

**ECRE**

EUROPEAN COUNCIL  
ON REFUGEES AND EXILES

CONSEIL EUROPEEN  
SUR LES REFUGIES  
ET LES EXILES

PP1/03/2004/Ext/CA

**POSITION ON EXCLUSION FROM REFUGEE STATUS**

**BY**

**THE EUROPEAN COUNCIL ON REFUGEES AND EXILES**

**March 2004**

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## **EXECUTIVE SUMMARY AND KEY RECOMMENDATIONS**

1. States have recently intensified their efforts in combating international terrorism. Growing internal security concerns are added to an already unfavourable climate vis-à-vis refugees and asylum seekers in many European asylum countries. This focus on international terrorism and national security has created an environment in which States seem to be searching for new ways to prevent asylum seekers from accessing and gaining permission to reside in their territory. As a result, they seem to contemplate the use of the exclusion clauses more often, with sometimes erroneous beliefs in their object and scope. It is one of ECRE's concerns that in times of numerous challenges to the asylum system, misuse of the exclusion clauses does not become another avenue by which refugees are denied access to international protection.

2. The object and purpose of the 1951 Refugee Convention consists in the protection of those who meet the refugee definition contained in the inclusion clause (Article 1 A). The exclusion clauses are thus of an exceptional nature, limiting in fact the purview of a human rights provision. For this reason, and because of the potentially serious consequences of exclusion from refugee status for the individual concerned, the exclusion clauses need to be interpreted restrictively and after extreme caution has been exercised.

3. Although not the object of the Refugee Convention, complementary forms of protection are a part of many national asylum systems. ECRE's position is that a complementary protection status is needed in Europe to protect those people whose reasons for flight are beyond a full and inclusive interpretation of the 1951 Refugee Convention, but who nevertheless require international protection. Since refugee protection within the ambit of the 1951 Convention and complementary protection have the same aim of sheltering those who flee human rights violations, ECRE believes that the concept of exclusion applies by analogy to complementary protection status as well.

4. The rationale of Article 1 F is that refugees who are responsible for the most serious crimes as defined in paragraphs (a) to (c) do not deserve international protection under the 1951 Refugee Convention, and that the refugee protection regime should not shelter serious criminals from justice. Since the commission of such crimes may themselves amount to acts of persecution, the perpetrators should not benefit from refugee protection. By excluding them from refugee status, the integrity of the international system of refugee protection shall be preserved. Thus, the exclusion clauses must be understood as a reinforcement of the central purpose of international refugee law, namely the protection of those fleeing persecution. It is not their main aim to protect the host country from serious criminals, as Articles 32 and 33 (2) of the Refugee Convention provide for effective measures against those who constitute a danger to the national security and public order of the host country (prosecution or expulsion).

5. ECRE is concerned about the apparent confusion occurring from time to time as regards the concept of exclusion and cases traditionally covered by Articles 32 and 33 (2). While the latter provide for the possibility to strip someone of his or her protection against non-*refoulement*, the person remains a refugee who deserves international protection. Exclusion on the other hand denies the protection of the Convention to all who fall within its ambit, the excludee is thus not a refugee. As a consequence to the exceptionality of this notion, it must be dealt with strictly within the terms of Article 1 F, which exhaustively lists all possible grounds for exclusion and to which, in accordance with Article 42 of the Refugee Convention, no reservations are possible. In ECRE's view, consideration of the national security interests of the host country is not appropriate within the scope of Article 1 F since Articles 32 and 33

(2) of the Convention deal adequately with these legitimate concerns of states. Article 1 F is also clearly to be differentiated from the concept of cessation, as entailed in Article 1 C of the Refugee Convention which exhaustively lists the conditions under which refugee status *ceases* because the refugee has, for instance, voluntarily re-availed himself of the protection of the country of origin.

6. It is clear that any perception that serious criminals and “terrorists” may avail themselves of asylum protection is contrary to the purposes of the Refugee Convention and the interests of refugees. However, such concerns must be balanced with the need to ensure that procedural fairness guarantees in the refugee status determination process are not denied to persons suspected of serious crimes and “terrorist” activity, and that individuals are not incorrectly excluded. The starting point must be that refugees themselves are by definition escapees from persecution and violence rather than perpetrators of terror.

7. ECRE recommends that the focus under Article 1 F be on the underlying offences, not on the question whether they are “terrorist”. This description is simply adjectival and adds no substantial value. What has to be assessed is not whether an applicant’s acts qualify as “terrorist” but whether s/he meets the criteria set out in Article 1 F. In this respect, ECRE believes that most so-called terrorist offences are appropriately dealt with under paragraph (a) and particularly (b). Whenever possible, recourse should be made to these provisions. Any unduly expansive interpretation of the ‘purposes and principles of the United Nations’ referred to in Article 1 F (c) should be avoided to prevent abuse of the exclusion clauses. Additionally, exclusion should only occur after consideration of the asylum seeker’s personal involvement in, and personal responsibility for, specific excludable crimes.

8. The relationship between the inclusion clause in Article 1 A (2) and the exclusion clauses in Article 1 F of the 1951 Convention is crucial for the consideration of the latter clauses. A determination with regard to inclusion – the question of an applicant’s well-founded fear of persecution – is generally a prerequisite to a principled application of exclusion. Using exclusion as a test of admissibility to a full examination of the need for protection is inconsistent with the exceptional nature of the exclusion clauses and can prejudice the decision-maker’s capacity to come to a sound conclusion. ECRE believes that if a case reveals an issue under the exclusion clause, a holistic approach to refugee status determination would require that inclusion and exclusion form integral parts of the asylum procedure in whatever sequence they are examined. Finally, ECRE is of the view that the decision-making process should, as a corollary of the idea of proportionality in the restriction of fundamental rights, entail an inherent balancing between the nature of the alleged crime and the likely persecution feared by the applicant, which requires an understanding of all the circumstances of the case.

9. Safeguards of procedural fairness, while essential in all status determination proceedings, are particularly crucial in the case of the application of the exclusion clauses. As the asylum procedure invariably takes on the character of a quasi-criminal investigation, certain rights typically triggered in criminal proceedings, such as the right to remain silent, the presumption of innocence and rights related to the defence are entailed. Notwithstanding the applicant’s general obligations to assist in establishing the facts of the asylum claim, the burden of proof for establishing the necessary evidence for exclusion lies with the state. Due to the complex nature of the merits of exclusion cases, the applicability of Article 1 F cannot be appropriately assessed in admissibility or accelerated procedures. ECRE opposes particularly the concept of

'*prima facie*' exclusion. Instead it recommends that cases suspected of falling under the exclusion clauses be prioritised within the regular procedure with all legal safeguards.

