

BACKGROUND PAPER ON THE ARTICLE 1 F EXCLUSION CLAUSES

I. INTRODUCTION

1. During its eighth meeting in May 1997, the Executive Committee considered a Note on Exclusion Clauses (EC/47/SC/CRP.29). The Note examined the content of the exclusion clauses in Article 1 F of the 1951 Convention, and reviewed the rationales and general principles governing their application. At its Planning Meeting in December 1997, the Standing Committee requested UNHCR to present an oral report on the exclusion clauses to its tenth meeting in June 1998.

2. As the exclusion clauses are integral to status determination procedures and to asylum, it is appropriate for the Standing Committee to signal its continuing interest in this important subject. This background paper looks briefly at the function of the exclusion clauses in Article 1 F of the 1951 Convention, their contemporary significance, and some challenges presented by their application.

II. NATURE AND FUNCTION OF ARTICLE 1 F ON EXCLUSION

3. Article 1 F applies in those exceptional situations where there are "serious reasons for considering" that an individual has committed crimes against peace, war crimes, crimes against humanity, serious non-political crimes, or acts contrary to the purposes and principles of the United Nations. Such an offender is deemed not to deserve the special protection accorded under the international regime applicable to

refugees, and is therefore precluded from it although he/she would otherwise fulfil the criteria for refugee status.

III. CONTEMPORARY CONTEXT OF ARTICLE 1 F ON EXCLUSION

4. Exclusion has received heightened attention in a global environment of internal conflicts combined with appalling atrocities and forced movements of both persecutors and their victims. In the context of the International Criminal Tribunals for the former Yugoslavia and Rwanda, UNHCR has been called upon to assist in identifying and facilitating access to witnesses or suspects who have approached the Office as asylum-seekers. UNHCR's policy is to fully collaborate with these Tribunals while maintaining independent fidelity to principles which govern the handling of individual cases.

5. In some instances, increased interest in the exclusion clauses has coincided with a restrictive asylum climate, and with an inclination to disregard due process and other rights of asylum-seekers and genuine refugees. In other cases, notably those involving suspected terrorists, there has been a tendency to resort to broad-ranging legislative responses outside the refugee regime, without fully exploring the capacity of the exclusion principles to identify and disqualify undeserving cases.

IV. SOME AREAS OF CURRENT INTEREST

6. The following discussion identifies some practical challenges which arise in the field of exclusion, and points to issues which UNHCR and States should address if the exclusion clauses are to function more effectively.

A. Exclusion in mass influx situations

7. Circumstances of mass influx have presented particular dilemmas for the practical application of Article 1 F exclusion. The recognition of refugee status on a *prima facie* basis or under the 1969 OAU Convention means, in some emergency situations, that perpetrators of excludable crimes will initially receive a measure of protection and assistance along with the victims of persecution. In these situations, the humanitarian imperative of preserving life dictates that admission to safety and material assistance has to take precedence over the need to identify those who do not deserve refugee status. In principle, however, the process of applying the exclusion clauses to those enjoying *prima facie* recognition should begin as soon as practicable in any refugee situation. Even in mass influxes, exclusion may only be properly explored within the framework of individual status determination.

8. In some mass influx situations, the process of applying exclusion clauses is likely to have major logistical, material, and even security implications, and cannot be contemplated by UNHCR without extraordinary support from the international community. Procedural problems of proof, credibility, confidentiality and security are also magnified in the mass influx context. Considering that the application of exclusion principles often has direct consequences for maintaining the exclusively civilian character of refugee camps, the exclusion process should be given at least equal priority with the tasks of providing humanitarian assistance to refugees, despite the constraints in mass influx situations.

B. Exclusion and terrorism

9. UNHCR shares the concern of States with regard to international terrorism, and has consistently maintained that the institution of asylum should not provide refuge for persons who commit or are accomplices to acts of terror. In its dialogue with States on this issue, UNHCR has emphasized that any linkage between refugees and terrorists is unwarranted, and is bound to prove prejudicial to the institution of asylum. UNHCR is concerned that the 1951 Convention should not be portrayed as an obstacle to international efforts to combat terrorism. On the contrary, it is clear that the proper application of Convention provisions, including Articles 1 F, 2, 32 and 33, should deny access to asylum for persons involved in terrorist acts.

10. Despite the lack of a generally accepted definition of terrorism, a number of international Conventions have identified various prohibited acts broadly described as such.¹ Persons who participate in crimes covered by these Conventions are, in principle, excludable from refugee status, though the basis for exclusion - i.e. the subsection of Article 1 F which is specifically applicable - will depend on variables such as the nature and context of the offence.

11. The exclusion of terrorists under Articles 1 F(b) and 1 F(c) has often attracted a considerable measure of debate. Questions have arisen regarding whether a terrorist

¹ See, for example: the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft; the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft; the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.

may avoid exclusion under Article 1 F (b) by claiming "political" motives. In response to such issues, a variety of tests have been devised which may result in the exclusion of terrorists regardless of the political nature of their objectives. These include the tests of causation and proportionality under which exclusion applies where the crime does not bear a direct causal relationship to the political object, or where the atrocious character of a terrorist act is deemed out of proportion to the alleged political objective.

12. Generally speaking, acts of terrorism may fall under any one of the categories of excludable crimes. Considering that the principles underlying Articles 1 F(a) and 1 F(b) have been subject to more thorough jurisprudential interpretation than those relating to Article 1 F(c), recourse to 1 F(a) and 1 F(b) makes for analytical clarity, avoids the need for unduly expansive interpretations of "purposes and principles of the United Nations", and minimizes the possibility of abuse of the exclusion clauses.

