specific subjects will be discussed, such as the standard of proof for the application of the exclusion clauses, whether a proportionality test should be had, what should happen to excluded persons, etc. The position of the UNHCR will be compared to the practice of European States and with the position of the European Union, academics and ECRE.

In Part B the main issues relating to the Cessation Clause will be presented, mostly in form of UNHCR documents.

Please keep in mind that this paper is meant as an introduction and it therefore does not pretend to be exhaustive in any way.

PART A: EXCLUSION CLAUSE

I. GENERAL INTRODUCTION ON THE EXCLUSION CLAUSES

1. INTRODUCTION

Article 1 of the Convention provides criteria for the refugee definition, determining who should and should not receive international refugee protection. A decision to exclude an asylum seeker under Article 1F is a determination that a person is not deserving of Convention protection because of serious reasons to consider that the asylum seeker has committed severe crimes prior to arriving in the host country, which are described in Article 1F (a), (b) and (c). At present, increasing use is made of the exclusion clauses, especially after the September 11 attacks. Refugee assisting organisations have already expressed their concern that Article 1F of the Refugee Convention will be used without an adequate assessment of the individual's asylum claim as recommended by the UNHCR.

Therefore, lawyers will be more and more confronted with the application of this article. With this Course, ELENA means to give an overview of the main issues concerning the exclusion clauses, to assist lawyers to gain a thorough understanding of the exclusion clauses and to engage in a debate with them on this subject.

2. INTERNATIONAL INSTRUMENTS

- **Article 14 of the Universal Declaration of Human Rights¹** provides that:
 1. Everyone has the right to seek and enjoy in other countries asylum from persecution.
 2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.
- **Statute of the Office of the United Nations High Commissioner for Refugees (1950), Article 7 (d)**

According to Article 7(d) of the UNHCR's Statute, the competence of the High Commissioner shall not extend to a person "in respect of whom there are serious reasons that he has committed a crime covered by the provisions of the treaties of extradition or a crime mentioned in Article VI of the London Charter of the International Military Tribunal or by the provisions of Article 14, Paragraph 2, of the Universal declaration of Human rights."
- **Article 1F of the 1951 Refugee Convention²** reads:

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

 - A. he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provisions in respect of such crimes;
 - B. he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
 - C. he has been guilty of acts contrary to the purposes and principles of the United Nations.
- **Article 1(5) of the OAU Convention governing the specific aspects of refugee problems in Africa³:**

The provisions of this Convention shall not apply to any person with respect to whom the country of asylum has serious reasons for considering that:

 - A. he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provisions in respect of such crimes;
 - B. he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
 - C. he has been guilty of acts contrary to the purposes and principles of the Organisation of African Unity;
 - D. he has been guilty of acts contrary to the purposes and principles of the United Nations.

3. OTHER INTERNATIONAL DOCUMENTS

In this Paragraph, a survey will be given of the main documents concerning Article 1F. After September 11th, this article is used more and more as a means to exclude terrorists

¹ Universal Declaration of Human Rights, 1948, G.A. Res. 217 A (III); U.N. Doc. A/810

² Geneva Convention relating to the Status of Refugees, 1951, 189 UNTS 150

³ OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969, UNTS 14 691

from protection. Therefore, particular attention will be paid to relevant documents relating to terrorism.

3.1. UN

One of the most important documents of the General Assembly in this regard is the Resolution 49/60, which identifies terrorism as: "a grave violation of the purposes and principles of the United Nations".⁴ By identifying terrorism as a violation of the purposes and principles of the United Nations, terrorism falls under Article 1F (c) of the Convention. However, one should keep in mind that despite many efforts, there still is no generally agreed definition of terrorism.

More recently, the Security Council Resolution 1269 (1999) called upon states to: "take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum seeker has not participated in terrorists acts". This is of particular importance as Security Council Resolutions do have legally binding effect on the UN Member States.

The fear that states may use the exclusion clauses more frequently after the events of 11 September 2001, in particular where asylum applications have been made by individuals suspected of terrorism, is further strengthened by United Nations Security Council Resolution 1373⁵ which not only reiterates Resolution 1269, but also calls upon states to: "Ensure, in conformity with international law, that refugee status is not abused by the perpetrators, the organisers or facilitators of terrorist acts, and that claims of political motivation are not recognised for the extradition of alleged terrorists."

Furthermore, this Resolution states: "[...] that acts, methods, and practices of terrorism are contrary to the purposes of the United Nations, and that knowingly financing, planning and inciting terrorists acts are also contrary to the purposes and principles of the United Nations. As a consequence, applicants under the Geneva Convention who have committed, or who are suspected of having committed terrorist acts, will be excluded from protection under Article 1F".

3.2. GENERAL UNHCR DOCUMENTS

UNHCR Handbook on Procedures and Criteria for determining Refugee Status⁶

UNHCR's Handbook was drafted in 1979 at the request of the Executive Committee and is regarded to contain views generally shared by the Member States.

In Chapter IV titled "Exclusion clauses", the UNHCR Handbook examines the situation of people deemed not to deserve any sort of international protection. Paragraph 140 states: "The 1951 Convention [...] contains provisions whereby people otherwise having the characteristics of refugees as defined in Article 1, Section A of the Convention, are excluded from refugee status. [...] The third group (Article 1F)

⁴ GA Res 49/60, 9 December 1994, Annex I. 2., Doc. A/RES/49/60. General Assembly Resolutions have no legally binding effect on UN Member States

⁵ Anti Terrorism Resolution No 1373 (2001), adopted by the Security Council at its 4385th Meeting, 28.9.2001

⁶ *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*. UNHCR. Geneva, 1979 (reedited January 1992)

enumerates the categories of persons who are not considered to be deserving of international protection”.

Concerning the third group, the ‘undeserving’, Paragraphs 147-163 explain the different provisions of Article 1F.

On Article 1F (a), the Handbook explains that: “In mentioning crimes against peace, war crimes or crimes against humanity, the Convention refers generally to ‘international instruments drawn up to make provision in respect of such crimes’. There are a considerable number of instruments dating from the end of the Second World War to the present time”⁷. These instruments will define the crimes mentioned in Article 1F(a) of the Convention.⁸

As for Article 1F (b), the Handbook is much more explicit and gives more detailed explanation on how to interpret the wording of this Article: “In determining where an offence is non-political [...] regard should be given in the first place to the nature and purpose i.e. whether it has been committed out of genuine political motives and not merely for political reasons or gain”. It further reads: “Only a crime committed or presumed to have been committed by an applicant outside the country of refuge, prior to his admission to that country as a refugee is a ground for exclusion”.⁹ Regarding the meaning of “serious” non-political crimes, the UNHCR Handbook defines them as: “a capital crime or a very grave punishable crime”.¹⁰ “In evaluating the nature of the crime presumed to have been committed, all the relevant factors, including any mitigating circumstances, must be taken into account. It is also necessary to have regard to any aggravating circumstances as; for example, the applicant may already have a criminal record. The fact that the applicant convicted of a serious non political crime has already served his sentence or has been granted pardon or has benefited from an amnesty is also relevant”.¹¹

As for Article 1F (c), UNHCR’s view is that this Article does not introduce any new elements with regard to Article 1F (a) and is just intended to: “cover in a general way such acts against the purposes and principles of the United Nations, that might not be fully covered by the two preceding exclusion clauses”.¹²

Guidelines on the application of the Exclusion Clauses¹³

The guidelines were formulated after an increased use of the exclusion clauses and because of many requests for clarifications on the clauses. In Paragraph 6, they stress the logic of Article 1F. “The logic of these exclusion clauses is that certain acts are so grave as to render the perpetrator undeserving of international protection. Thus, their primary purposes are to deprive the perpetrators of heinous acts, and serious common crimes of such protection; and to safeguard the receiving country from criminals who present a danger to the country’s security. These underlying purposes, notably the

⁷ *Ibid* Para. 150

⁸ A very recent instrument which is defining these crimes is the Statute of the International Criminal Court, entered into force on 1 July 2002

⁹ See Footnote 6, Para. 153

¹⁰ *Ibid*. Para. 155

¹¹ *Ibid*. Para. 157

¹² *Ibid*. Para. 162

¹³ *The Exclusion Clauses: Guidelines on their Application*. UNHCR. Geneva, December 1996. At the time of drafting this paper, UNHCR was updating the Guidelines. The new version is supposed to be published very shortly

determination of an individual as undeserving of protection, must be born in mind in interpreting the applicability of the exclusion clauses.”

Paragraph 8 of the Guidelines recommends that States interpret the exclusion clauses in a restrictive way: “As with any exceptions to provisions of human rights law, the exclusion clauses have to be interpreted restrictively”.

In Paragraph 10: “The exclusion clauses should not be used to determine the admissibility of an application or claim for refugee status. A preliminary or automatic exclusion would have the effect of depriving such individuals of an assessment of their claim for refugee status.”

Other UNHCR documents

- In a **Note on the Exclusion Clauses**,¹⁴ the Standing Committee is once more describing how the exclusion clauses should be used. Although not legally binding, this statement has considerable political impact since it is formulated by the Standing Committee. The content of the Note corresponds with the above-mentioned UNHCR’s guidelines.
- In May 2001, the UNHCR organised a **Global Consultation on International Protection** during which many issues regarding the exclusion clauses were addressed by states. Since UNHCR is an intergovernmental organisation, the outcome of this roundtable is important for the future policy of the UNHCR. The consultations resulted in summary conclusions reflecting broadly the issues emerging from the discussion.¹⁵
- In a **Press Release of 23 October 2001**, the UNHCR expressed concern about the way States might have recourse to the exclusion clauses in the aftermath of September the 11 and stated: “UNHCR is concerned that governments may automatically or improperly apply exclusion clauses or other criteria to individual asylum seekers based on the assumption that they might be terrorists because of their religion, ethnicity, nationality or political affiliation”.
- In its paper titled **Addressing Security Concerns without undermining Refugee Protection**¹⁶, the UNHCR expresses its concern for the policy responses in the aftermath of the attacks of 11 September 2001. In Paragraphs 12-19 different remarks are being made concerning the exclusion from refugee status, which may lead to a changing policy concerning the application of the exclusion clauses.

3.3. EUROPEAN UNION

After the 11th September, more and more attention has been paid to the security of EU Member States and many refugee-assisting agencies fear that this will lead to a deterioration of the protection of refugees. In this paragraph the most relevant documents of the EU are outlined.

In the **Resolution on Manifestly Unfounded Applications for Asylum**¹⁷, it is stated that if a case manifestly falls within the situations as mentioned in Article 1F of the

¹⁴ *Note on the Exclusion Clauses*, Standing Committee, 30 May 1997, EC/47/SC/CRP.29

¹⁵ Lisbon Experts Roundtable Global Consultations on International Protection, 3-4 May 2001, EC/GC/01/Track/1

¹⁶ *Addressing Security Concerns without Undermining Refugee Protection. UNHCR’s Perspective*. Geneva, November 2001

¹⁷ *Resolution on Manifestly Unfounded Applications for Asylum*, London, 30 November and 1 December 1992

Refugee Convention, or else for serious reasons of public security, accelerated procedures may apply, even when the case itself is not manifestly unfounded in accordance with Paragraph 1 of the Resolution.¹⁸

In a non-legally binding document of 4 March 1996, the European Union Member States adopted a **Joint Position on the harmonised definition of the term ‘refugee’**¹⁹. Point 13 of this document states that the exclusion clauses are designed to “exclude from protection under that Convention persons who cannot enjoy international protection because of the seriousness of the crimes which they have committed. The exclusion clauses may also be applied where the acts become known after the grant of refugee status. In view of the serious consequences of such a decision for the asylum-seeker, Article 1F must be used with care and thorough consideration, and in accordance with the procedures laid down in international law.”

Proposal for a Council directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection²⁰

In the Proposal, Article 14 stipulates that Member States shall exclude from refugee status any applicant of whom there are serious reasons for considering that he has committed certain crimes or acts. The text of Article 1F of the Refugee Convention was originally copied into draft Article 14, so no different interpretation of the Convention was intended. However, following negotiations between Member States on the Proposal have led to considerable changes and the final text remains to be seen.

Commission Working Document

In response to the September 11 terrorists attacks in the United States, the Commission released a working document entitled “**The Relationship Between Safeguarding Internal Security and Complying with International protection obligations and instruments**” (hereinafter the Working Document) that examines mechanisms for excluding suspected terrorists from international protection²¹. Although this is not a legally binding document, it sets out the context within which the Commission will be working on all aspects concerning internal security vis-à-vis international protection obligations and instruments. Therefore, this document will be referred to in the next chapter when considering specific aspects of the exclusion clauses.