10. The examination of the exclusion clauses requires a high degree of legal and factual expertise and specialised knowledge on the part of the determining authorities in order to give due consideration to the complexities involved and the potentially severe consequences for the applicant. ECRE calls upon states to develop special capacities for responding to the specific requirements of a proper assessment of the exclusion clauses. The establishment of especially trained exclusion units within the competent authority for refugee status determination may be a way to allow states to concentrate their expertise and take well-researched decisions on exclusion. Nevertheless, while taking into account the different character of the asylum procedure when the exclusion clauses are assessed, the establishment of 'special exclusion procedures' should not infringe on the principle of the presumption of innocence equally enshrined in relevant international instruments. States should elaborate clear guidelines for those examining applications for asylum, which apply at the moment in which an issue of criminal conduct arises in a particular case. Only skilled and highly trained adjudicators should be called upon to undertake the consideration of the exclusion clauses.

11. ECRE believes that the State, which finds an asylum applicant to be excludable under Article 1 F, should initiate criminal proceedings against the individual for the committed crime. For some of the crimes under Article 1 F (a) or (c), international law has established universal jurisdiction. Furthermore, for a number of crimes, the principle *aut dedere aut judicare* is embedded in a series of relevant multilateral Conventions. ECRE calls therefore upon states to introduce the necessary legislative means in order to exercise jurisdiction over the most serious crimes in accordance with recognised principles of international law. Alternatively and in line with the above-mentioned principle to extradite or to prosecute, a person who is properly excluded from refugee status may – provided no other human rights provisions conflict therewith – be returned to his or her home country or another country by way of extradition in order to face justice there.

12. In the case that Article 1 F is applied, wider international human rights obligations provide the individual protection against the return to torture or grave harm. Thus, in the situation where an excludable applicant for asylum cannot be sent back to his/her country of origin due to international human rights provisions, the host country has no jurisdiction over the allegedly committed crimes, and no other country requests his/her extradition, ECRE believes that such persons should benefit from some form of, albeit limited legal status. This takes into account that while undeserving of international refugee protection, these individuals require other international and national human rights protection.

## I. Introduction

1. After the end of the cold war, major international and internal conflicts in various parts of the world (Balkans, Rwanda, Afghanistan) have caused tremendous human suffering among the civilian population with millions fleeing their homes. Throughout these conflicts and refugee movements, the international community witnessed the commission of some of the most serious crimes, such as war crimes and crimes against humanity. The presence of perpetrators of these crimes among the refugee population resulted in a more frequent consideration of Article 1 F of the 1951 Refugee Convention, referred to as the exclusion clauses, which stipulates that persons responsible for the same crimes that generate refugee movements shall not benefit from international refugee protection.

2. At the same time, these conflicts have had an important impact on the development of international law. The decision to set up two ad hoc tribunals, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), paved the way for the establishment of the International Criminal Court (ICC). The respective statutes, rules and jurisprudence of these courts constitute an invaluable source for the interpretation of the exclusion clauses.

3. More recently, States have intensified their efforts in combating international terrorism. Growing internal security concerns are added to an already unfavourable climate vis-à-vis refugees and asylum seekers in many European asylum countries. The focus on international terrorism and national security has created an environment in which States seem to be searching for new ways to prevent asylum seekers from accessing and gaining permission to reside in their territory. As a result, they seem to contemplate the use of the exclusion clauses more often, with sometimes erroneous beliefs in their object and scope. It is one of ECRE's concerns that in times of numerous challenges to the asylum system, misuse of the exclusion clauses does not become another avenue by which refugees are denied access to international protection.

4. Exclusion has been the subject of research studies, discussions at governmental and non-governmental levels, as well as academic writings.<sup>1</sup> This position paper on exclusion from refugee status is the result of consultation and dialogue between the 78 refugee assisting NGOs across Europe who are members of ECRE. It aims to offer guidance to member agencies and other organisations and practitioners active in the legal defence of asylum seekers and refugees, as well as to governments and intergovernmental organisations. It complements ECRE's position on Article 1 of the 1951 Refugee Convention.<sup>2</sup>

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<sup>1</sup> See, for instance, Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, UNHCR 2003 (hereinafter: UNHCR Background Note), UNHCR Executive Committee, Standing Committee sessions of 1997 (8<sup>th</sup> meeting) and 1998 (10<sup>th</sup> meeting); UNHCR Global Consultations on International Protection, Lisbon Expert Roundtable (May 2001), Summary Conclusions – Exclusion from Refugee Status, UNHCR Doc. EC/GC/01/2Track/1 (hereinafter UNHCR Lisbon Roundtable); Lawyers Committee for Human Rights, Research and Advocacy Project *Safeguarding the Rights of Refugees under the Exclusion Clauses* in: IJRL Vol. 12 Special Supplementary Issue 2000 Exclusion from Protection, and *Refugees, Rebels and the quest for justice, 2002*; P.J van Krieken (ed.), *Refugee Law in Context: The Exclusion Clause* (The Hague 1999).

<sup>2</sup> ECRE, Position on the Interpretation of Article 1 of the Refugee Convention (September 2000).

