

7.2 Summary Conclusions: exclusion from refugee status

Expert roundtable organized by the United Nations High Commissioner for Refugees and the Carnegie Endowment for International Peace, hosted by the Luso-American Foundation for Development, Lisbon, Portugal, 3–4 May 2001



The first day of the Lisbon expert roundtable addressed the question of the exclusion clauses of the 1951 Convention Relating to the Status of Refugees, basing the discussion on a background paper by Professor Geoff Gilbert, University of Essex, ‘Current Issues in the Application of the Exclusion Clauses’. In addition, roundtable participants were provided with the UNHCR Guidelines on the Exclusion Clauses and written contributions from the Government of the Netherlands and the Government of Turkey. Subsequently, written contributions were received from government experts of Canada, France, Turkey, and the United Kingdom and will be reflected in the report. Participants included thirty-two experts from twenty-five countries, drawn from governments, NGOs, academia, the judiciary, and the legal profession. Professor Georges Abi-Saab, former Justice of the International Criminal Tribunal for the former Yugoslavia, moderated the discussion.

In view of the limited time available, the discussion focused on those aspects of the background paper and the UNHCR Guidelines that were considered to be in need of clarification. The paragraphs below, while not representing the individual views of each participant or necessarily of UNHCR, reflect broadly the issues emerging from the discussion.

General considerations

1. In the wake of the Second World War, the drafters of the Convention contemplated certain types of crime to be so horrendous that they justified the exclusion of the perpetrators from the benefits of refugee status. In this sense, the perpetrators are considered ‘undeserving of refugee protection’. Other reasons for the exclusion clauses include the need to ensure that fugitives from justice do not avoid prosecution by resorting to the

protection provided by the 1951 Convention, and to protect the host community from serious criminals. The purpose of the exclusion clauses is therefore to deny refugee protection to certain individuals while leaving law enforcement to other legal processes.

2. The interpretation and application of Article 1F should take an 'evolutionary approach', and draw on developments in other areas of international law since 1951, in particular international criminal law and extradition law as well as international human rights law and international humanitarian law.
3. Refugee law, extradition, international criminal law, and international human rights law provide complementary principles and mechanisms to bridge the tension between the need to avoid impunity and the need for protection.
4. Exclusion clauses are of an exceptional nature and should be applied scrupulously and restrictively because of the potentially serious consequences of exclusion from refugee status for the individual concerned.

Article 1F(a): crimes against peace, crimes against humanity, war crimes

5. Article 1F(a) is a dynamic provision to be interpreted in the light of a number of different rapidly evolving sources of international criminal law.
6. The Rome Statute establishing the International Criminal Court and the Statutes of the two ad hoc tribunals (the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda), constitute the latest comprehensive instruments informing the interpretation of Article 1F(a) crimes. These, together with provisions in other international humanitarian law instruments, clarify the interpretation of crimes covered by Article 1F(a). The forthcoming publication by the International Committee of the Red Cross of a study on customary rules of international humanitarian law may be another source of interpretation.

Article 1F(b): serious non-political crimes

7. State practice on the interpretation of the term 'serious non-political offence' in Article 1F(b) varies.
8. It is difficult to achieve consensus on the precise meaning of 'political', not least because a certain margin of interpretation of the term remains a sovereign prerogative. In this context, it should be noted that extradition treaties specify that certain crimes, notably certain terrorist acts, are

to be regarded as non-political, although such treaties typically also contain non-persecution clauses.

9. It was acknowledged that there is no generally accepted definition of terrorism. Many perpetrators of terrorist acts may fear prosecution and not persecution, and so would in fact not qualify for inclusion. If they did, Article 1F(b) would be sufficient to exclude them in most instances.
10. The context, methods, motivation, and proportionality of a crime to its objectives are important in determining whether it is political or not. The 'predominance' test (i.e. whether the offence could be considered to have a predominantly political character and in this sense might be proportionate to the political objective) is used in most jurisdictions to define 'political' crimes.
11. A 'serious' offence is one that would on the facts attract a long period of imprisonment, and should include direct and personal involvement. The term 'serious' is also linked to the principle of proportionality, the question being whether the consequence (eventual return to persecution) is proportionate to the type of crime that was committed. Each case must be viewed on its own facts, calling into question the existence of automatic bars to refugee status based on the severity of any penalty already meted out.
12. There was considerable debate on the question of proportionality and balancing. In considering this question:
 - (i) State practice indicates that the balancing test is no longer being used in common law and in some civil law jurisdictions.
 - (ii) In these jurisdictions, other protection against return is, however, available under human rights law.
 - (iii) Where no such protection is available or effective, 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 application of exclusion should take into account fundamental human rights law standards as a factor in applying the balancing test.The meeting did not reach consensus on point (iii), although some support for it was expressed. It is suggested that this be examined further at the second roundtable in the context of the discussion on Article 33 of the 1951 Convention.

Article 1F(c): acts contrary to the purposes and principles of the United Nations

13. Article 1F(c) is not redundant, although most exclusion cases can be covered by the other provisions. Some States have used it as a residual category, for instance, in relation to certain terrorist acts or trafficking

in narcotics. The exclusion of terrorists under Article 1F(c) attracted considerable debate. There was, however, no agreement on the types of crimes Article 1F(c) would usefully cover.