¹⁸ Paragraph 1 points out that an application shall be regarded as manifestly unfounded if it is clear that it meets none of the substantive criteria under the Refugee Convention and Protocol for one of the following reasons:

- there is clearly no substance to the applicant’s claim to fear persecution in his own country or;
- the claim is based on deliberate deception or is an abuse of asylum procedures.

¹⁹ *Joint Position defined by the Council of the European Union on the basis of Article K.3 of the Treaty on European Union on the Harmonised Application of the Definition of the term “Refugee” in Article 1 of the Geneva Convention relating to the Status of Refugees*

²⁰ *Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons who otherwise need International Protection*, 21 September 2001, COM(210)510

²¹ *Commission Working Document, The Relationship Between Safeguarding Internal Security and Complying with International Protection Obligations and Instruments*, 5 December 2001, COM (2201) 743 final

3.4. COUNCIL OF EUROPE

On 15 July 2002, the Council of Europe adopted guidelines on human rights and the fight against terrorism²². In Paragraph XII, some reference is made to the exclusion clause.

“XII *Asylum, return (“refoulement”) and expulsion*

1. All requests for asylum must be dealt with on an individual basis. An effective remedy must lie against the decision taken. However, when the State has serious grounds to believe that the person who seeks to be granted asylum has participated in terrorist activities, *refugee status must be refused to that person*.
2. It is the duty of a State that has received a request for asylum to ensure that the possible return (“*refoulement*”) of the applicant to his/her country of origin or to another country will not expose him/her to the death penalty, to torture or to inhuman or degrading treatment or punishment. The same applies to expulsion.
3. Collective expulsion of aliens is prohibited.
4. In all cases, the enforcement of the expulsion or return (“*refoulement*”) order must be carried out with respect for the physical integrity and for the dignity of the person concerned, avoiding any inhuman or degrading treatment.”

²² The full text can be found at:

http://www.coe.int/T/E/Communication_and_Research/Press/Theme_Files/Terrorism/CM_Guidelines_20020628.asp#TopOfPage

II SPECIFIC SUBJECTS

1. PROCEDURAL MATTERS

The rationale of Article 1F of the Refugee Convention is widely accepted. It is based on the fundamental conviction that certain persons do not deserve the protection as described in the Refugee Convention and that states should not be required to grant international protection to international criminals or fugitives from justice. However, as James Hathaway and Colin Harvey have noticed, if governments are allowed to deny refugee status without fully considering the merits of the case, the potential for abuse of authority increases.²³ Besides, one should keep in mind that the severe consequences for the applicant when the exclusion clauses are applied, require a strict and thorough examination of the application, with attention being paid towards the fundamental procedural rights of the applicant. Therefore, this chapter will discuss some procedural safeguards intended to prevent and ensure that the examination of the application is handled carefully.

1.1. INCLUSION BEFORE EXCLUSION

Should states first of all examine whether someone meets the definitions as laid down in Article 1A, the inclusion test, or should they determine first whether an applicant should be excluded according to Article 1F, the so-called exclusion test? In this paragraph different approaches towards this question will be outlined.

1.1.1. UN

In Resolution 1373, Paragraph 3(f), states have agreed that they: “should take appropriate measures in conformity with the relevant provisions of national and international law, including international standards on human rights, *before granting refugee status*, for the purpose of ensuring that the asylum seeker has not planned, facilitated or participated in the commission of terrorist acts”. The italic printed sentence ‘*before granting refugee status*’, could possibly be interpreted by states in favour of exclusion before inclusion. However, the phrase could similarly be interpreted to mean that an inclusion determination would first have had to be concluded positively for states to consider to grant status.²⁴

1.1.2. UNHCR

In Paragraph 176 and 177 of its Handbook, the UNHCR points out that first the inclusion clauses should be examined, like any other application. Only after having determined if an applicant fulfils the criteria of inclusion, the question may arise whether the exclusion clauses will apply.

UNHCR states in Paragraph 9 of its guidelines that: ”in principle, the applicability of the exclusion clauses should be considered only after the adjudicator is satisfied that the individual fulfils the criteria for refugee status.”

²³ *Framing Refugee Protection in the New World Disorder*. By James C. Hathaway and Colin J. Harvey. *Cornell International Law Journal*, Volume 34, 2001, number 2, page 262

²⁴ See *Comments from the European Council on Refugees and Exiles on the Commission Working Document* The relationship between safeguarding internal security and complying with international protection obligations and instruments, May 2002, para. 1.4.2.2.

In the Summary Conclusions of the Lisbon Roundtable on 3-4 May 2001, organised by the UNHCR, it is stated too that a holistic approach to the refugee status determination should be taken, and in principle the inclusion elements of the refugee definition should be considered first. However, according to these conclusions, “it is possible for exclusion to come first in the case of indictments by international tribunals and in the case of appeal proceedings. An alternative option in the face of an indictment is to defer status determination procedures until after criminal proceedings have been completed. The outcome for the criminal proceedings would then inform the refugee status determination decision.”²⁵

1.1.3. EUROPEAN UNION

Regarding the inclusion before exclusion debate, the Working Document²⁶ of the European Commission is clearly in favour of a comprehensive examination of each individual case as “facts justifying the excludability of an applicant will normally emerge in the course of the ‘inclusion phase’ of the refugee determination process [...] and may be then referred to during the ‘exclusion phase’ of the case”.²⁷ However, the Document goes on to suggest accelerated procedures for cases in which it has been “prima facie established that someone falls under the scope of the exclusion clauses” and states that States are entitled in such procedures to “limit themselves to the particular examination of the applicability of the exclusion clauses, as a preliminary matter at the commencement of a hearing, without having the need to examine the “inclusion clauses” of the Refugee Convention.”²⁸

It seems however that the European Union is mixing the two concepts in the latest available version of the Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons who otherwise need International Protection²⁹. Article 2(C) of the Proposal, which is currently under discussion at Council level, now reads:

“ ‘Refugee’ means a third country national who, owing to a well-founded fear of being persecuted for reasons of race religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself to the protection of that country, and a stateless persons, who, being outside the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 14 does not apply”.

Since Article 14 concerns the exclusion clause, the wording of Article 2(C) seems to imply that exclusion could be considered before inclusion.

1.1.4. ECRE

²⁵ Lisbon Experts Roundtable Global Consultations on International Protection, 3-4 May 2001, EC/GC/01/Track/1. Para. 15 and 16

²⁶ *Commission Working Document, The Relationship Between Safeguarding Internal Security and Complying with International Protection Obligations and Instruments*, COM (2201) 743 final, 5 December 2001

²⁷ *Ibid.* Para 1.4.3.1.

²⁸ See *Ibid.* Para. 1.4.3.2.

²⁹ Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons who otherwise need International Protection²⁹. 2001/0207 (CNS), 7 October 2002. See Article 2

In its Position on the Interpretation of Article 1 of the Refugee Convention, ECRE noted, “as a matter of law, however, the exclusion clauses can only be applied to those who have first met the criteria of the inclusion clauses.”³⁰ In its response to the Commission’s Working Paper, ECRE noted that “even in cases suspected to fall within the scope of the exclusion clauses, there are a number of reasons why it is necessary that the possibility of exclusion should be dealt with within a regular procedure which allows the opportunity to present his/her claim for inclusion”, citing general principles of procedural safeguards and the need for full knowledge of all facts due to the complex nature of exclusion cases.

1.1.5. SELECTED ACADEMIC ARGUMENTS

Guy Goodwin-Gill³¹

According to Guy Goodwin-Gill “Article 1F excludes ‘persons’, rather than ‘refugees’ from the benefit of the Convention, suggesting that the issue of a well-founded fear of persecution is irrelevant and need not be examined at all if there are ‘serious reasons for considering’ that an individual comes within its terms. In practice, the claim to be a refugee can rarely be ignored, for a balance must be struck between the nature of the offence presumed to have been committed and the degree of persecution feared.” The latter will be discussed hereinafter.

Jean-Yves Carlier³²

“By definition, the causes of exclusion or cessation of the protection under refugee status must be examined after the causes of recognition of this status. To be outside one must first be inside.”

Lawyers Committee for Human Rights (LCHR)³³

The LCHR also advocates in favour of inclusion before exclusion when considering a refugee’s claim. The Legal Advisory Group of the LCHR found that “a determination with regard to “inclusion” is a prerequisite to a principled application of exclusion. While acknowledging that state practice with regard to this issue is not uniform, the members of the Legal Advisory Group were of the view that using exclusion as a test of admissibility is inconsistent with the capacity to carry out a full examination of all the circumstances of a case –integral to the final decision on the issue.

1.1.6. PRACTICE OF EUROPEAN STATES

Belgium

In Belgium, the Commission Permanente de Recours des Refugies (CPRR) held recently³⁴ that the concepts ‘inclusion’ and ‘exclusion’ had been developed in the doctrine, they were not part of the 1951 Convention and it was, therefore, in perfect conformity with the Convention to exclude someone without first having to examine

³⁰ *Position on the Interpretation of Article 1 of the Refugee Convention*, September 2000, para. 75

³¹ *The Refugee in International Law*. By Guy S. Goodwin-Gill. Oxford University Press, Second edition, 1996

³² *Who is a Refugee? A Comparative Case Law Study*. By Jean Yves Carlier, Dirk Vanheule, Klaus Hullmann & Carlos Pena Galiano (Eds.). Kluwer Law International, 1997

³³ *Safeguarding the Rights of Refugees under the Exclusion Clauses. Summary findings of a Project of the Lawyers Committee for Human Rights*. By the Lawyers Committee for Human Rights. *International Journal of Refugee Law*. Volume 12, Special Supplementary Issue 2000. Page 324

³⁴ CPRR, R1338 of 23 July 1993, where the CPRR held that, given the applicability of Article 1F (a), examination of the well-founded ness of the claim was no longer necessary

whether he or she would have met the refugee definition.³⁵ However, there are also decisions in which the existence of a well-founded fear is recognised before the applicability of Article 1F is examined³⁶.

Denmark³⁷

The Danish Refugee Council subscribes to a reading of the Aliens Act rendering mandatory a determination of the question as to whether the applicant is in need of protection before deciding on her excludability.³⁸

France

France has usually considered that exclusion clauses should be applied only to those having a well-founded fear of persecution as formulated under Article 1A of the Refugee Convention.³⁹

Netherlands

In the Netherlands, exclusion is examined before inclusion. The Secretary of Justice has explicitly stated in a letter of 19 November 1997 to the Chairman of the Second Chamber of the Parliament that nothing in the text of the Convention indicates that Article 1A must be applied first. “In any case, Article 1F states that the provisions of the Convention on Refugees do not apply to persons who can be excluded under this Article.” According to the Secretary of Justice a major argument for not examining Article 1A first, can also be found in Article 14 of the Universal Declaration of the Rights of Man that states in Paragraph two that there are some categories of persons who do not even have the right to seek asylum. This should mean that the exclusion clauses in the Convention on Refugees should be discussed as soon as possible. The State Secretary refers also to the Travaux Préparatoires of the Convention on Refugees, which contains many references to Article 14(2) of the Universal Declaration.

Moreover, the Secretary of Justice finds it is ‘totally incorrect to claim that key aspects of the asylum seekers account will be lost if status is not determined before Article 1F is put to the test. For, if the criteria of Article 1F are applied in the manner described in this policy memo, all individual circumstances will be taken into account. [...] It is therefore no longer necessary for a test on the basis of Article 1F of the Convention to be preceded by a test on the basis of Article 1A.’ Finally, in this letter to the Parliament, the Secretary of Justice explicitly referred to Article 3 of the European Convention for Human Rights and the Protection of Fundamental Freedoms, which should provide even further assurance that all the individual circumstances are taken into account by the decision maker.

United Kingdom

Also in the United Kingdom the practice on this issue is not uniform. Some cases have firstly dealt with inclusion, and in others, exclusion was considered before inclusion.⁴⁰

³⁵ *Exclusion Clauses in Europe*. By Sibylle Kapferer. *International Journal of Refugee Law*. Volume 12, Special Supplementary Issue 2000

³⁶ CPRR, W2418 of 25 January 1996

³⁷ *Exclusion Project Europe: Workshop Outline*. By Lawyers Committee for Human Rights (LCHR)

³⁸ *The Exclusion Clause in Danish Law*. E-mail dated 21 May 2001 of the Danish Refugee Council to LCHR, filed by LCHR

³⁹ *Refugee Law in Context. The Exclusion Clause*. Edited by Peter J. van Krieken. 1999, T.M.C. Asser Press, The Hague, The Röling Foundation and the authors. Page 294

⁴⁰ *Exclusion Clauses in Europe*. By Sibylle Kapferer. *International Journal of Refugee Law*. Volume 12 Special Supplementary Issue 2000

1.2. SPECIAL PROCEDURES

The examination of cases potentially falling within the exclusion clause requires a high degree of expertise and specialised knowledge on the part of the determining authorities in order to give due justice to the complexities and severe consequences involved. The question whether therefore special procedures are needed will be discussed below.