## II. The Exclusion Clauses in Context

### A. Legal Sources

5. The 1948 Universal Declaration of Human Rights contains in its Article 14 (2) a first exclusion clause. Pursuant to Article 14 (1), *everyone has the right to seek and to 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.*

6. Paragraph 7 (d) of the 1950 Statute of the Office of the United Nations High Commissioner for Refugees states that *the competence of the High Commissioner as defined in paragraph 6 shall not extend to a person:*

*d) in respect of whom, there are serious reasons for considering that he has committed a crime covered by the provisions of treaties of extradition or a 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 on Human Rights.*

7. While clearly influenced by Article 14 (2) of the Universal Declaration and Paragraph 7 (d) of the UNHCR Statute, the negotiating parties at the Geneva Conference relating to the Status of Refugees took a more specific approach for the purposes of an international treaty, the wording of which is generally considered as more authoritative.<sup>3</sup> According to Article 1 F of the 1951 Convention Relating to the Status of Refugees, *the Provisions of this Convention shall not apply to any persons with respect to whom there are serious reasons for considering that:*

*(a) he has committed a crime against peace, a war crime, or a crime against humanity as defined in the international instruments drawn up to make provision in respect of such crimes;*

*(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;*

*(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.*

### B. Rationale and Scope

8. The rationale of Article 1 F is that refugees who are responsible for the most serious crimes as defined in paragraphs (a) to (c) do not deserve international protection under the 1951 Refugee Convention, and that the refugee protection regime should not shelter serious criminals from justice.<sup>4</sup> Since the commission of such crimes may themselves amount to acts of persecution, the perpetrators should not benefit from refugee protection. By excluding them from refugee status, the integrity of the international system of refugee protection shall be preserved. Thus, the exclusion clauses must be understood as a reinforcement of the central purpose of international refugee law, namely the protection of those fleeing persecution.

9. It is hence not the main aim of the exclusion clauses to protect the host community from serious criminals.<sup>5</sup> Articles 32 and 33 (2) of the Refugee Convention provide for effective measures against those who constitute a danger to the national security and public order of the

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<sup>3</sup> See UNHCR Background Note, para. 20.

<sup>4</sup> See UNHCR Lisbon Roundtable, para. 1.

<sup>5</sup> Article 1F (b), however, also has the aim to protect the community of a receiving country from the danger of admitting a refugee who has committed a serious common crime. See UNHCR Handbook, para. 151.

host country (prosecution or expulsion). Article 32 applies to recognised refugees “lawfully in the territory”, stipulating that they shall be expelled only “in pursuance of a decision reached in accordance with due process of law” save where “compelling reasons of national security” require otherwise.<sup>6</sup> Procedural safeguards apply to the decision to expel, such as the refugee must be given a reasonable period of time within which to seek entry to another State. Importantly, the person remains a refugee if already recognised. Article 33 (2) provides for the withdrawal of the protection of the non-*refoulement* principles where there are reasonable grounds for considering that the refugee is “a danger to the security of the country in which he is, or who,...., constitutes a danger to the community of that country.” Because of the severity of such a decision, the procedural protections set in Article 32 should be implied as applicable. Even if Articles 32 and 33 (2) are applied, however, and the non-*refoulement* protection is lifted from a refugee, wider international human rights obligations provide him or her protection against the return to torture or grave harm.<sup>7</sup>

10. Article 1 F is also clearly to be differentiated from the concept of cessation, as entailed in Article 1 C of the 1951 Refugee Convention. Article 1 C exhaustively lists the conditions under which refugee status *ceases* because the refugee has, for instance, voluntarily re-availed himself of the protection of the country of origin or can no longer refuse to avail himself of that protection due to a permanent change in circumstances. The commission of a crime in the host country should thus under no circumstances lead to the cessation of refugee status. Articles 32 and 33 (2) will usually govern the treatment of those rightfully recognised as refugees. It is fathomable that in accordance with general principles of administrative law refugee status may be *cancelled* where it is subsequently revealed that the status should not have been granted in the first place since facts come to light later which would have made one of the exclusion clauses applicable. In these cases, the act of cancellation rectifies an earlier mistake and has therefore an *ex tunc* effect, i.e., the person has in fact never been a refugee.<sup>8</sup> Additionally, some jurisdictions have used Article 1 F as a basis to resort to *revocation* of refugee status *ex nunc* in very rare and grave circumstances where a refugee engages in conduct coming within the scope of Article 1 F (a) or 1 F (c) within the host country.<sup>9</sup>

11. ECRE is concerned about the apparent confusion occurring from time to time as regards the concepts of exclusion and cessation and cases traditionally covered by Article 33 (2) of the 1951 Refugee Convention.<sup>10</sup> Exclusion as an exceptional notion, which denies the protection of the Convention to all who fall within its ambit, must be dealt with strictly within the terms of Article 1 F, which exhaustively lists all possible grounds for exclusion. In accordance with Article 42 of the Refugee Convention, no reservations are possible to Article 1, which relates to the intrinsic nature of the individual seeking protection under the Convention. In ECRE’s view, consideration of the national safety and security interests of the country of asylum is not appropriate within the scope of this provision.<sup>11</sup> Other provisions of the Convention as outlined above deal adequately with these legitimate concerns of States.

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<sup>6</sup> There are, however, other measures short of expulsion that may be taken against a refugee who presents a security risk such as restrictions on the freedom of movement, etc. From a security point of view, it should be pointed out that expulsion might not actually diminish the risk posed by the individual in question.

<sup>7</sup> See also below VI.A and B.

<sup>8</sup> See also UNHCR Handbook, para. 141.

<sup>9</sup> See also UNHCR Background Note, para. 17.

<sup>10</sup> See, for instance, Article 14 B (4) 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 protection, Asile 40, 2001/0207 (CNS), of 19 June 2003. See also below VI.B.

<sup>11</sup> Only in the most exceptional cases might it be envisaged that national security issues are considered within the realm of Article 1 F of the 1951 Convention.

12. Although not the object of the Refugee Convention, complementary forms of protection are a part of many national asylum systems. ECRE's position is that a complementary protection status is needed in Europe to protect those people whose reasons for flight are beyond a full and inclusive interpretation of the 1951 Refugee Convention, but who nevertheless require international protection.<sup>12</sup> Complementary forms of protection are designed to cover cases of a well-founded fear of being subjected to serious and unjustified harm such as torture or inhuman or degrading treatment, or threat to life as a result of indiscriminate violence arising in situations of armed conflict.<sup>13</sup> ECRE has argued that there is no legal or logical reason to grant a refugee under a complementary form of protection fewer or lesser rights than Convention refugees.<sup>14</sup> Since refugee protection within the ambit of the 1951 Convention and complementary protection have the same aim of sheltering those who flee human rights violations, ECRE believes that the concept of exclusion applies by analogy to complementary protection status as well. The application of the concept of exclusion to persons benefiting from complementary protection does not, however, alter their need for or right to international human rights protection.<sup>15</sup>

### C. Related Areas of International Law

13. The exclusion clauses lie squarely at the intersection of other areas of international law, including humanitarian law, human rights law, criminal law and extradition law.<sup>16</sup> While Article 1 F is part of international refugee law, its use of terminology better known in international humanitarian and criminal law (paragraph a), extradition law (paragraph b), and the Charter of the United Nations (paragraph c), suggests the relevance of those areas of international law as a comprehensive and holistic interpretation is required. Article 1 F of the 1951 Refugee Convention should not be considered in isolation from these areas of international law.