13. With regard to Article 1 F(c), UNHCR has consistently maintained that this clause applies to persons acting on behalf of States because the United Nations' purposes and principles² are intended to be a guide for member States in their relations with each other.

14. UNHCR acknowledges that in a world of rapid and radical change, acts which warrant exclusion from refugee status are bound to assume new and challenging forms with time. UNHCR is therefore aware of the need periodically to review its interpretation of the exclusion clauses, in the light of current international

² These are set forth in Articles 1 and 2 of the United Nations Charter.

developments. In this context, for example, pronouncements by the General Assembly on such matters as what specific acts should be understood as contrary to the purposes and principles of the United Nations will come to influence the interpretation of Article 1 F (c) in refugee status determination procedures.

C. Procedural issues and other areas of interest

15. (i) The need to consider inclusion before exclusion, and to avoid the use of Article 1 F to decide on the admissibility of a refugee claim: UNHCR's understanding of established doctrine is that inclusion and exclusion are integral aspects of the status determination process. Both should be regarded as part of a comprehensive examination of all relevant facts underlying a refugee claim. Facts justifying an examination of the applicant's excludability will normally emerge in the course of the refugee status determination process, and may then be referred to during the exclusion phase of the case. Thus, "inclusion before exclusion" gives full effect to the applicant's right to be heard and ensures that exclusion decisions are made in accord with standards of fairness and natural justice. The practice of employing exclusion as a test of admissibility is inconsistent with the exceptional nature of exclusion clauses, and risks prejudicing the careful weighing of all relevant factors which should be integral to any exclusion decision.

(ii) The "balancing test": This test has been developed in relation to Article 1 F(b). In exclusion cases, a number of contrasting factors need to be assessed prior to a just decision. These include eligibility issues and, where applicable, the asylum-

seeker's alleged criminal acts. The process of weighing the seriousness of the harm feared against the gravity of a criminal offence is referred to as the "balancing test". A finding for exclusion would normally be justified where this weighing process leads to a conclusion that an individual's criminal character overrides the applicant's need for refugee protection.³ Where crimes against peace, war crimes, crimes against humanity and acts contrary to the purposes and principles of the United Nations are in issue, a "balancing test" is superfluous because the criminal element obviously supersedes the perpetrator's character as a genuine refugee. In cases involving "serious non-political crimes" under Article 1 F(b), however, the weight of the criminal element is not as self-evident as it is in Article 1 F(a) and 1 F(c) cases because "seriousness" is a matter of degree. Hence the view that in cases falling under Article 1 F(b), a judicious balance must be struck between the nature and consequences of the crime in question and the persecution feared by the applicant.

(iii) Implications of exclusion for family members: The exclusion of a head of family does not *per se* affect the possibility that his/her dependants may fulfil the refugee criteria. The spouse and dependants of an excluded person can still establish independent refugee claims even where their fear of persecution is a result of their relationship to a perpetrator of excludable acts, and even if the facts substantiating their refugee claims are similar to those presented by the excluded head of family.

³ In the words of the President of the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (1951), "When a person with a criminal record sought asylum as a refugee, it was for the country of refuge to strike a balance between the offences committed by that person and the extent to which his fear of persecution was well-founded". See Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the 29th meeting, United Nations document A/Conf.2/SR.29, at page 23.

Family members of excluded persons should therefore be given an opportunity to individually establish their claims.

(iv) The exclusion of minors: The exclusion of minors should be governed not only by general principles of exclusion, but also by rules pertaining to the special status of children under national and international law. Procedures for the status determination and possible exclusion of minors should also recognize their vulnerable status and special needs.

D. Exclusion from refugee status and other human rights protection

16. Exclusion from refugee status does not mean disqualification of the individual from all forms of protection under international or national law. The excluded person may still be able to turn for physical protection to relevant municipal and international instruments. As to the latter, the notable examples are the protections against *refoulement* afforded by Article 7 of the 1966 International Covenant on Civil and Political Rights, Article 3(1) of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Article 3 of the 1953 European Convention for the Protection of Human Rights and Fundamental Freedoms and Articles 5(2) and 22(8) of the 1969 American Convention on Human Rights.

17. These provisions have no direct implications for the international protection of refugees as such. They nevertheless create practical dilemmas when States are obliged to host an excluded person under the protection of human rights principles.

Questions then arise, for example, as to what status should be accorded to the excluded person in the receiving country. From UNHCR's standpoint, it is important to maintain a clear differentiation between refugee protection and human rights protection of other sorts. Protection against return under, for example, Article 3 of the Torture Convention, does not confer refugee status on the individual who fails to qualify for or is excluded from refugee status.

V. SUMMARY AND CONCLUSION

18. A person excluded from refugee status is first determined to possess a well-founded fear of persecution, but is nevertheless rejected on account of his/her involvement in certain specified criminal acts. Exclusion principles help to preserve the integrity of the asylum institution by denying the benefits of asylum - including, in some cases, the protection of the *non-refoulement* principle - to persons whose criminal conduct falls within Article 1 F. Given the exceptional nature and the grave consequences of exclusion, the principles governing their application seek to ensure that the due process and other rights of asylum-seekers are respected.

19. Interest in the exclusion clauses has been amplified by a number of international developments including the proliferation of internal conflicts and the functioning of international criminal Tribunals. The practical application of exclusion principles present conceptual and procedural challenges in several contexts, notably in mass influx situations, in cases where acts of terrorism are at issue, and in situations where other human rights protections apply. Much cooperation is required to achieve consistency and maximum efficacy in the application of exclusion principles, and in the procedures for exclusion.