1.2.1. UNHCR

In the paper “*Addressing Security Concerns without Undermining Refugee Protection - UNHCR’s perspective-* (Geneva, November 2001)” the UNHCR advocates in favour of a special ‘exclusion unit’, dealing with the refugee status determination. Such unit would have expertise in relevant areas of refugee law and criminal law, specialist knowledge of terrorist organisations and clear communication links with intelligence services and criminal enforcement agencies⁴¹. By having such specialist knowledge, states will be able to make a fast and quality decision.

1.2.2. EUROPEAN UNION

In the resolution on Manifestly Unfounded Applications for Asylum⁴², the Ministers of the Member States of the European Community, responsible for Immigration, agreed that there may exist a need for an urgent resolution of the claim when Article 1F is concerned or for serious reasons of public security. If this is the case, and the application *manifestly* falls within the situation mentioned in Article 1F of the Refugee Convention, an accelerated procedure is acceptable, even when the case itself is not manifestly unfounded in accordance with Paragraph 1 of the resolution (see Chapter 1, Paragraph 3.3.).

As mentioned before, the Commission released a Working Document, which examines mechanisms for excluding suspected terrorists from international protection⁴³. This paper advocates in favour of the creation of special units (“Exclusion/Security units”) dealing exclusively with cases of persons suspected of terrorism (see Paragraph 1.5.1). It also states that States can have recourse to accelerated procedures when assessing a claim that seems to fall within the scope of the exclusion clauses: “There may however be cases in which it has been *prima facie* established that someone falls under the scope of the exclusion clauses. In such situations States should be entitled to channel such claims through an accelerated procedure”.⁴⁴ The European Union maintains therefore its position as described in the Resolution concerning Manifestly Unfounded Applications for Asylum.

The UNHCR has replied to that Working Document by stressing that the use of accelerated procedures is inappropriate to deal with exclusion cases as these involve very complex situations: “Given that the application of the exclusion clauses normally involves the examination of very complex issues, UNHCR considers that such

⁴¹ See Para. 7

⁴² *Resolution on Manifestly Unfounded Applications for Asylum*, London, 30 November and 1 December 1992

⁴³ *Commission Working Document, The Relationship Between Safeguarding Internal Security and Complying with International protection obligations and instruments*, COM (2201) 743 final, 5 December 2001

⁴⁴ *Ibid.* Para 1.4.3.2

examinations should not take place in the context of admissibility procedures or accelerated procedures”⁴⁵.

1.2.3. ECRE

In its response to the Commission’s Working Document, ECRE underlined its view that even in cases suspected to fall within the scope of the exclusion clauses, it is necessary that the possibility of exclusion be dealt with within a regular procedure, which allows the applicant the full opportunity to present his/her claim for inclusion. “According to the general principle of procedural fairness, an individual has the right to present and the decision maker the obligation to consider all information relevant to a decision. Given the complex nature of Article 1 F cases, full knowledge of all the facts could only emerge through a regular procedure which involves thorough examination of complex questions and the careful weighing of all relevant factors which should be integral to any exclusion decision.”

While acknowledging state concerns to strengthen national security in the aftermath of the events of the 11th September, ECRE proposed that states prioritise the examination of suspected cases within the regular procedure, rather than channelling them through into the accelerated procedure.⁴⁶

1.2.4. SELECTED ACADEMIC ARGUMENTS

Lawyers Committee for Human Rights (LCHR)

The LCHR states, “given the difficult issues of law and facts, which are present in the consideration of the exclusion clause, only skilled and highly trained adjudicators should be called upon to undertake it [...]. A decision on exclusion can never be taken within an expedited procedure such as a ‘manifestly unfounded’ regime.”⁴⁷

Michael Bliss⁴⁸

Michael Bliss is strongly against the fact that some states make decisions in an expedited determination process for manifestly unfounded claims. He fears these practices will lead towards deterioration of minimum requirements of procedural fairness. As an example, he mentions the 1995 Resolution on Minimum Guarantees for Asylum Procedures of the EU⁴⁹, which states that the minimum procedural guarantees are not to apply to an application refused on the basis that it is manifestly unfounded. Especially in the case of exclusion, a decision should never be taken in an expedited determination process. Such expedited exclusion does not permit the application of the balancing test, simply because there will not be enough time to consider all the relevant and -very often- complicated factors.

⁴⁵ UNHCR’s *Comments on the European Commission’s Working Document on the Relationship Between Safeguarding internal Security and Complying with International Protection Obligations and Instruments*. 2 May 2002

⁴⁶ *Comments from the European Council on Refugees and Exiles on the Commission Working Document on the relationship between safeguarding internal security and complying with international protection obligations and instruments*, May 2002, para. 1.4.3.2.

⁴⁷ *Safeguarding the Rights of Refugees under the Exclusion Clauses. Summary findings of a Project of the Lawyers Committee for Human Rights*. By LCHR. *International Journal of Refugee Law*. Volume 12, Special Supplementary Issue 2000, page 324-325

⁴⁸ *‘Serious Reasons for Considering’: Minimum Standards of Procedural Fairness in the Application of the Article 1F Exclusion Clauses*. By Michael Bliss. *International Journal for Refugee Law*. Volume 12, Supplementary Issue 2000

⁴⁹ *EU Council Resolution on Minimum Guarantees for Asylum Procedures*. O.J. (C274) 13-17 (1996)

1.2.5. PRACTICE OF EUROPEAN STATES

The Netherlands

The IND is organised in five regional directorates. It is the directorate in the region south-west (Rijswijk), which is responsible for the 1F-cases. A special unit with specialised personnel deals with them. The 1F-unit, as it is called, can ask the Ministry of Foreign Affairs and their own country desk for specific information about for instance a special person, group or political party of a country. 1F-cases are usually dealt with in the normal procedure and not in the accelerated one.⁵⁰

Spain⁵¹

There is no special procedure for considering the exclusion clauses. The number of cases which fall under the exclusion clauses does not render it necessary to hire specialised people, nevertheless the asylum officials are specialised in regions and countries and normally they know quite well the specific problems that may arise from each nationality. The exclusion clause can be applied both within the accelerated procedure and the normal procedure.

Switzerland⁵²

There is no special procedure or special unit dealing with exclusion clauses. A decision on Article 1F of the Refugee Convention will be taken by the authorities of the FOR (Federal Office for Refugees) during the regular procedure.

The application of the exclusion clause does not lead *per se* to an accelerated procedure. Swiss asylum law foresees an accelerated procedure for manifestly unfounded or inadmissible cases. But even then, if there were a sign for persecution, the request would enter the normal procedure. In theory, depending on the case, the application of Article 1F could also be examined under an accelerated procedure. However, the accelerated examination would then most likely lead to the result that the cases would need to enter the normal procedure, as probably there would be signs of persecution in the country of origin.

⁵⁰ E-mail dated 17 May 2002 of the Dutch Refugee Council to ECRE, filed by ECRE

⁵¹ E-mail dated 27 May 2002 of the Asociacion Comision Catolica Espanola de Migraciones (ACCEM) to ECRE, filed by ECRE

⁵² E-mail dated 26 April 2002 of the Swiss Refugee Council to ECRE, filed by ECRE

2. THE BALANCING TEST AND PROPORTIONALITY

In this paragraph, the so-called balancing test will be discussed. With this test, the decision maker must consider the gravity of the crime presumed to have been committed by the applicant and the nature of the persecution to which the asylum seeker fears exposure. State practice is mixed, as we will see below. Common law countries have generally rejected the application of a balancing test.

Normally, the balancing test is regarded in relation to Article 1F(b), and not in relation to Article 1F(a) and (c). This chapter will therefore focus on Article 1F(b). If different, this will be mentioned explicitly.

2.1. UNHCR

In Paragraph 156 of the Handbook, the UNHCR points out that a “balancing test” must be applied before the exclusion clause concerning serious non-political crimes may be invoked. The seriousness of a crime should be weighed against the level of persecution likely to be faced by the offender in the country of origin. If the persecution feared is so severe as to endanger the offender’s life or liberty, then only an extremely grave offence will justify the application of the exclusion clause.⁵³

As said before, UNHCR advocates in favour of inclusion before exclusion when an asylum seeker’s claim is being assessed by the national authorities of a country. As a result, UNHCR’s viewpoint is that a “proportionality test” should be applied in every case: “An assessment of the case requires that these elements be weighted against each other [the nature of the crime and the applicant’s role in it on the one hand and the gravity of the persecution feared on the other]. This can only be undertaken by officials fully familiar with the case and the nature of the persecution feared by the applicant”.⁵⁴

The question of proportionality and balancing was brought up too during the Lisbon Expert Roundtable the 3rd and 4th May 2001. In considering this problem during the Roundtable, it became clear that state practice indicates that the balancing test is no longer used in common law and in some civil jurisdictions. Other protection against return is, however, often available under human rights law (like Article 3 of the European Convention on Human Rights). Where no such protection is available or effective however, for instance in the determination of refugee status under UNHCR’s mandate in a country which is not party to the relevant human rights instruments, the conclusions of the Roundtable⁵⁵ point out that the application of exclusion should take into account fundamental human rights law standards as a factor in applying the balancing test. The meeting did, however, not reach consensus on the latter point.

2.2. EUROPEAN UNION

The European Union has stated that the application of Article 1F of the Refugee Convention must be used with care and after thorough consideration. On Article 1F(b) the European Council recommends that “the severity of the expected persecution is

⁵³ See also *Note on the Exclusion Clause*. UNCHR. Geneva, 30 May 1997. Para. 18
Document symbol EC/47/SC/CRP.29

⁵⁴ *The Exclusion Clauses: Guidelines on their application*. UNCHR. Geneva, December 1996. Para. 8-9

⁵⁵ Lisbon Experts Roundtable Global Consultations on International Protection, 3-4 May 2001, EC/GC/01/Track/1, para.12

weighed against the nature of the criminal offence of which the person concerned is suspected. Particular cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes. This applies both to the participants in the crime and to its instigators.”⁵⁶ This is in line with UNHCR’s position.

However, there are some signals that the European Union is also advocating in favour of using the principle of proportionality when considering Article 1F(a) and 1F(c). The formally adopted *Council Directive on minimum standard for giving temporary protection in the event of a mass-influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof*⁵⁷ notes in Article 28(2) that the decision concerning the exclusion clauses referred to in Paragraph 1 of Article 28, which uses the exact wording as Article 1F (a), (b) and (c), shall be based on the principle of proportionality.

2.3. ECRE

In its Position on the Interpretation of Article 1 of the Refugee Convention, ECRE has noted regarding Article 1 F (b) “because of the severity of the consequences for an excluded refugee the nature of the criminal offence must be sufficiently serious to raise the prospect of exclusion.” “ECRE believes that the more outrageous the act, the less likely is it to be found proportionate to the ends to be achieved.”⁵⁸

2.4. SELECTED ACADEMIC ARGUMENTS

Guy Goodwin-Gill⁵⁹

According to Guy Goodwill-Gill “a balance must be struck between the nature of the offence presumed to have been committed and the degree of persecution feared. A person with a well-founded fear of very severe persecution, such as would endanger life or freedom, should only be excluded for the most serious reasons. If the persecution feared is less, then the nature of the crime or crimes in question must be assessed to see whether criminal character in fact outweighs the applicant’s character as a *bona fide* refugee”⁶⁰.

Walter Kälin and Jörg Künzli

In a recent Article⁶¹, both advocate in favour of balancing as part of the application of Article 1F(b). By striking a balance, the seriousness of the crime is placed in relation to the nature of the persecution. “A person who has perpetrated an especially cruel or grave non-political crime but can expect relatively minor disadvantages on account of his race, religion, political opinion, and so forth, does not merit the rather far-reaching

⁵⁶ *Joint Position defined by the Council of the European Union on the basis of Article K.3 of the Treaty on European Union on the Harmonised Application of the Definition of the term “Refugee” in Article 1 of the Geneva Convention relating to the Status of Refugees*

⁵⁷ *Council Directive on minimum standard for giving temporary protection in the event of a mass-influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof*, 2001/55/EC, 20 July 2001

⁵⁸ *Position on the Interpretation of Article 1 of the Refugee Convention*, September 2000, para. 78.