14. In fact, the Refugee Convention is a living instrument and it cannot be viewed in a legal vacuum. References to other areas of international law should be interpreted flexibly, dynamically and in an evolutionary way. Therefore, developments that took place after the adoption of the 1951 Refugee Convention need to be taken into account when interpreting its provisions and existing definitions and jurisprudence in other areas of relevant international law should be respected.<sup>17</sup> The recently adopted Statute of the International Criminal Court takes a prominent role among those instruments.

## **III. Interpretation: The Crimes**

### A. Article 1 F (a)

15. Article 1 F (a) applies to crimes against peace, war crimes and crimes against humanity "as defined in the international instruments drawn up to make provision in respect of such crimes." The best-known instruments that predate the 1951 Convention are the 1945 London Agreement and Charter of the International Military Tribunal (Nuremberg), the 1948

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<sup>12</sup> See ECRE's Position on Complementary Protection, September 2000, para. 5.

<sup>13</sup> See, for instance, Article 15 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 protection, Asile 40, 2001/0207 (CNS), of 19 June 2003.

<sup>14</sup> See ECRE's Position on Complementary Protection, September 2000, para. 28.

<sup>15</sup> See below VI. B.

<sup>16</sup> See also Lawyers Committee for Human Rights, (2000) 12 IJRL Special Supplementary Issue 317 (318).

<sup>17</sup> See UNHCR Lisbon Roundtable, para. 2.

Genocide Convention and the 1949 Geneva Conventions<sup>18</sup>, which provide for definitions of the above-mentioned crimes. However, in line with an evolutionary approach in interpreting Article 1 F, ‘international instruments’ will also include instruments that were developed after 1951, for instance, the ICTY, ICTR and ICC Statutes.<sup>19</sup> Unless an excludable crime falls under the specific jurisdiction of a tribunal operating on the basis of a particular international instrument that defines Article 1 F crimes (such as the ICTY), ECRE recommends referring to the ICC Statute for the purpose of a general definition of Article 1 F (a) crimes.

#### *a) Crimes Against Peace*

16. As far as crimes against peace are concerned, Article 1 F (a) overlaps with Article 1 F (c), the maintenance of peace being the most prominent purpose of the United Nations. Both provisions face, however, the problem of a definition of crimes against peace. The only definition of crimes against peace in an international treaty dates back to the Nuremberg Charter. Although Article 5 (1) (d) of the ICC Statute contains the crime of aggression, the Court will only exercise jurisdiction over this crime once a definition has been agreed and been incorporated in the ICC Statute through an amendment procedure in accordance with Article 5 (2).<sup>20</sup> Until such time, the General Assembly’s approach to aggression may be referred to for guidance.<sup>21</sup>

#### *b) War Crimes*

17. Unlike crimes against peace, war crimes<sup>22</sup>, violations of the laws and customs of war applicable in armed conflict, have been defined in numerous international instruments. When the 1951 Refugee Convention was adopted, the term ‘war crimes’ referred to serious violations of international humanitarian law, in particular the London Charter and the 1949 Geneva Conventions (under the notion of grave breaches).<sup>23</sup> Since then, the term was further developed in the 1977 Additional Protocols (expanding protection in non-international armed conflicts), the Statutes of the ICTY, the ICTR and their respective jurisprudence.<sup>24</sup> A major achievement of the ICC Statute is to extend the term of ‘war crimes’ to cover certain acts

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<sup>18</sup> See the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (hereinafter GC I); the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (hereinafter GC II); the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (hereinafter GC III); and the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War (hereinafter GC IV). See also Additional Protocol to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and Additional Protocol to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflict (Protocol II).

<sup>19</sup> See UNHCR Lisbon Roundtable, para. 6.

<sup>20</sup> Article 121 and 123 of the ICC Statute stipulate that no amendments to the Statute shall be possible until seven years after it enters into force, which would thus be earliest in July of 2009.

<sup>21</sup> UN General Assembly Resolution 3314 (XXIX), 1974 on the Definition of Aggression: Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in the Definition. Article 1 of the Annex to the Resolution.

<sup>22</sup> Examples for war crimes in accordance with Article 8 of the ICC Statute are: wilful killing and causing of great suffering; torture; extensive destruction and appropriation of property; unlawful deportation or transfer or unlawful confinement.

<sup>23</sup> See Article 6 (b) of the Charter of the International Military Tribunal; Articles 129, 130 of the Geneva Convention relative to the Treatment of Prisoners of War (GC III) and Articles 146, 147 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (GC IV).

<sup>24</sup> See Article 85 of Additional Protocol I; Articles 2, 3 of the ICTY Statute; Article 4 of the ICTR Statute.

perpetrated in non-international armed conflict and to provide for individual criminal responsibility by way of an international treaty.

### *c) Crimes Against Humanity*

18. Crimes against humanity<sup>25</sup> have also been the object of important legal developments since the 1951 Refugee Convention was drafted. Earlier instruments include in particular the 1945 London Charter and the 1948 Genocide Convention.<sup>26</sup> Later, the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid and the Statutes of the ICTY, ICTR and ICC were added.<sup>27</sup> It is again the ICC Statute that contains the most comprehensive international treaty provisions dealing with crimes against humanity. The scope of such crimes is defined as acts committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.<sup>28</sup> Crimes against humanity may be committed at time of peace as well as time of war.