14. In view of its vague and imprecise language, it should be interpreted restrictively and with caution. It should be limited to acts contrary to the purposes and principles of the United Nations, as defined by the UN.

Inclusion before exclusion

15. A holistic approach to refugee status determination should be taken, and in principle the inclusion elements of the refugee definition should be considered before exclusion. There are a number of reasons of a policy, legal, and practical nature, for doing this:
 - exclusion before inclusion risks criminalizing refugees;
 - exclusion is exceptional and it is not appropriate to consider an exception first;
 - non-inclusion, without having to address the question of exclusion, is possible in a number of cases, thereby avoiding complex issues;
 - inclusion first enables consideration to be given to protection obligations to family members;
 - inclusion before exclusion allows proper distinction to be drawn between prosecution and persecution;
 - textually, the 1951 Convention would appear to provide more clearly for inclusion before exclusion, such an interpretation being consistent in particular with the language of Article 1F(b); and
 - interviews which look at the whole refugee definition allow for information to be collected more broadly and accurately.
16. 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 of the criminal proceedings would then inform the refugee status determination decision.

Standard of proof

17. Exclusion proceedings do not amount to a full criminal trial. In determining the applicable standard of proof in exclusion procedures, 'serious reasons' should be interpreted as a minimum to mean clear evidence sufficient to indict, bearing in mind international standards. Appropriate

procedural safeguards derived from human rights law should be put in place in view of the seriousness of the issues and of the consequences of an incorrect decision. In particular, the benefit of the doubt should be available in exclusion cases.

18. Association with or membership of a group practising violence or committing serious human rights abuse is, *per se*, not sufficient to provide the basis for a decision to exclude. However, depending on the nature of the organization, it is conceivable that membership of a certain organization might be sufficient to provide a basis for exclusion in some instances.
19. Expertise of a very special nature is frequently required where exclusion questions arise. More attention should be given to training of decision makers in laws relevant to the question of exclusion, particularly in international human rights law and international criminal law.

Defences

20. In general, the defences as outlined in the UNHCR Guidelines and which are normally available under national and international criminal law should be available in the context of examining the applicability of the exclusion clauses. The absence of *mens rea* is not a defence as such, but indicates the lack of an element of the offence.
21. There is no room for the defence of superior orders in considering the applicability of the exclusion clauses. Duress, on the other hand, which is a different defence, may apply. The question of whether amnesty laws might raise a defence would depend on the facts of the particular case.

Family members

22. Where a family head is excluded from refugee protection, family members' qualification for refugee status should be considered in their own right. There should be no exclusion by association.

Minors

23. Under Article 40(3)(a) of the Convention on the Rights of the Child, States have an obligation to set a minimum age for criminal liability. Children below that age must not be considered for exclusion.
24. Minors should not be excluded where the necessary *mens rea* cannot be established.

25. As noted in the UNHCR Guidelines on Exclusion, even if Article 1F is applied to a child, s/he should be protected against *refoulement*.

Exclusion in mass influx situations

26. In situations of mass influx, there are two key guiding principles:
 (i) the exclusion clauses apply in mass influx situations; and
 (ii) exclusion needs to be examined in individual procedures.
27. A clear distinction should be made between operational arrangements to separate armed elements from the refugee population on the one hand and individual procedures in relation to certain suspected groups for the purpose of exclusion from refugee status on the other.
28. Armed elements, while protected under the relevant provisions of international humanitarian law, are not to be considered as asylum seekers unless they lay down their arms. Their identification and separation is the responsibility of the host State but it often presents a plethora of operational problems, the resolution of which is only successful if the international community, including the Security Council, provides the necessary support, including a safe and secure environment.
29. The issue of those excluded from refugee status in mass influx situations should also be addressed, as developing countries confronted with these problems do not have the capacity or resources to deal with these cases.
30. More in-depth examination and analysis is required of the application of the exclusion clause in situations of mass influx, including on the relevance of inclusion before exclusion where there is *prima facie* recognition of refugees, as well as other substantive, procedural, and evidentiary problems. In view of the policy, legal, and operational aspects of these problems, UNHCR should undertake further study of the subject in cooperation with States, NGOs, and scholars.

Final observations

31. There is a need to examine further the relevance of exclusion in the context of those benefiting from *non-refoulement* as a principle of customary international law. This issue could be discussed at the Cambridge roundtable on Article 33.
32. Non-returnability under human rights law is much wider than the protection afforded under the 1951 Convention. Such non-returnability could be available to those excluded from refugee status.

33. The exclusion clauses in the 1951 Convention are exhaustively enumerated. No other exclusion provisions can therefore be incorporated into national legislation.
34. In developing the interpretation and application of the exclusion clauses, the central tenet must remain protection-oriented while ensuring that fugitives from justice do not avoid prosecution by resorting to the protection provided by the 1951 Convention. Where appropriate, States should prosecute excludable persons who are not returned in accordance with international and national law. The goal should be towards developing a normative system that integrates the different applicable legal regimes in a coherent and consistent manner.