⁵⁹ *Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons who otherwise need International Protection*⁵⁹. 2001/0207 (CNS), 7 October 2002

⁶⁰ *Ibid.* Pages 106-107

⁶¹ *Article 1F(b): Freedom Fighters, Terrorists, and the Notion of Serious Non-Political Crimes*. By Walter Kälin and Jörg Künzli. *International Journal of Refugee law*. Volume 12, Special Supplementary Issue 2000. Pages 46-78

protection of the Convention even though he or she might not be extradited. Conversely, persons who have committed a crime which, although serious, is not a particularly gross offence do not automatically forfeit the protection of refugee law if they are under threat of extremely harsh political persecution.”⁶²

James Hathaway and Colin Harvey

In the *Cornell International Law Review*,⁶³ they criticize the “balancing test” of Article 1F(b). According to them, the balancing test is not a legally tenable position. “By implicitly suggesting that some forms of “less serious” criminality can be relevant for Article 1F(b) purposes, UNHCR effectively invites states to impose exclusion for crimes that fail to meet the drafters’ basic litmus test of extraditable criminality. Also, state practice does not support the notion of gradations in persecution suggested by the reference to “less serious” persecution. [...] Moreover, no historical support exists for a general duty under refugee law to balance the harm feared by the asylum seeker against the gravity of the crime committed.”⁶⁴

Lawyers Committee of Human Rights (LCHR)

The position of LCHR is clearly described in the summery findings of their Project Safeguarding the Rights of Refugees under the Exclusion Clause⁶⁵. The Legal Advisory Group considered that the balancing test was a fundamental aspect of exclusion. “It was inherent in the exclusion decision-making process and was a corollary of the idea of proportionality in the restriction of fundamental rights. It also mitigated the effect that a decision to exclude would have in situations where States have still not signed and ratified the key human rights instruments and where a serious protection gap might result in the wake of a decision to exclude.”⁶⁶ The Lawyers Committee advocates in favour of using the balancing test not only in the context of Article 1F(b) but also in the context of Article 1F(a) and (c). “Although acknowledging that crimes under Article 1F(a) and (c) may well be more grave than those under Article 1F(b), the Advisory Group considered that it will be necessary to consider all relevant factors before making a decision in respect of any of the sub-clauses. An asylum seeker’s assumed responsibility for crimes under those clauses, however, may only be outweighed in cases where the asylum seeker is facing imminent and extremely severe persecution. This approach is in keeping with recent developments in international human rights law, which increasingly provide for absolute prohibitions on expulsion of a person to a territory where he or she faces execution or torture.”⁶⁷

2.5. PRACTICE OF EUROPEAN STATES REGARDING THE “BALANCING TEST”

Belgium

There is no well-established line in the case law of the “Commission Permanente de Recours des Réfugiés (CPRR)” concerning the balancing approach. However, there are

⁶² *Ibid.* Page 73

⁶³ *Framing Refugee Protection in the New World Disorder*. By James C. Hathaway and Colin J. Harvey. *Cornell International Law Journal*. Volume 34, 2001, number 2

⁶⁴ *Ibid.* Pages 309-313

⁶⁵ *Safeguarding the Rights of Refugees under the Exclusion Clauses. Summery findings of a Project of the Lawyers Committee for Human Rights*. By the Lawyers Committee for Human Rights. *International Journal of Refugee Law*. Volume 12, Special Supplementary Issue 2000

⁶⁶ *Ibid.* Page 335

⁶⁷ *Ibid.* Page 335-336

some cases in which the CPRR⁶⁸ balanced “the probability of prolonged detention and the possibility of a trial that would not meet all the internationally recognised standard against the crimes imputed to the applicants and considered that the gravity of these human rights violations committed voluntarily and systematically, outweighed the expected risk of persecution”⁶⁹.

Denmark⁷⁰

In a decision dated 24 August 1999, the Danish Refugee Board admitted an asylum seeker from Sri Lanka, applying the balancing test to determine his excludability. Despite his involvement in a LTTE attack on a farm in Sri Lanka, the Board ruled in favour of the applicant, weighing in the age of the asylum seeker, his low rank—he was a Private—, his inexperience in military operations—it had been his first action with the LTTE—and the fact that he had learnt about the civilian nature of the target only minutes before the attack had been launched.⁷¹

Spain⁷²

The Spanish authorities of asylum disagree with the “balancing approach” as proposed by UNHCR. When it is suspected that an exclusion clause can be applied to an asylum claim, the “seriousness” of the offense is not taken into account as UNHCR proposed. According to the Asylum Office, it is not possible to value whether a crime or an offense is serious enough for the application of the exclusion clauses. If an exclusion clause is applicable, the case falls outside the Geneva Convention and therefore refugee status should not be granted. However, the state nevertheless takes into account the seriousness of the offense and the consequences of a deportation under other international treaties such as the European Convention for Human Rights.

Switzerland⁷³

Swiss asylum legislation does follow the balanced approach. There is an examination of proportionality between the gravity of the crime committed and the penal sanctions that the perpetrator has to fear in his/her country of origin. The penal sanctions have to outweigh the severity of the crime. See also the following decisions:

Decision SAAC 1993/8 of 27 November 1992, Turkey:

”Whether a crime does qualify as serious crime in the sense of Article 1F(b) of the Refugee Convention has to be decided through the balancing consideration of the protected values: The protection of the perpetrator against the threat of persecution in the country of origin has to be put against the reprehensible ness of his crime and his subjective guilt. The threat of persecution has to outweigh the reprehensible ness and the subjective guilt.”

In this case involving the killing of a driver of a convict transporter during a violent operation to free a prisoner who had received a death sentence, the committed crime

⁶⁸ See CPRR, W1916 of 9 August 1995; CPRR, W4403 of 9 March 1998 and CPRR, W4589 of 23 April 1998

⁶⁹ *Exclusion Clauses in Europe*. By Sibylle Kapferer. *International Journal of Refugee Law*. Volume 12, Special Supplementary Issue 2000

⁷⁰ *Exclusion Project Europe: Workshop Outline*. By Lawyers Committee for Human Rights (LCHR) Page 20

⁷¹ E-mail of Danish Refugee Council to LCHR dated 21 May 2001, on file with LCHR.

⁷² E-mail dated 17 May 2002 of the Dutch Refugee Council to ECRE, filed by ECRE

⁷³ E-mail dated 27 May 2002 of the Asociacion Comision Catolica Espanola de Migraciones (ACCEM) to ECRE, filed by ECRE

was considered to be of a relative political nature. The carefully stated reasons for the ruling are governed by the principles of extradition law and pose an example of the “balancing approach”.

Decision SAAC 1996/40, of 17 September 1996, Turkey:

”The principle of proportionality has to be respected when deciding upon the unworthiness of asylum. Therefore, the time that passed since the crime has been committed needs to be taken into account in an analogy to the rules on the statute of limitations of the penal code.”

The Netherlands

The Dutch government does not use the balancing/proportionality test.

United Kingdom⁷⁴

Like more common law countries, the balancing test has been rejected by the United Kingdom. The Court of Appeal in *T v. Secretary of State for Home Department*⁷⁵ rejected the argument that a balancing test should be applied, finding that there was no basis in the Convention for the test.⁷⁶

⁷⁴ *Exclusion Project Europe: Workshop Outline*. By Lawyers Committee for Human Rights (LCHR). Page 21

⁷⁵ *T v. Secretary of State for Home Department*, [1995] Imm A.R. 142 (C.A.)

⁷⁶ ‘Serious reasons for considering’: *Minimum Standards of Procedural Fairness in the Application of the Article 1F Exclusion Clauses*. By Michael Bliss. *International Journal of Refugee Law*. Volume 12, Special Supplementary Issue 2000. Page 111

3. STANDARD OF PROOF

Article 1F applies to those applicants of whom there are ‘serious reasons for considering’ that they committed an act/crime as mentioned in Article 1F (a), (b) or (c). The question arises when the ‘serious reasons’ standard is fulfilled. As we will see below, no common standard has been developed yet. This might lead to an insufficient standard to be applied, which would obviously be to the detriment of the asylum seeker.

3.1. UNHCR

Paragraph 149 of the Handbook points out that for the exclusion clauses to apply, it is: “sufficient to establish that there are ‘serious reasons for considering’ that one of the acts described has been committed. Formal proof of previous penal prosecution is not required. Considering the serious consequences of exclusion for the person concerned, however, the interpretation of these exclusion clauses must be restrictive.”

Regarding the standard of proof required to exclude a claim, UNHCR’s Guidelines state that: “The applicant’s own confession, the credible and unrebutted testimonies of other persons or other trustworthy and verifiable information may suffice to establish ‘serious reasons for considering’ that the applicant should be excluded. However, ordinary rules of fairness and natural justice require that an applicant be given the opportunity to rebut or refute any accusations”.⁷⁷

3.2. EUROPEAN UNION

In the Commission Working Document on the relationship between safeguarding internal security and complying with international protection obligations and instruments, the following considerations on the concept of ‘standard of proof’ are made:

“The term “*serious reasons for considering*”, used in the chapeau to Article 1(F), should be interpreted as meaning that the rules on the admissibility of evidence and the high standard of proof required in criminal proceedings do not need to apply in this respect. There is therefore no need to prove that the person has committed the act, which may justify the exclusion from refugee status. It is sufficient to establish that there are serious reasons for considering that the person has committed those acts. The basis for such conclusion must be clearly established. Thus, an investigation should be undertaken, checking the claimant’s potential links with, or involvement with violent acts. In order to consider the possibility of exclusion of refugee status as a result of individual liability for terrorist acts, the measure of personal involvement required must be assessed carefully. A person whose actions contribute to the crime, through orders, incitement or significant assistance, may be excluded from refugee status.”

⁷⁷ *The Exclusion Clauses: Guidelines on their Application*. UNHCR. Geneva, December 1996. Para. 11

3.3. SELECTED ACADEMIC ARGUMENTS

Michael Bliss

In his article about the concept of ‘serious reasons for considering’⁷⁸, Michael Bliss examines extensively the requirements of procedural fairness in the exclusion context. He states that there is no generally agreed interpretation of the term ‘serious reasons’ and describes therefore the need to create a meaningful standard.

“The ‘serious reasons for considering’ test is clearly less than the criminal standard of ‘proof beyond reasonable doubt’. However a high standard is required, in recognition of the severe consequences of a decision to exclude, the exceptional nature of exclusion and the general protection purpose of the Convention. At a minimum, the ‘serious reasons for considering’ test must be greater than the ‘balance of probabilities’ standard. A standard lower than this would inevitably result in the exclusion of persons genuinely deserving protection.”⁷⁹

Furthermore, he stresses that, although it is difficult to identify a precise formulation of this concept, it is possible though to think of creating a list of evidence, which can constitute “serious reasons for considering” that an individual had committed a crime. He points out e.g. that on this list of evidence may appear:

- credible confessions by the asylum seeker of involvement in excludable crimes
- verified and legitimate conviction of an excludable crime
- indictment by an international tribunal
- other clear and convincing evidence

He sets out his limits with secret and confidential evidence: this should only be used if strictly limited and certain safeguards are observed.⁸⁰ Michael Bliss states further that secret evidence⁸¹ should never be accepted, since this is contrary to all the major elements of procedural fairness⁸².

James C. Hathaway

James Hathaway points out that the asylum state needs to have only ‘serious reasons for considering’ that the applicant is a criminal as described in the exclusion clause: “there is no requirement that she has been formally charged or convicted, or even that her criminality is capable of the establishment ‘beyond a reasonable doubt’ by a judicial procedure. It is enough that the determination authority has ‘sufficient proof warranting the assumption of the claimants guilt of such a crime’”⁸³.

The Lawyers Committee for Human Rights (LCHR)

The LCHR concludes “serious reasons constitutes a standard lying between the poles of conviction and indictment”. They suggest this should be interpreted as ‘clear and

⁷⁸ *Serious Reasons for Considering. Minimum Standards of Procedural Fairness in the Application of the Article 1F Exclusion Clauses.* By Michael Bliss. *International Journal of Refugee Law*. Volume 12, Special Supplementary Issue 2000. Pages 115-117

⁷⁹ *Ibid.* Page 116

⁸⁰ *Ibid.* Pages 120-123

⁸¹ Meaning: Evidence, which is secret if the decision maker not only does not disclose the identity of the source of the evidence, but does not inform the asylum seeker of the nature of the evidence, or in the most extreme case, does not even inform the asylum seeker that the evidence exists.