### B. Article 1 F (b)

19. Under Article 1 F (b) serious non-political crimes committed outside the country of refuge are grounds for exclusion. The provision was drafted in part in order to solve potential conflicts between extradition treaties and refugee law. States were concerned that "fugitives from justice" should not avoid extradition on the grounds of their claim for refugee protection. While extradition law is relevant for the interpretation of Article 1 F (b), caution should be exercised since not every crime covered by an extradition treaty should automatically lead to consideration for exclusion from refugee status. First, the approach to excludable crimes in Article 1 F (b) differs to the one taken in Paragraph 7 (d) of the UNHCR Statute, which contains a direct reference to extradition treaties. Second, extradition treaties, in particular bilateral ones, may vary one from another.<sup>29</sup>

### *a) Serious*

20. The notion of 'serious' (non-political) crimes in Article 1 F (b) requires a uniform interpretation. State practice, however, shows little consistency in interpreting the meaning of a 'serious' crime. Thus, formal criteria such as the length of sentence or whether the crime is extraditable may only serve as indicators.<sup>30</sup> The preferred approach for purposes of interpreting the exclusion clauses is to focus on the substance: to take into account the nature and circumstances of the crime. Serious crimes usually involve crimes against physical

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<sup>25</sup> Examples of crimes against humanity in accordance with Article 7 of the ICC Statute are (when committed as acts of a widespread or systematic attack directed against any civilians population, with knowledge of the attack): murder; extermination; enslavement; deportation or forcible transfer of population; rape; enforced disappearance.

<sup>26</sup> See Article 6 (c) of the Charter of the International Military Tribunal; Article I, II of the Genocide Convention.

<sup>27</sup> See Article I, II of the Anti Apartheid Convention; Article 4, 5 of the ICTY Statute; Article 2, 3 of the ICTR Statute; Article 6, 7 of the ICC Statute.

<sup>28</sup> See Article 7 of the ICC Statute.

<sup>29</sup> Compare in this respect Article 2 ('Extraditable Offences') of the European Convention on Extradition of 13 December 1957, ETS No. 24; and Article 2 of the Model Treaty on Extradition, Annex to UN General Assembly Resolution 45/116 of 14 December 1990.

<sup>30</sup> Article 2 (b) of the UN Convention against Transnational Organised Crime defines a 'serious crime' as conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty; however, Article 2 (1) of the European Convention on Extradition refers to "offences punishable by deprivation of liberty or under a detention order for a maximum period of at least one year or by a more severe penalty".

integrity, life and liberty such as murder or robbery.<sup>31</sup> While the principle of ‘double criminality’ (the offence must constitute a crime in both the country of asylum (requested State) and the country where the crime was committed (requesting State)), which usually applies in extradition law,<sup>32</sup> may be referred to as guidance, the gravity of the crime should be judged against international standards, not simply by the characterisation in the host state or country of origin.<sup>33</sup>

*b) Non-political*

21. Only non-political crimes are excludable. The term originates from extradition law, but apart from a small number of specific international treaty instruments there is no universally accepted definition.<sup>34</sup> Further, even within one State, it is frequently the case that alternative formulas for the concept of ‘non-political’ are contained in different extradition treaties. State practice has, however, broadly developed two different categories of offences regarded as political: on the one hand, absolute or purely political offences, on the other, relative or related political offences. The first type of crime relates to acts that directly interfere with the integrity or security of the State but not with other individuals’ rights. In these cases, such as treason, extradition will generally not be granted, nor should there be a ground for exclusion.

22. Relative political offences pose more difficulties of interpretation. Here, common crimes are committed with a more or less political motivation. For an offence to be deemed ‘political’, its political nature must *predominate* over its common criminal character.<sup>35</sup> National jurisprudence has developed several criteria for the ‘predominance test.’ (1) Has the act been perpetrated in connection with a struggle for political power within the State or in the course of a rebellion, civil war, or violent movement seeking to alter the balance of power within or the structure of the State? (2) Has it been motivated by political ideology? Is there a close and causal link between the act and its objective? (3) Are the means employed proportionate to the political objectives pursued?<sup>36</sup> The latter may not be the case if the acts committed are grossly disproportionate to the objective or are of an atrocious or barbarous

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<sup>31</sup> See G. Goodwin-Gill, *The Refugee in International Law*, p. 105; see also UNHCR, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees* (April 2001), para. 45.

<sup>32</sup> See, for instance, Article 2 (1) and (2) of the European Convention on Extradition and Article 2 (1) and (2) of the UN Model Treaty on Extradition. The concept of double criminality has been abandoned with respect to 32 serious offences within the European Union in line with the Council Framework Decision on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) of 13 June 2002.

<sup>33</sup> See UNHCR Background Note, para. 38.

<sup>34</sup> See, generally, Article 3 of the European Convention on Extradition and Article 3 of the UN Model Treaty on Extradition. Pursuant to Article 1 of the Additional Protocol to the European Convention on Extradition of 15 October 1975, ETS Series No. 86, political offences shall not include crimes against humanity (with a reference to the Genocide Convention) and grave breaches of the four 1949 Geneva Conventions (Article 50 GC I, Article 51 GC II, Article 130 GC III, Article 147 GC IV). Article 11 of the International Convention for the Suppression of Terrorist Bombing of 12 January 1998 and Article 1 of the European Convention on the Suppression of Terrorism of 27 January 1977 stipulate that for the purpose of extradition the respective crimes should not be regarded as political offences.

<sup>35</sup> See UNHCR Lisbon Roundtable, para. 10.

<sup>36</sup> See also *Refugees, Rebels and the quest for justice*, The Lawyers Committee for Human Rights, 2002, page 135.

nature, thus acts also referred to as terrorist.<sup>37</sup> The democratic or oppressive nature of the opposed regime is also relevant in this context.<sup>38</sup>

### *c) Outside the Country of Refuge*

23. Only a crime committed or presumed to have been committed by an applicant outside the country of refuge prior to his or her admission to that country as a refugee is a ground for exclusion. This country would usually be the country of origin or another third country except the country of asylum.<sup>39</sup> Refugees who commit serious, non-political crimes within the country of refuge, are subject to Articles 32 and 33 (2) of the Refugee Convention and the asylum country's criminal law process.

### C. Article 1 F (c)

24. Under Article 1 F (c), applicants who are guilty of acts contrary to the purposes and principles of the United Nations shall be excluded. This provision references the language in Article 14 (2) of the Universal Declaration of Human Rights.<sup>40</sup>

#### *a) Purposes and Principles of the United Nations*

25. The reference to the purposes and principles of the United Nations makes Article 1 F (c) a difficult provision to grasp. State practice is rare and diverse.<sup>41</sup> The purposes and principles of the UN are vague and unusual if not unsuitable for the characterisation of individual acts of a criminal nature.<sup>42</sup> The risk of a broad interpretation further contrasts with the necessary restrictive understanding of the exclusion clauses in the Refugee Convention.<sup>43</sup> By their very nature, the purposes and principles of the UN relate to member states and questions of international concern, such as, for instance, international peace and security, the territorial integrity or political independence of any State, the peaceful resolution of international disputes, or equal rights and self-determination of peoples.<sup>44</sup> ECRE acknowledges that not only persons who control and implement the policies of States are potential perpetrators. However, whether in or outside a government, paragraph (c) requires individuals to be in a position of power and instrumental to their State's infringement of the purposes and principles of the UN.