⁸² *Serious Reasons for Considering. Minimum Standards of Procedural Fairness in the Application of the Article 1F Exclusion Clauses.* By Michael Bliss. *International Journal of Refugee Law*. Volume 12, Special Supplementary Issue 2000. Page 123

⁸³ *The Law of Refugee Status.* By James Hathaway. Butterworths Canada Ltd. 1991. Page 215

convincing' reasons requiring the existence of 'clear and convincing evidence'. This evidence should be detailed, specific and 'credible and reliable in nature.'⁸⁴ They outline several 'rules' when it comes to evidence, which can be summarised as following⁸⁵:

- The decision maker may rely on an admission by an asylum seeker as evidence upon which to exclude, if the decision maker is satisfied that the statement has been made voluntarily.
- Information may also be provided by witnesses and informants. Decision makers must have the skills, experience and judgment necessarily to accurately determine the credibility and relevance of such evidence, and to give it appropriate weight.
- Witness protection must be considered if refugee witness testimony is employed.
- Information that the refugee is the subject of an indictment, charge, proceeding, or conviction before a national tribunal for an excludable crime should not be automatically accepted as 'clear and convincing reasons' for exclusion.
- Information that a refugee is the subject of an indictment, charge, proceeding, or conviction before an international tribunal for an excludable crime will usually constitute 'clear and convincing reasons' for exclusion.
- A claimant may not be excluded on the basis of his or her mere membership in an organisation or political party.
- The claims of persons suspected of 'terrorism' must be considered in the same manner as all other claims.
- Refugees may not be excluded solely because they are or were combatants. Combatants who have laid down their arms and who have not been involved with the commission of excludable crimes may be entitled to international protection as refugees.
- Adequate time must be allowed for the examiner to interview and assess the applicant's credibility and evidence proffered: more time might be needed for further inquiries.

3.4. PRACTICE OF EUROPEAN STATES

As we will see below, it can be said that state practice in relation to the standard of proof is not very clear. Often it is stated by courts that Article 1F should be interpreted restrictively, but further few structural criteria are used when it comes to evidence.

Belgium

In a decision of the Belgian Conseil d'Etat of 29 July 1998, it was held that utmost caution should be exercised when applying Article 1F of the 1951 Convention, in particular when establishing and assessing the facts of the case.⁸⁶

Furthermore, in Belgium it is accepted that the statements of the applicant may be sufficient evidence for there to be serious reasons: there are several decisions which accept the declarations made by the asylum seeker as their sole evidentiary basis.⁸⁷

⁸⁴ *Safeguarding the Rights of Refugees under the Exclusion Clauses. Summary findings of a Project of the Lawyers Committee for Human Rights.* By the Lawyers Committee for Human Rights. *International Journal of Refugee Law*. Volume 12, Special Supplementary Issue 2000. Page 329

⁸⁵ *Ibid.* Page 330-334

⁸⁶ *Exclusion Clauses in Europe.* By Sibylle Kapferer. *International Journal of Refugee Law*. Volume 12, Special Supplementary Issue 2000. Page 208

In addition, the asylum authorities do not need to have actual proof of a crime in order to exclude a person from protection under the 1951 Convention.⁸⁸

The Netherlands

In various decisions, it is stated that Article 1F should be interpreted restrictively and that the Immigration Authorities should motivate clearly why Article 1F is applicable⁸⁹.

The confessions of the applicant play an important role as evidence during the examination whether the exclusion clause is applicable. The declarations of the applicant should however be consistent and correspond with what is known about the general situation in the country of origin.⁹⁰

Switzerland

The examination of the concept of “serious reasons” for the consideration of Article 1F requires a lower standard of proof than “predominant probability”. The minimum requirement is a substantiated suspicion that is in any case more than a mere assumption.⁹¹

United Kingdom

There is no particular attention being paid in the UK to what constitutes ‘serious reasons’ of considering, but it seems that fact finding in exclusion-related cases is done in the same way as for other asylum claims, the essential criterion being the credibility of the applicant.

⁸⁷ *Ibid.* Page 208

⁸⁸ *Ibid.* Page 208

⁸⁹ See Court of Haarlem, Awb 95/6692 and Awb 95/6691, 1 April 1996

⁹⁰ Court of ‘s-Hertogenbosch, Awb 98/6995, 27 May 1999

⁹¹ See SAAC-decision 1999/12, 14 September 1998

4. PERSONAL LIABILITY AND DURESS

This chapter will discuss individual liability issues, such as the question when an applicant can be excluded from refugee protection because of his personal involvement in a group, which commits crimes or advocates violence. Can the mere involvement with such an organisation amount to ‘serious reasons for considering’ that the asylum seeker has committed excludable crimes?

In certain circumstances, there are valid defences to the crimes mentioned in Article 1F, notably where the criminal intent is absent. One of these defences, which is used regularly by applicants, is duress or coercion. The criteria for duress as a sustained appeal will be outlined below as well.

4.1. UN: ICC STATUTE

The Rome Statute entered into force on 1 July 2002 and established the International Criminal Court. The Statute contains the latest international agreement on issues related to international law, including individual liability.

Individual responsibility

Article 25 of the ICC statute deals with individual criminal responsibility.

“Article 25:

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
 - (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
 - (b) Orders, solicits or induces the commission of such a crime, which in fact occurs or is attempted;
 - (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
 - (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
 - (ii) Be made in the knowledge of the intention of the group to commit the crime;
 - (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
 - (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of

the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.”

In order to be held responsible, Article 30 of the ICC Statute outlines that the crimes must be committed with intent and knowledge:

“Article 30:

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
 - (a) In relation to conduct, that person means to engage in the conduct;
 - (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.”

Duress

Concerning the possibility to invoke duress as a defence the ICC Statute states:

“Article 31:

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:
 - (d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:
 - (i) Made by other persons; or
 - (ii) Constituted by other circumstances beyond that person's control...”

4.2. UNHCR

Personal liability

In Paragraphs 36-48 of the guidelines of the UNCHR on the application of the exclusion clause, UNHCR describes its position in view of the concept of individual liability. UNHCR states that membership *per se* of an organisation, which advocates or practises violence, is not necessarily decisive or sufficient and does not, in and of itself, amount to participation. However, voluntary membership of certain –particularly violent– organisations may amount to the personal and knowing participation if the fact of such a membership may be impossible to disassociate from the commission of terrorist crimes.⁹² Nevertheless, each case has to be examined with great caution and has to take into account factors such as self-defence or duress.⁹³

⁹² *The Exclusion Clauses: Guidelines on their Application*. UNHCR. Geneva, December 1996. Para. 47

⁹³ *Ibid.* Para. 48

Duress

According to Paragraph 78 of the guidelines of UNCHR on the application of the exclusion clause, there are three conditions to be met for the defence of duress to have validity. First of all, the perpetrator of the incriminating act must be able to show that he would have placed himself in grave, imminent and irremediable peril if he had offered any resistance. In the second place, the perpetrator must not have contributed to the emergence of this peril. Third, the harm caused by obeying the illegal order cannot be greater than the harm, which would result from disobeying the order.

Furthermore, the UNCHR refers to the established principle of law that the fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility⁹⁴.

4.3. EUROPEAN UNION

The proposal for a Council Directive for a minimum standard for a refugee definition⁹⁵ explicitly notes that the grounds for exclusion should be based solely on the personal and knowing conduct of the person concerned⁹⁶.

In Paragraph 1.1.3. of the Commission Working Document⁹⁷ it is stated that: “mere, voluntary, membership of a terrorist group may, in some cases, amount to personal and knowing participation, or acquiescence amounting to complicity, in the crimes in question, and hence to exclusion from refugee status. In this assessment the purpose of the group, the status and level of the person involved, and factors such as duress and self-defence against superior orders, as well as the availability of a moral choice should be taken into consideration. If it has been determined that the person is still an actual, active, present and willing member, the fact of mere membership may be difficult to dissociate from the commission of terrorist crimes.”

4.4. ECRE

ECRE has emphasised in its Position on the Interpretation of Article 1 of the Refugee Convention⁹⁸ that membership *per se* of an organisation, which advocates or uses violence is not necessarily decisive or sufficient to exclude a person from refugee status. Individual liability must be proved, which entails evidence of a positive act and an intention by the claimant.

⁹⁴ *Ibid.* Para. 76-77

⁹⁵ *Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection.* 2001/0207 (CNS). Article 14

⁹⁶ *Ibid.* Article 14(2) (in the original Draft Proposal of September 2001)

⁹⁷ *Commission Working Document, The Relationship Between Safeguarding Internal Security and Complying with International protection obligations and instruments*, COM (2201) 743 final, 5 December 2001

⁹⁸ *Position on the Interpretation of Article 1 of the Refugee Convention*, September 2000, para. 80.

4.5. SELECTED ACADEMIC ARGUMENTS

Guy s. Goodwin-Gill⁹⁹

Guy Goodwin-Gil refers in this context to the decisions of the International Military Tribunal and the 1949 Geneva Conventions, which provide provisions on individual responsibility. Furthermore, he mentions the fact that in the Statutes of the Tribunals on Former Yugoslavia and Rwanda the concept of individual responsibility is further defined. It is stressed that the ‘official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment,’ as well as: ‘A superior may also be responsible for the actions of a subordinate, and while the subordinate will not be relieved of responsibility, superior orders may be considered in mitigation of punishment.’

However, he points out that a distinction must be drawn between ‘mere membership of an organisation which engages in international crimes, and actual complicity [...]. Recent jurisprudence¹⁰⁰ has also required *personal and knowing participation*¹⁰¹.

With this personal and knowing participation-test, a three-part test for complicity is introduced:

1. Membership in an organisation, which committed international offences as a continuous and regular part of its organisation;
2. Personal and knowing participation;
3. Failure to disassociate from the organisation at the earliest safe opportunity.

Lawyers Committee for Human Rights (LCHR)

LCHR states that a claimant may not be excluded on the basis of his or her mere membership in an organisation or political party. In the determination procedure of the application, the individual responsibility should always be taken into account.

In their Summery Findings¹⁰², the LCHR expresses its concern at the establishment of statutory bars, which absolutely prevent those associated with certain governments and armed organisations from accessing asylum determination procedures.”

The Committee therefore does not agree with the position of the European Commission as described above.

Michael Bliss

In a recent Article¹⁰³, Michael Bliss shares the view of UNHCR that mere membership of an organisation will generally not lead to the exclusion of the asylum seeker. ”Exclusion on the basis of such evidence will constitute a denial of procedural fairness

⁹⁹ *The Refugee in International Law*. By Guy S. Goodwin-Gill. Oxford University Press, Second Edition, 1998

¹⁰⁰ Case *Ramirez v Minister of Employment and Immigration* [1992] 2 FC 306

¹⁰¹ *The Refugee in International Law*. By Guy S. Goodwin-Gill. Oxford University Press, Second Edition, 1998. Page 101

¹⁰² *Safeguarding the Rights of Refugees under the Exclusion Clauses. Summery findings of a Project of the Lawyers Committee for Human Rights*. By the Lawyers Committee for Human Rights. *International Journal of Refugee Law*. Volume 12, Special Supplementary Issue 2000. Pages 332-333

¹⁰³ ‘*Serious Reasons for Considering*’: *Minimum Standards of Procedural Fairness in the Application of the Article 1F Exclusion Clauses*. By Michael Bliss. *International Journal for Refugee Law*. Volume 12, Supplementary Issue 2000. Page 124-126

and a contravention of the requirement to make an individual determination of the claim. Therefore, in cases where an asylum seeker is a member of a particular organisation, the focus must be on his or her activities within the organisation and his or her objective role in the commission of excludable acts.’ This doesn’t have to mean that the asylum seeker has participated in the crime personally or directly. ‘It may have been enough that an asylum seeker’s activities within an organisation amount to clear and convincing evidence that he or she was part of a conspiracy to commit such crimes, or was complicit in them in some way.’”

Michael Bliss sees difficulties, however, when considering the statement of the UNHCR that mere voluntary membership of particular violent organisations may amount to the personal and knowing participation. He disagrees with the UNHCR on this point, because this ‘contradicts one of the most basic principles in the exclusion context; that exclusion should only occur after consideration of the asylum seeker’s personal involvement in and criminal responsibility for excludable crimes’. However, he adds that in such cases the decision maker will normally need only little additional evidence to have ‘serious reasons for considering’, that the applicant committed an excludable crime.

James Hathaway

Personal liability

Mere presence at the scene of a crime is not enough to justify criminal liability according to James Hathaway. “Exclusion is warranted when the evidence establishes that the individual in question personally ordered, incited, assisted, or otherwise participated in the persecution.”¹⁰⁴

Duress

James Hathaway agrees¹⁰⁵ that it should be possible to invoke the defence of duress. “This exception recognises 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. Moreover the predicament must not be of the making or consistent with the will of the person seeking to invoke this exception. Most important, the harm inflicted must not be in excess of that which would otherwise have been directed at the person alleging coercion.”

4.6. PRACTICES OF EUROPEAN STATES

Generally, it is accepted by Member States that the mere membership of armed opposition cannot lead automatically to exclusion.

Belgium

The mere membership of an organisation is not enough to presume there are serious reasons for considering that an applicant falls under the exclusion clauses. In the case of the former chief of the gendarmerie in Rwanda, the CPRR held that, while the fact that the applicant had occupied a position of high responsibility in Rwanda during the genocide was sufficient to justify the presumption of serious reasons for considering

¹⁰⁴ *The Law of Refugee Status*. By James C. Hathaway. Butterworths Canada Ltd 1991. Page 220

¹⁰⁵ *Ibid.* Page 218

that he fell under Article 1F (a), (b) of (c), such a presumption was not irrefutable and the individual circumstances had to be examined¹⁰⁶.

Duress

The individual circumstances of the applicant should be taken into account, and the principle to invoke defences such as duress is therefore accepted.

Denmark¹⁰⁷

It is possible in Denmark to invoke defences. In a decision dated 24 August 1999, the Danish Refugee Board admitted an asylum seeker from Sri Lanka, applying a balancing test to determine his excludability. Despite his involvement in a LTTE attack on a farm in Sri Lanka, the Board ruled in favour of the applicant, weighing the age of the asylum seeker, his low rank -he was a Private-, his inexperience in military operations -it had been his first action with the LTTE- and the fact that he had learnt about the civilian nature of the target only minutes before the attack had been launched.

The Netherlands

In a case¹⁰⁸ concerning an Afghan who worked for the KhAD, the court concluded that it is not required that the applicant himself committed violations of human rights. The court investigated if in this case the applicants' *personal and knowing participation* could lead to exclusion. Important is that the applicant supported the KhAD by the (ordering to) arrest, the (ordering to) interrogate and the (ordering to) hand over of political opponents to the KhAD in his function as a police officer. Given his rank in the police, he should have known that the KhAD committed violations of human rights.

Switzerland

The Swiss Asylum Appeals Commission (SAAC) has stated in a decision¹⁰⁹ that the exclusion clause of Article 1F requires personal responsibility for a certain policy of the government, in direct breach of the purpose and principles of the United Nations.

In another case¹¹⁰, the SAAC states that exclusion clauses are not applicable on the sole ground that the Office of the Federal Prosecutor is accusing the asylum seeker of being a member of a party or group that is illegal in the country of origin (the applicant was in this case a rather prominent member of the FIS in Algeria). Mere membership of such a group is therefore not enough for the applicability of the exclusion clauses.¹¹¹

United Kingdom

In several cases¹¹² the Immigration Appeals Tribunal (IAT) stated that it was an error of law to exclude a person simply for their connections with a group or organisation, as the question of exclusion must be decided in reference to the individual and not the organisation.¹¹³

¹⁰⁶ CPRR, F629, 28 May 1994

¹⁰⁷ E-mail of the Danish Refugee Council to LCHR, 21 May 2001, on file with LCHR

¹⁰⁸ Court of Amsterdam, Awb 01/9461, 23 July 2001

¹⁰⁹ SAAC-decision 1999/11, 14 September 1998

¹¹⁰ SAAC-decision 1998/12, 16 June 1998, Leading case

¹¹¹ This judgement was confirmed by an unpublished decision of the Fourth Chamber of the SAAC of 25 January 2001, also a case from an Algerian asylum seeker

¹¹² Omar Dogan (11793), 10 Jan. 1995; Nadarajah Nanthakumar (11619), 22 Nov. 1994

¹¹³ *The Law of Refugee Status*. By James C. Hathaway. Butterworths Canada Ltd 1991. Page 212

5. TREATMENT OF THE EXCLUDED PERSONS

If an asylum seeker is excluded from the protection of the Refugee Convention, the question follows what to do with him or her. Important issues such as ‘do states have the obligation to prosecute these persons’ and ‘what rights do they and their family members have once excluded?’ will therefore be discussed below.

5.1. UN

In several resolutions, the United Nations has expressed the need to prosecute those who have committed serious crimes.

In Resolution 978 (1995), the Security Council urges states to arrest and detain and, where appropriate, prosecute persons found within their territory against whom there is sufficient evidence that they were responsible for genocide and other grave human rights violations.

In Resolution 1373 (2001) the Security Council further holds states to deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens¹¹⁴. Furthermore, states are called on to ensure that any person involved in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice.

5.2. UNHCR

Prosecution

In its guidelines, UNHCR notes in Paragraph 86 that a country of asylum should be encouraged to try the asylum seeker for the alleged crime.

Family members

In Paragraph 185 of the Handbook, it is clearly stated that family members themselves are not prevented from applying for refugee status, even if the head of the family is excluded. ‘The principle of family unity operates in favour of dependants, and not against them’.

Furthermore, in its guidelines, UNHCR stresses in Paragraph 12 and 13 that “if a refugee is excluded, derivative refugee status should also be denied to dependants. Dependents and other family members can, however still establish their own claims to refugee status. Such claims are valid even where the fear of persecution is a result of the relationship to the perpetrator of excludable acts. Family members with valid refugee claims are excludable only if there are serious reasons for considering that they, too, have knowingly participated in excludable acts.” “Where family members have been recognised as refugees, the excluded applicant/head of family cannot rely on the principle of family unity to secure protection or assistance as a refugee.”

¹¹⁴ See Paragraph 2, under (c)

5.3. EUROPEAN UNION

Prosecution/extradition

In the Commission Working Document,¹¹⁵ Chapter 2 is dedicated to the legal follow up to the exclusion of persons from Refugee Convention status or other forms of international protection.

First of all, the Commission states that a state is according to international law obliged to either surrender or prosecute a person excluded from protection regimes. On the application of this principle states have developed different practices. Not all national laws provide for universal jurisdiction. The International Criminal Court (ICC) could play an important role in the prosecution of some cases, if the ICC has jurisdiction. The European Commission advocates in favour of a co-operation agreements between Member States and the ICC in potential Article 1F cases.

Secondly, if there is no possibility to bring a person to trial, nor to have the person indicted by the ICC, a state needs to extradite the person involved if the extradition is legally and practically possible to either the country of origin, another Member State or another third country. Extradition may however not always be possible because of legal obstacles such as (Article 3 of) the European Convention on Human Rights or other Human Rights instruments such as the United Nations Convention against Torture or the International Covenant on Civil and Political Rights. In this regard, it is, however, highly preoccupying that the Commission suggested that the European Court of Human Rights may have to reconsider its jurisdiction that no derogations to Article 3 of the ECHR are possible in the light of the events of 11 September.¹¹⁶

Basic rights?

The European Commission acknowledges that the current situation of Member States having limited policy options for dealing adequately with excludable but non-removable persons is a very unsatisfactory one. Therefore, the Commission pleads in favour of the harmonisation of basic rights granted to these persons, and to assess the differing means for dealing with these persons if they pose a security risk.¹¹⁷

5.4. ECRE

ECRE believes that those who are responsible for human rights violations should be brought to justice.¹¹⁸ In response to the Commission's Working Document, ECRE

¹¹⁵ *Commission Working Document, The Relationship Between Safeguarding Internal Security and Complying with International Protection Obligations and Instruments*, COM (2201) 743 final, 5 December 2001

¹¹⁶ *Ibid*, Chapter 2.

¹¹⁷ *Ibid*. Para. 2.4.

¹¹⁸ *Ibid*, para. 75.

underlined its view that the guarantee of Article 3 of the Convention against Torture is absolute and extradition may therefore often not be legal, even if “legal guarantees” have been received from the state requesting extradition.¹¹⁹

¹¹⁹ *Comments from the European Council on Refugees and Exiles on the Commission Working Document on the relationship between safeguarding internal security and complying with international protection obligations and instruments*, May 2002, para. 2.3.2.

5.5. SELECTED ACADEMIC ARGUMENTS

Geoff Gilbert

In a background paper¹²⁰ written for the UNHCR's experts' roundtable discussion on exclusion, he states concerning the implications of exclusion for family members:

“Ordinarily, where a head of family is given refugee status, the principle of family reunification allows in the rest of the family to obtain derivative refugee status. The corollary should not arise, however, that where the head of family is excluded, the rest of the family is excluded. Article 1F speaks of those committing crimes or guilty of acts contrary to the purposes and principles of the United Nations, and there should be no exclusion by association.¹²¹ Other members of the family should be entitled to prove they qualify in their own right. Indeed, the fact that the head of family has been excluded may well be further evidence that other members of the family would suffer persecution.”

Advice Committee for matters on behalf of Aliens in the Netherlands¹²²

In a report concerning the practice of Article 1F of the Refugee Convention in the Netherlands, the Committee states that the asylum seeker who is excluded, has an obligation to leave the country. The Dutch state is recommended to take all measures to make sure that such a person will leave the country and to make serious efforts to extradite him or her, as long as international obligations will not prevent the extradition. Such measures should *imply* the withdrawal of any status and rights such as housing, a right to work, social benefits and others. Above this, all family members, whose asylum application is *depending* on the application of the excluded person, should equally be withhold any status and social rights. However, if there are very special circumstances involved (e.g. serious illness) the asylum application of these family members should be reconsidered and the Dutch government should balance the interests of the state with the interests of the family members. After five years of illegal residence, the balance should be weighed in favour of the family members, who should than be given a legal status, according to the Committee.

5.6. PRACTICE OF EUROPEAN STATES

Belgium¹²³

A person excluded under Article 1F may apply before the Ministry of Interior to obtain the regularisation of the stay on the territory under, for instance, Article 3 of the ECHR. There's no specific procedure and it often takes months to get the decision. The person cannot be detained for administrative reasons if there's no effective possibility to expel him/her. He/she can however be detained if there are legal proceedings or a penal sentence pronounced in Belgium against him/her.

Denmark

An asylum seeker excluded from protection in accordance with Article 1 F will receive an order to leave the country. If he does not leave the country voluntarily, he may be deported forcibly. Unless deportation will be in violation of the principle of non-

¹²⁰ *Current issues in the Application of the Exclusion Clauses*. Geoff Gilbert, 2001

¹²¹ Geoff Gilbert refers to Article 10 Convention on the Rights of the Child

¹²² This Committee is an independent Committee, which advises the Dutch Minister of Justice in matters of aliens. See its '*Report concerning Article 1F of the Refugee Convention*', The Hague, January 2002, not published

¹²³ E-mail of Aide aux Personnes Déplacées to ECRE dated 6 May 2002, filed by ECRE

refoulement (Section 31 of the Danish Aliens Act), deportation may be effectuated to his country of origin.¹²⁴

Section 31 of the Aliens Act stipulates that:

- (1) An alien must not be expelled to a country in which he will risk the death penalty or torture or inhuman or degrading treatment or punishment, or in which the alien will not be protected against being sent on to such country.
- (2) An alien covered by the provision in section 7 (1) must not be expelled to a country in which he will risk persecution on the grounds set out in Article 1 A of the Convention relating to the Status of Refugees, 28 July 1951, or in which the alien will not be protected against being sent on to such country. However, this does not apply if definite reasons are found for assuming that the alien presents a risk to Denmark's national security or if, after final conviction for a particularly dangerous crime, the alien must be assumed to present an immediate danger to the life, body, health or liberty of other persons. This is without prejudice to the provision in subsection 1.

If, in accordance with the above provision, a rejected asylum seeker cannot be deported to his country of origin, an order to leave Denmark for any other country but for a country in which he may risk persecution or indirect refoulement will nevertheless be issued. In practice such a deportation order will however not be effectuated.

On a regular basis the authorities may review the question of whether deportation to the country of origin continue being barred by the non-refoulement provision of Section 31.

In the preparatory works, it is explicitly emphasised, that this provision will be applied in accordance with Article 3 of the European Convention on Human Rights and the Fourth Protocol regarding the death penalty, and that a person covered by one of these provisions will not be forcibly expelled from Denmark.