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<sup>37</sup> But see W. Kaelin, J. Kuenzli, (2000) 12 IJRL Special Supplementary Issue 46 (76) pointing out that international law permits combatants the use of force in international or internal conflicts and that an attack which in itself is classified as an act of terrorism may constitute the only means of opposing very grave encroachments by the government authority.

<sup>38</sup> For similar criteria see UNHCR Handbook, para. 152.

<sup>39</sup> See *ibid.*, para. 153.

<sup>40</sup> See also Paragraph 7 (d) of UNHCR's Statute, which refers to Article 14 (2) of the UDHR.

<sup>41</sup> Some States have used it as a residual category in relation to certain terrorist acts or trafficking in narcotics. German jurisprudence found that terrorist and sabotage activities from Lebanon against Israel were a basis for exclusion under Article 1 F (c). Also, in 1972, a German court held that bomb and terrorist attacks resulting in deaths were contrary to the purpose and principles of UN. The UK Home Office has reportedly applied Article 1 F (c) to offences considered to be terrorism although there is no generally accepted definition of terrorism or of the elements necessary to constitute the crime of terrorism. The Netherlands declared that Article 1 F (c) is an inherently vague basis for peremptory exclusion of any kind and has therefore decided not to rely on this provision at all.

<sup>42</sup> The purposes and principles of the UN are set out in the Preamble, Article 1 and 2 of the UN Charter.

<sup>43</sup> See below, para. IV. A.

<sup>44</sup> See UNHCR Handbook, para. 163.

26. ECRE thus urges a particularly cautious interpretation. Furthermore, as regards the actual crimes under the purview of Article 1 F (c), it appears that paragraphs (a) and (b) will cover most of them. Indeed, it is evident that a crime against peace, a war crime and a crime against humanity is also an act contrary to the purposes and principles of the United Nations.<sup>45</sup>

*b) Terrorism*<sup>46</sup>

27. The application of the exclusion clauses in the case of asylum seekers suspected of “terrorist” activities is a particularly controversial issue. In its November 2001 statement in the wake of the September 11 events, UNHCR declared that it shared “the legitimate concern of States to ensure that there would be no avenue for those supporting or committing terrorist acts to secure access to territory, whether to find a safe haven, avoid prosecution or to carry out further attacks.”<sup>47</sup> But there was no need, in UNHCR’s view, for an overhaul of the refugee protection regime. Current refugee instruments rendered “the identification of persons engaged in terrorist activities possible, and necessary, and foresee their exclusion from refugee status and do not shield them against either criminal prosecution or expulsion.”<sup>48</sup>

28. It is clear that any perception that “terrorists” may avail themselves of asylum protection is contrary to the purposes of the Refugee Convention and the interests of refugees. However, such concerns must be balanced with the need to ensure that procedural fairness guarantees in the refugee status determination process are not denied to persons suspected of “terrorist” activity, and that individuals are not incorrectly excluded. The starting point must be that refugees themselves are by definition escapees from persecution and violence rather than perpetrators of terror.

29. In 2001, the UN Security Council declared that acts of international terrorism are contrary to the purposes and principles of the United Nations.<sup>49</sup> While not explicitly making this link, the UN General Assembly has constantly condemned acts of international terrorism.<sup>50</sup> “Terrorism” as such, however, cannot lend itself to being used as a separate ground for exclusion, given the lack of consensus within the international community as to its exact definition and constituent elements.<sup>51</sup> Clearly, many acts considered “terrorist” would be covered by the exclusion clauses.<sup>52</sup> It is, however, crucial not to equate Article 1 F (c) with a simple anti-terrorist clause.

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<sup>45</sup> See also UNHCR Handbook, para. 162.

<sup>46</sup> There is no internationally agreed definition of terrorism. The term is used here in the context of the ongoing international debate about the apprehension of violent offences with an international character, which are rooted in political or ideological motivations.

<sup>47</sup> See UNHCR “*Addressing Security Concerns Without Undermining Refugee Protection*,” November 2001, A (1).

<sup>48</sup> *Ibid.*

<sup>49</sup> UN Security Council Resolution 1373 (2001) of 28 September 2001, para. 5 and Resolution 1377 (2001) of 12 November 2001, Annex.

<sup>50</sup> See, for instance, UN General Assembly Resolution 57/27 of 15 January 2003 - Measures to eliminate international terrorism; Resolution 56/88 of 24 January 2002; Resolution 55/158 of 30 January 2001.

<sup>51</sup> Although there is no internationally accepted legal definition of terrorism as of yet, at the end of 2001 there were no fewer than 19 global and regional treaties that dealt with various acts of terrorism. For a full list of international instruments related to the prevention and suppression of terrorism, see General Assembly, Sixth Committee Information, UN doc.no.A./56/160 at Section III. During the process of negotiating the ICC Statute, it was suggested that certain treaty crimes, including terrorism, be included in the Court’s jurisdiction; however, the treaty crimes provision was eventually not included in the Rome Statute adopted on 17 July 1998. This was in part due to the difficulty of defining the term.

<sup>52</sup> The attacks of the September 11, 2001, for example, have been widely defined as crimes against humanity and thus fall under Article 1 F (a).

30. ECRE recommends that the focus under Article 1 F be on the underlying offences, not on the question whether they are “terrorist”. This description is simply adjectival and adds no substantial value. What has to be assessed is not whether an applicant’s acts qualify as “terrorist” but whether s/he meets the criteria set out in Article 1 F. As the U.K. House of Lords stated in *Re T*<sup>53</sup>, a person may not be excluded from the Convention merely because he or she, or his or her acts, have been labelled “terrorist”; there must still be serious reasons for considering that he or she has committed an excludable crime under Article 1 F. In this respect, ECRE also believes that most so-called terrorist offences are more appropriately dealt with under paragraph (a) and particularly (b).<sup>54</sup> Whenever possible, recourse should be made to these provisions. Any unduly expansive interpretation of the ‘purposes and principles of the United Nations’ referred to in Article 1 F (c) should be avoided to prevent abuse of the exclusion clauses.

#### **IV. Interpretation: Issues Common to Article 1 F (a) to (c)**

##### A. General Principles

31. The object and purpose of the 1951 Refugee Convention consists in the protection of those who meet the refugee definition contained in the inclusion clause (Article 1 A). The exclusion clauses are therefore of an exceptional nature, limiting in fact the purview of a human rights provision.<sup>55</sup> For this reason, and because of the potentially serious consequences of exclusion from refugee status for the individual concerned, the exclusion clauses need to be interpreted restrictively and after extreme caution has been exercised.<sup>56</sup>

32. The exclusion clauses themselves do not precisely enumerate the acts that may render a person undeserving of refugee status. Guidance for how the crimes described in the clauses are to be defined, and how criminal responsibility for those crimes is assigned must therefore be found outside refugee law – such as in international criminal law, a rapidly developing field. ECRE favours a dynamic and evolutionary approach, which consequently requires an interpretation of the respective instruments, for instance the ICC Statute, in accordance with their own objects and purposes. In doing so, we would however urge to strictly respect the interpretation given by the responsible bodies, for instance the ICC, as well as the parameters set by the Vienna Convention on the law of treaties.

##### B. Serious Reasons – the Standard of Proof

33. The 1951 Refugee Convention does not provide any guidance as to what is meant by “serious reasons for considering” that an applicant has committed a crime falling within the scope of Article 1 F. The UNHCR Handbook does not add much either beyond stating that “formal proof of previous penal prosecution is not required”.<sup>57</sup> There is little consistency in state practice relating to the application of the “serious reasons for considering” standard. Different legal systems (civil, common law) and different trial systems make this task

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<sup>53</sup> House of Lords (U.K.) *T. v. Secretary of State for the Home Department* [1996] 2 All E.R. 865.

<sup>54</sup> See *ibid.*; and UNHCR, *Addressing Security Concerns without Undermining Refugee Protection – UNHCR’s perspective*, November 2001, para. 15.

<sup>55</sup> UNHCR Lisbon Roundtable, para. 4.

<sup>56</sup> See also ECRE Comments on the Commission Working Document on the relationship between safeguarding internal security and complying with international protection obligations and instruments, May 2002.

<sup>57</sup> UNHCR Handbook, para. 149.

difficult. Many attempts have been undertaken to define “serious reasons for considering”, mostly in a negative way.<sup>58</sup> ECRE does not seek to add another definition, as it appears more important to identify an approach for a common interpretation that could serve as a meaningful standard, minimising discretion and ensuring objectivity in exclusion proceedings. Clearly though, because of the severe consequences of a decision to exclude, the exceptional nature of exclusion and the general protection purpose of the 1951 Convention, the threshold of proof applied should be high.<sup>59</sup>

34. Since the exclusion clauses deal with the commission of crimes, it seems reasonable to search for existing standards of proof in the area of criminal law, ideally international criminal law. In this respect, reference can be made to the standard of proof required for criminal indictment.<sup>60</sup> In terms of the ICC Statute, this corresponds with what is required by the Prosecutor of the ICC to convince the Pre-Trial Chamber to open a trial against a person on charges within the jurisdiction of the Court, i.e. *substantial grounds to believe* that the person has committed the crime charged.<sup>61</sup> While no equation can be made, there is a certain textual similarity (‘serious reasons for considering’, ‘substantial grounds to believe’) as well as a comparability of the respective objectives.

35. Regarding the kind of evidence, which may constitute the basis for a finding that there are serious reasons for considering that a person has committed an excludable crime, a distinction should be made between formal and substantive evidence. The former relates to actual convictions, indictments or opened trials by national or international courts. The applicable standards may vary, and particular caution should be exercised in relation to courts from the country of origin. Substantive evidence may consist in a credible voluntary admission by the applicant, clear reliable and convincing information such as testimony, documentary and other forms of evidence recognised in national and international systems.<sup>62</sup>

### C. Individual Responsibility

36. While Article 1 F does not expressly mention individual criminal responsibility as a condition for its application, it can be clearly inferred from the text “any person ... has committed” or “... has been guilty”. Thus, when establishing whether a person is excludable

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<sup>58</sup> See, e.g. Michael Bliss, ‘Serious Reasons for Considering’: Minimum Standards of Procedural Fairness in the Application of the Article 1 F Exclusion Clauses, 12 IJRL, Special Supplementary Issue 2000, p. 92 (116). The ‘serious reasons for considering’ test is clearly less than the criminal standard (required for conviction for a criminal offence) of ‘proof beyond reasonable doubt’. At a minimum, the ‘serious reasons for considering’ test must be greater than the civil ‘balance of probabilities’ standard.

<sup>59</sup> See also *Refugees, Rebels and the quest for justice*, The Lawyers Committee for Human Rights, 2002, page 152.

<sup>60</sup> See also UNHCR Lisbon Roundtable, para. 17: 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. However, general reference to the standards of evidence required for an indictment is in itself unhelpful, as these standards vary between jurisdictions. See also UNHCR Background Note, para. 107.

<sup>61</sup> See Article 61 of the ICC Statute (Confirmation of the charges before trial). According to Article 61 (5), at the hearing, the Prosecutor shall support each charge with sufficient evidence to establish *substantial grounds to believe* that the person committed the crime charged. Under Article 61 (7), the Pre Trial Chamber then shall determine whether there is sufficient evidence to establish *substantial grounds to believe* that the person has committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall confirm these charges and commit the person to a Trial Chamber for trial on those charges as confirmed.

<sup>62</sup> See the Rules of Procedure and Evidence of the ICC, ICC-ASP/1/3 (2002), Chapter 4, Section I (Evidence).

under Article 1 F, the determining authority needs to show that there are serious reasons to believe that the applicant is in fact *individually* responsible for the committed crime.