Asylum seekers who are covered by the exclusion clauses, but nevertheless "rescued" by the above prohibition against *refoulement* in Section 31, will merely be "tolerated" during their future stay in Denmark. By and large they will be entitled to the same rights and benefits as asylum seekers in general. They will not receive a residence permit, nor will they be able to work. They will be accommodated at an asylum centre run by the Danish Red Cross. They will receive a small amount of pocket money and be entitled to basic health services and education in line with what is granted to asylum seekers in general.

A rejected asylum seeker may be detained in view of deportation if this is deemed necessary in order to secure his presence. If deportation is not possible, detention cannot be applied in these cases.

France

Concerning the family of an excluded person, France has the following practice:

- "Someone who is excluded from international protection is not entitled to refugee status by the application of the principle of family unity;
- The family members of someone who has been excluded will not be automatically excluded as well; exclusion will only be contemplated if their personal situation is also relevant to Article 1F;

¹²⁴ E-mail of the Danish Refugee Council to ECRE dated 27 September 2002, filed by ECRE

- Refugee status will be granted to such persons if their *personal* fears are well founded and Article 1F does not apply;
- Their applications will, however, be rejected as not falling under Article 1A(2) if the fear in questions only stems from the acts having motivated the exclusion on the ground of Article 1F(c).¹²⁵

Netherlands¹²⁶

Persons who are excluded under Article 1F but in whose cases there is, according to the IND or court, no real risk that they will be treated in a way forbidden by Article 3 ECHR, can get the notification to leave the Netherlands in 28 days.

If possible (i.e. documents are available) these persons will be expelled to their country of origin. If this is not possible according to international obligations, a person will not be granted a residence permit, or a formal permission to stay. In addition, they cannot claim any provisions, such as family reunion, social benefits, etc. So, they are tolerated, but without any rights. They can only be detained if they pose a risk to the Dutch society.

Persons, whose application is family-related to the application of an excluded person, will not be recognised as refugees and will not have any rights either.

After the decision on Article 1F is made, the file is handed over to the Public Prosecutor, who is then investigating the possibilities for prosecution. However, this has never resulted in a conviction.

Spain¹²⁷

Once an application for asylum is rejected, the claimant must leave the country within 15 days after the final decision has been reached.

Sometimes the applicant can not be expelled to his country of origin because of international obligation. The authorities will then take into account whether the claimant is entitled to other kinds of protection.

When Article 1F is applicable, the asylum seeker will only be detained if he/she presents a risk to the Spanish society. Sometimes the Spanish authorities do not expel, nor do they provide him/her with any documents which will allow the applicant to remain in Spain legally.

Switzerland

The following decision of the Swiss Asylum Appeals Commission (SAAC) outlined how to cope with family members of excluded persons:

Decision SAAC 1993/23 of 3 February 1998, Turkey:

The fact that an asylum seeker is unworthy of being granted asylum because of different crimes (among them rape) does not exclude his family members from being granted

¹²⁵ *Refugee Law in Context. The exclusion clause.* Edited by Peter J. van Krieken. 1999, T.M.C. Asser Press, The Hague, The Röling Foundation and the Authors. Page 295

¹²⁶ E-mail dated 17 May 2002 of the Dutch Refugee Council to ECRE, filed by ECRE

¹²⁷ E-mail dated 27 May 2002 of the Asociación Comision Católica Española de Migración (ACCEM) to ECRE, filed by ECRE

refugee status. If the family members themselves fulfil the criteria of Art. 3 SAA (Refugee status), they will be granted the status of asylum.

5.7. RELEVANT CASE LAW FROM THE EUROPEAN COURT OF HUMAN RIGHTS

In many countries national provisions expressly provide for the possibility of forcible removals of rejected and excluded asylum seekers.

The right to decide who is entitled to remain on a state's territory is an individual state's prerogative. However, when a state decides not to grant the refugee protection to a person, it cannot overlook its legal responsibility simply by denying recognition of the refugee status as the removal or expulsion of the person from its territory can result in a human rights violation. Article 3 of the European Convention on Human Rights is relevant of these cases.

According to the provisions of this Article "No one shall be subjected to torture or to inhumane or degrading treatment or punishment".

Article 3 has been interpreted by the European Court of Human Rights to prohibit Member States from sending anyone to a country where s/he would be submitted to such treatment. Parties to the Convention cannot derogate under any circumstances from that prohibition, as the protection enshrined in Article 3 is absolute, regardless of the conduct of the person concerned. This principle has been firmly established by the Court in the well-known *Soering* judgement of 7 July 1989. In a unanimous judgement, the European Court held that it would be contrary to Article 3 for a Party to the Convention to return an individual to a State "where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture, inhumane or degrading treatment or punishment in the requesting country"¹²⁸.

*Vilvarajah et al v. United Kingdom*¹²⁹:

Nadarajah Vilvarajah and four other Tamils were expelled from the United Kingdom to Sri Lanka in February 1988 after having unsuccessfully applied for asylum. Three of them claimed to have been subjected to torture following their return. The applicant Sivakumaran alleged that he had been imprisoned for more than six months and that he had been tortured every four or five days.

The Court found that there was no violation of Article 3 by the United Kingdom. In that case it had been decisive for the Court that there had been a voluntary return programme set up by the UNHCR and that many Tamils had in fact made use of this scheme and returned voluntarily. The Court decided that even if the situation was still unsettled and there was a risk that the applicants might be detained and ill-treated, 'a mere possibility of ill-treatment in such circumstances' was not considered sufficient by the Court to give rise to a breach of Article 3.

¹²⁸ *Soering v. the United Kingdom*, Judgement of 7 July 1989, Series A, Vol. 161, para 91

¹²⁹ *Vilvarajah et al. v. United Kingdom*, Judgement of 30 October 1991, Serie A, Vol. 215

*Chahal v. the United Kingdom*¹³⁰:

This case explicitly compares the protection offered by Article 3 of the European Convention on Human Rights and Article 32 and 33 of the Refugee Convention. In Paragraph 79, it is stated that “the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim’s conduct.”

In Paragraph 80, it is mentioned further “the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees.”

¹³⁰ *Chahal v. The United Kingdom*, Judgment of 15 November 1996, 70/1995/576/662

6. THE RELATIONSHIP BETWEEN ARTICLE 1F AND ARTICLE 33(2) OF THE CONVENTION

Article 33(2) of the Refugee Convention notes that contracting states can expel or return 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.” This is a very different approach than that used in Article 1F of the Convention, as it only regards the removal of non-*refoulement* protection. However, in state practices these two clauses seem at times to be confused.

6.1. UNHCR

UNHCR has always stated that the two concepts should be treated separately. Article 1F is dealing with the exclusion from refugee protection, while Article 33(2) removes the particular non-*refoulement* protection from the refugee (where no exclusion clause is applicable). In its *Observations on the European Commission’s proposal for a Council Directive on minimum standards on procedures for granting and withdrawing refugee status*¹³¹, the UNHCR explicitly stated that the exception laid down in Article 33(2) ‘denies, in very exceptional cases, the benefit of the non-*refoulement* rule to persons who are refugees within the meaning of Article 1(A) of the Convention. Withdrawal of refugee status is not at issue in the operation of this exceptional provision.’

6.2. EUROPEAN UNION

The European Union seems to be ambiguous as to the two concepts.

The formally adopted *Council Directive on minimum standard for giving temporary protection in the event of a mass-influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof*¹³² shows the European Union is merging the two concepts. Article 28(1)(b) notes that it is possible for states to **exclude** a person from temporary protection if, amongst other grounds, ‘there are reasonable grounds for regarding him or her as a danger to the security of the Host Member State or, having been convicted by a final judgment of a particularly serious crime, he or she is a danger to the community of the host Member State’. The wording of this Article is exactly the same as in Article 33(2) of the Refugee Convention, but is falsely brought into the exclusion context.

6.3. SELECTED ACADEMIC ARGUMENTS

James C. Hathaway and Colin J. Harvey

Hathaway and Harvey are pointing out in the *Cornell International Law Journal*¹³³ that Article 1F and Article 33(2) aim for two different goals. Whilst the purpose of Article 1F is to identify inherently unworthy asylum seekers to make sure those undeserving

¹³¹ *Observations on the European Commission’s proposal for a Council Directive on minimum standards on procedures for granting and withdrawing refugee status*. UNHCR Geneva, July 2001

¹³² Directive (2001/55/EC), 20th July 2001

¹³³ *Framing Refugee Protection in the New World Disorder*. By James C. Hathaway and Colin J. Harvey *Cornell International Refugee Law*. Volume 34, Number 2, 2001

will not receive any international protection, the purpose of Article 33(2) is to protect the asylum-state.

Hugo Storey

In a recent background paper¹³⁴, Storey agrees with the statements made by Hathaway and Harvey concerning this subject. He mentions that their position reflects recent case law, and refers to the Canadian case of Pushpanathan¹³⁵. In this case, the Canadian Supreme Court states that the ‘general purpose of Article 1F is not the protection of the society of refuge from dangerous refugees, whether because of acts committed before or after the presentation of a refugee claim; that purpose is served by Article 33(2) of the Convention.’

6.4. PRACTICE OF EUROPEAN STATES

Generally, it has been widely accepted that the two concepts are different and should be treated separately. However, increasingly, states have used the argumentation of Article 33 (2), i.e., a person has committed a serious crime within the country of asylum and is therefore a danger to the community and should be removed, within their interpretation of Article 1 F.

France¹³⁶

The *French Appeals Board*, in its early stages, applied the Exclusion Clauses to applicants having committed crimes in *France*, provided that the crime was committed before refugee status was recognised, but regardless of its criminal qualification under French law. The court justified the extensive interpretation of Article 1F(b) with the intentions of the authors of the Convention, invoking Article 33(2), and with an argument *a fortiori*: Those breaching the goodwill of their host country proved to be all the more unworthy of asylum.¹³⁷ This practice has however recently been ended.¹³⁸

Netherlands

In the note on Article 1F to the Parliament¹³⁹, the Dutch State Secretary of Justice has mentioned that since Article 1F states clearly that the provisions of the Convention on Refugees do not apply to persons who can be excluded under this Article, “the obvious conclusion is therefore that Article 33 (1) of the Convention (generally known as the *refoulement* principle) does not apply to cases in which there are serious reasons for considering that the individual is guilty of one of the acts contemplated by Article 1F. It should be emphasised that when Article 1F speaks of serious reasons for considering that an offence has been committed, it is referring to offences stated in Article 1F itself and not to an actual judgement for such an offence’.

¹³⁴ *More questions than answers: the exclusion clauses in the light of September 11*. Paper by Dr. Hugo Storey for joint IARLJ.ILPA Seminar on 4 March 2002

¹³⁵ *Pushpanathan v. Minister of Citizenship & Immigration* [1998] 1 S.C.R. 982, 999-1000 (Can.)

¹³⁶ See: *Exclusion Clauses for Europe*. Lawyers Committee for Human Rights, Workshop Outline, p. 6.

¹³⁷ CRR, 1 April 1955, 635; *Who is a Refugee? A Comparative Case Law Study*. Edited By Jean-Yves Carlier, Dirk Vanheule, Klaus Hullman and Carlos Pena Galiano. Page 421

¹³⁸ *Exclusion Clauses in Europe*. By Sybille Kapferer. *International Journal in Refugee Law*. Volume 12, Special Supplementary Issue 2000. Page 221

¹³⁹ *Refugee Law in Context. The exclusion clause*. Edited by Peter J. van Krieken. 1999, T.M.C. Asser Press, The Hague, The Röling Foundation and the Authors. Page 300-312

Court of Amsterdam, February 8th 2000, Awb 98/2110

The applicant is an Iranian citizen recognised as a refugee in the Netherlands. Afterwards, he was sentenced to 4 years imprisonment in Hungary, because of an opium offence. For this reason, the IND suspended his residence permit and declared the applicant as undesirable alien. The IND also told the applicant he would not be deported to Iran as long as there was a real risk of being subjected to a treatment as described in Article 3 ECHR. The IND viewed the crime committed by the applicant as a particular serious crime in the meaning of Article 33(2) of the Refugee Convention.

The Court considered that the reasons why the applicant had been granted asylum did still exist and therefore it had to be considered if the applicant, given his sentence of a foreign court, compared to the Dutch criminal system, constituted a danger to the Dutch community. The court stated that there was no such danger, given the fact that the sentence of the applicant had been 4 years ago, and since then there had been no other sentences.

PART B: CESSATION CLAUSE

1. INTRODUCTION

The so-called ‘cessation clauses’ of Article 1C of the Refugee Convention spell out the conditions under which a refugee ceases to be a refugee. They are based on the consideration that international protection should not be granted where it is no longer necessary or justified. The formal loss of refugee status on the basis of the cessation clauses must be distinguished from cancellation of refugee status. The latter is undertaken when it comes to light that the individual should never have been recognised in the first place. Such would be the case where it is established that there had been a misrepresentation of the facts, or that one of the exclusion clauses would have been applicable had all the relevant facts been known.¹⁴⁰

In this chapter, the most relevant issues relating to the cessation clauses will be shortly outlined.

¹⁴⁰ *Note on the Cessation clauses*. UNHCR, Standing Committee, 30 May 1997, EC/47/SC/CRP.30

2. UNHCR

The Refugee Convention

Article 1C of the Refugee Convention stipulates the following:

“This Convention shall cease to apply to any person falling under the terms of section A if:

- (1) He has voluntarily re-availed himself of the protection of the country of his nationality; or
- (2) Having lost his nationality, he has voluntarily re-acquired it, or
- (3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or
- (4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or
- (5) He can no longer, because the circumstances in connection 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; Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;
- (6) Being a person who has no nationality he is, because of the circumstances in connection with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence; Provided that this paragraph shall not apply to a refugee falling under section A (1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.”

As we see, the first four cessation clauses reflect a change in the situation of the refugee that has been brought about by himself, whilst the last two clauses are based on the consideration that international protection is no longer justified on account of changes in the country where persecution was feared, because the reasons for the person having become a refugee have ceased to exist.

Executive Committee Conclusion No. 69¹⁴¹

This conclusion –amongst others- points out that all refugees affected by a group or class decision to apply the cessation clauses must have the possibility, upon request, to have an application of a cessation clause in their cases reconsidered on grounds relevant to their individual case.

Furthermore, UNHCR underlines the need of a humanely approach when applying the cessation clause, given the effect such a decision will have on those persons.

Handbook

In UNHCR’s Handbook, it is further described what the criteria are for the application of Article 1C. In Paragraphs 118-139 the interpretation of the UNHCR of these clauses is given. The text is as follows:

“1) *Voluntary re-availment of national protection*

¹⁴¹ *Cessation of status*. ExCom UNHCR, 9 October 1992, no. 69 (XLIII)-1992

118. This cessation clause refers to a refugee possessing a nationality who remains outside the country of his nationality. (The situation of a refugee who has actually returned to the country of his nationality is governed by the fourth cessation clause, which speaks of a person having “re-established” himself in that country.) A refugee who has voluntarily re-availed himself of national protection is no longer in need of international protection. He has demonstrated that he is no longer “unable or unwilling to avail himself of the protection of the country of his nationality”.

119. This cessation clause implies three requirements:

- (a) voluntariness: the refugee must act voluntarily;
- (b) intention: the refugee must intend by his action to re-avail himself of the protection of the country of his nationality;
- (c) re-availment: the refugee must actually obtain such protection.

120. If the refugee does not act voluntarily, he will not cease to be a refugee. If he is instructed by an authority, e.g. of his country of residence, to perform against his will an act that could be interpreted as a re-availment of the protection of the country of his nationality, such as applying to his Consulate for a national passport, he will not cease to be a refugee merely because he obeys such an instruction. He may also be constrained, by circumstances beyond his control, to have recourse to a measure of protection from his country of nationality. He may, for instance, need to apply for a divorce in his home country because no other divorce may have the necessary international recognition. Such an act cannot be considered to be a “voluntary re-availment of protection” and will not deprive a person of refugee status.

121. In determining whether refugee status is lost in these circumstances, a distinction should be drawn between actual re-availment of protection and occasional and incidental contacts with the national authorities. If a refugee applies for and obtains a national passport or its renewal, it will, in the absence of proof to the contrary, be presumed that he intends to avail himself of the protection of the country of his nationality. On the other hand, the acquisition of documents from the national authorities, for which non-nationals would likewise have to apply – such as a birth or marriage certificate – or similar services, cannot be regarded as a re-availment of protection.

122. A refugee requesting protection from the authorities of the country of his nationality has only “re-availed” himself of that protection when his request has actually been granted. The most frequent case of “re-availment of protection” will be where the refugee wishes to return to his country of nationality. He will not cease to be a refugee merely by applying for repatriation. On the other hand, obtaining an entry permit or a national passport for the purposes of returning will, in the absence of proof to the contrary, be considered as terminating refugee status. This does not, however, preclude assistance being given to the repatriant-also by UNHCR – in order to facilitate his return.

123. A refugee may have voluntarily obtained a national passport, intending either to avail himself of the protection of his country of origin while staying outside that country, or to return to that country. As stated above, with the receipt of such a document he normally ceases to be a refugee. If he subsequently renounces either intention, his refugee status will need to be determined afresh. He will need to explain why he changed his mind, and to show that there has been no basic change in the conditions that originally made him a refugee.

124. Obtaining a national passport or an extension of its validity may, under certain exceptional conditions, not involve termination of refugee status (see [paragraph 120](#) above). This could for example be the case where the holder of a national passport is not permitted to return to the country of his nationality without specific permission.

125. Where a refugee visits his former home country not with a national passport but, for example, with a travel document issued by his country of residence, he has been considered by certain States to have re-availed himself of the protection of his former home country and to have lost his refugee status under the present cessation clause. Cases of this kind should, however, be judged on their individual merits. 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.

(2) Voluntary re-acquisition of nationality

126. This clause is similar to the preceding one. It applies to cases where a refugee, having lost the nationality of the country in respect of which he was recognized as having well-founded fear of persecution, voluntarily re-acquires such nationality.

127. While under the preceding clause (Article 1 C (1)) a person having a nationality ceases to be a refugee if he re-avails himself of the protection attaching to such nationality, under the present clause (Article 1 C (2)) he loses his refugee status by re-acquiring the nationality previously lost. [17](#)

128. The re-acquisition of nationality must be voluntary. The granting of nationality by operation of law or by decree does not imply voluntary reacquisition, unless the nationality has been expressly or impliedly accepted. A person does not cease to be a refugee merely because he could have reacquired his former nationality by option, unless this option has actually been exercised. 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.

(3) Acquisition of a new nationality and protection

129. As in the case of the re-acquisition of nationality, this third cessation clause derives from the principle that a person who enjoys national protection is not in need of international protection.

130. The nationality that the refugee acquires is usually that of the country of his residence. A refugee living in one country may, however, in certain cases, acquire the nationality of another country. If he does so, his refugee status will also cease, provided that the new nationality also carries the protection of the country concerned. This requirement results from the phrase “and enjoys the protection of the country of his new nationality”.

131. If a person has ceased to be a refugee, having acquired a new nationality, and then claims well-founded fear in relation to the country of his new nationality, this creates a completely new situation and his status must be determined in relation to the country of his new nationality.

132. Where refugee status has terminated through the acquisition of a new nationality, and such new nationality has been lost, depending on the circumstances of such loss, refugee status may be revived.

(4) Voluntary re-establishment in the country where persecution was feared

133. This fourth cessation clause applies both to refugees who have a nationality and to stateless refugees. It relates to refugees who, having returned to their country of origin or previous residence, have not previously ceased to be refugees under the first or second cessation clauses while still in their country of refuge.

134. The clause refers to “voluntary re-establishment”. This is to be understood as return to the country of nationality or former habitual residence with a view to permanently residing there. A temporary visit by a refugee to his former home country, not with a national passport but, for example, with a travel document issued by his country of residence, does not constitute “re-establishment” and will not involve loss of refugee status under the present clause.

(5) Nationals whose reasons for becoming a refugee have ceased to exist

135. “Circumstances” refer to fundamental changes in the country, which can be assumed to remove the basis of the fear of persecution. A mere – possibly transitory – change in the facts surrounding the individual refugee's fear, which does not entail such major changes of circumstances, is not sufficient to make this clause applicable. A refugee's status should not in principle be subject to frequent review to the detriment of his sense of security, which international protection is intended to provide.

136. The second paragraph of this clause contains an exception to the cessation provision contained in the first paragraph. It deals with the special situation where a person may have been subjected to very serious persecution in the past and will not therefore cease to be a refugee, even if fundamental changes have occurred in his country of origin. The reference 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. It is frequently recognized that a person who – or whose family – has suffered under atrocious forms of persecution should not be expected to repatriate. 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.

(6) Stateless persons whose reasons for becoming a refugee have ceased to exist

137. This sixth and last cessation clause is parallel to the fifth cessation clause, which concerns persons who have a nationality. The present clause deals exclusively with stateless persons who are able to return to the country of their former habitual residence.

138. “Circumstances” should be interpreted in the same way as under the fifth cessation clause.

139. It should be stressed that, apart from the changed circumstances in his country of former habitual residence, the person concerned must be *able* to return there. This, in the case of a stateless person, may not always be possible.’

Note on the Cessation Clause¹⁴²

In this note, the Standing Committee of the UNHCR seeks to provide a comprehensive review of the principles relating to the application of the cessation clauses. Again, the different cessation clauses are explained and clarified.

One chapter concerns the ceased circumstances cessation clause. UNHCR points out that for this clause to be applicable, the changes in the country must be fundamental, durable and effective. In determining if these changes are fundamental, all relevant facts must be taken into consideration. Large-scale spontaneous repatriation of refugees does not itself constitute fundamental changes within the meaning of the cessation clause. Furthermore, the fundamental changes must be stable and durable: UNHCR recommends therefore that all developments which would appear to evidence significant and profound changes be given time to consolidate before any decision on cessation is made. A period of twelve to eighteen months should elapse after the occurrence of a profound change should be taken as a minimum for assessment purposes.¹⁴³

Internal Guidelines on the Application of Cessation Clauses¹⁴⁴

In these Internal Guidelines the cessation clauses are in detail examined, taken into account scholarly writings on the subject, case law, the *travaux préparatoires* of the relevant instruments, Conclusions of the Executive Committee and UNHCR's doctrine and practice.

Global Consultations on International Protection¹⁴⁵

During the Global Consultations, many issues regarding the cessation clauses were addressed by states. In the Summary Conclusions the outcome of these discussions is reflected.

As a guiding principle, it is stipulated in this paper that cessation of refugee status should lead to a durable solution. It should not result in people residing in a host state with an uncertain status, nor would cessation necessarily lead to return.

As for the cessation determination of refugee status, it states that if in the course of the asylum procedures, there are fundamental changes in the country of origin, the asylum authorities should bear the burden of proof that such changes are indeed fundamental and durable.

¹⁴² *Note on the Cessation clauses*. UNHCR, Standing Committee, 30 May 1997, EC/47/SC/CRP.30

¹⁴³ *Ibid.* Para. 20-21

¹⁴⁴ *Guidelines on the application of cessation clauses*. UNHCR, Inter-Office/Field-Office Memorandum No. 17/99, 26 April 1999

¹⁴⁵ Lisbon Experts Roundtable Global Consultations on International Protection, 3-4 May 2001, EC

3. EUROPEAN UNION

Refugee definition

In the latest available version of the Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons who otherwise need International Protection¹⁴⁶. Article 13 of the Proposal, which is currently under discussion at Council level, now reads:

“1. [...] A third country national or a stateless person shall cease to be a refugee if he or she:

- (a) has voluntarily re-availed himself or herself of the protection of the country of nationality; or
- (b) having lost his or her nationality, has voluntarily re-acquired it; or
- (c) has acquired a new nationality, and enjoys the protection of the country of his or her new nationality; or
- (d) has voluntarily re-established himself or herself in the country which he or she left or outside which he or she remained owing to fear of persecution; or
- (e) can no longer, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, continue to refuse to avail himself or herself of the protection of the country of nationality, unless there are compelling reasons arising out of previous persecution for refusing to avail himself or herself of the protection of the country of his or her nationality;
- (f) being a person with no nationality, he or she is able, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, to return to the country of former habitual residence, unless there are compelling reasons arising out of previous persecution for refusing to avail himself or herself of the protection of the country of his or her former habitual residence;

In considering sub-paragraph (e), Member States shall have regard to whether the change of circumstances is of such a significant and durable nature that the refugee's fear of persecution can no longer be regarded as well-founded.

2. (deleted)”

The text of the Proposal is more or less corresponding with Article 1 C of the Convention. However, this definition is still under discussion and might undergo substantial changes until the final adoption of the Directive.

¹⁴⁶ Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons who otherwise need International Protection¹⁴⁶. 2001/0207 (CNS), 25 September 2002. See Article 13