37. The concept of individual responsibility for criminal offences is well established in national and international criminal law. It involves an objective and a subjective element. In this respect, Article 25 of the ICC Statute, which provides a detailed compilation of the various forms of how criminal responsibility may be established (objective element), and Article 30, which describes the mental element required (subjective element), may be considered to reflect an international consensus in respect of crimes covered by Article 1 F (a) and (c).<sup>63</sup> In the absence of clear international standards describing criminal responsibility of serious non-political crimes, this should also be considered the appropriate standard in respect of Article 1 F (b). Other provisions of the ICC Statute on the scope of the responsibility of commanders and superiors (Article 28) are equally important for the application of the exclusion clauses.<sup>64</sup>

38. As in the criminal context, the question of applicable defences must also be considered as an element of individual responsibility (e.g., duress, necessity, self-defence, insanity, error of law and fact, etc.). There is no justification to exclude a claimant for the commission of a particular criminal offence, for which s/he is not responsible under criminal law. Depending on the crime committed and the applicable jurisdiction, different reasons for excluding criminal responsibility may apply. Thus, while the Statutes of the ICTY and ICTR contained only rudimentary provisions on defences,<sup>65</sup> Article 31 to 33 of the ICC Statute on the absence of the mental element, self defence, duress and superior orders are more elaborate. In the absence of any specifically applicable provisions of national or international law, ECRE recommends to refer to the ICC Statute.<sup>66</sup>

39. A number of States consider the mere membership of a terrorist organisation as sufficient to amount to complicity with or participation in the acts of the organisation. In ECRE's view, this is incorrect. The starting point must always be that a specific criminal offence has been

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<sup>63</sup> Article 25 (3) of the ICC Statute provides that a person shall be criminally responsible and liable for punishment for a crime [...] if that person (a) Commits 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; (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 [...]. (Italics added).

Article 30 (1) of the ICC Statute stipulates that a person shall be criminally responsible and liable for punishment for a crime [...] 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 purpose 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.

<sup>64</sup> See also Article 7 of the ICTY Statute and Article 6 of the ICTR Statute.

<sup>65</sup> See Article 7 (2) – (4) ICTY of the Statute and Article 6 (2) – (4) of the ICTR Statute. On duress, see also ICTY: *Prosecutor v. Erdemovic*, Case No. IT-96-22-A, para. 1229.

<sup>66</sup> For instance, on duress, Article 31 (d) of the ICC Statute may be referred to. See further on duress, UNHCR Background Note, para. 70.

committed or attempted. In a second step the individual criminal responsibility of the person concerned needs to be examined. The focus should be on the claimant's personal and knowing participation or complicity in the crime or crimes in question.<sup>67</sup> ECRE is also opposed to the introduction of a rebuttable presumption in such cases. This would contradict the principle of the presumption of innocence during the procedure.<sup>68</sup> Exclusion should only occur after consideration of the asylum seeker's personal involvement in, and personal responsibility for, specific excludable crimes.

#### D. Expiation and Lapse of Time

40. A person who has been convicted for an excludable offence and served a sentence is generally considered to have expiated this offence. According to the nationally and internationally recognised principle of *ne bis in idem*, such a person shall not be tried again for this offence in the same jurisdiction.<sup>69</sup> The fact that an asylum applicant was convicted of a serious non-political crime and served a sentence or benefited from an amnesty should therefore be taken into account.<sup>70</sup> The presumption will usually be that the exclusion clause is no longer applicable. However, an exception may be justified if the proceedings in the other court were designed to shield the accused from criminal responsibility or otherwise were not concluded independently or impartially in accordance with the norms of due process recognised by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.<sup>71</sup> Similarly, an exception may be justified in cases of truly heinous crimes (most likely for Article 1 F (a) or (c) crimes) where it may be considered that the person is still undeserving of international refugee protection.

41. The same rationale applies to lapse of time. Just as extradition shall not be granted if, under the law of either party, a person becomes immune from prosecution or punishment by reason of lapse of time, an applicant should not be excluded from refugee status under these conditions.<sup>72</sup> However, this is only going to be relevant with regard to Article 1 F (b), since no statutory limitations shall apply to war crimes and crimes against humanity as well as crimes against the purposes and principles of the UN, irrespective of the date of the commission.<sup>73</sup>

#### E. Proportionality

42. One of the key debates surrounding the application of the exclusion clauses is whether, even if the decision maker is satisfied that there are "serious reasons for considering" that the

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<sup>67</sup> See also ECRE's Comments on the Commission Working Document on the relationship between safeguarding internal security and complying with international protection obligations and instruments, May 2002, para. 1.1.3; similarly UNHCR Background Note, para. 59.

<sup>68</sup> See below, under V. B.; see UNHCR, Addressing Security Concerns without Undermining Refugee Protection – UNHCR's perspective, November 2001, para. 18 and Background Note, para. 106, arguing that only an indictment by an international criminal tribunal would reverse the burden of proof.

<sup>69</sup> See Article 20 of the ICC Statute; Article 10 of the ICTY Statute; Article 9 of the ICTR Statute; Article 3 of the European Council Framework Decision on the European arrest warrant and the surrender procedures between Member States; Article 3 (d) of the UN Model Treaty on Extradition.

<sup>70</sup> See also UNHCR Background Note, para. 73 and UNHCR Handbook, para 157.

<sup>71</sup> Article 20 (3) of the ICC Statute; see also Article 10 (2) of the ICTY Statute and Article 9 (2) of the ICTR Statute. See UNHCR Handbook, para. 157, arguing that the exclusion clause may still be applicable if "the applicant's criminal character still predominates".

<sup>72</sup> See Article 3 (e) of the UN Model Treaty on Extradition.

<sup>73</sup> See the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 26 November 1968 and Article 29 of the ICC Statute.

applicant has committed an excludable crime, there may still be certain circumstances in which exclusion should not be applied. Proponents of the existence of such a final consideration have generally formulated it in terms of the proportionality or balancing test. State practice varies regarding the question whether the examination of Article 1 F requires a balancing or proportionality test between the nature of the crime presumed to have been committed and the likely persecution feared by the applicant.<sup>74</sup> ECRE is of the view that balancing is inherent in the exclusion decision-making process and a corollary of the idea of proportionality in the restriction of fundamental rights.<sup>75</sup>

## V. Procedural Issues

### A. Inclusion – Exclusion

43. The relationship between the inclusion clause in Article 1 A (2) and the exclusion clauses in Article 1 F of the 1951 Convention is crucial for the consideration of the latter clauses. A determination with regard to inclusion – the question of an applicant’s well-founded fear of persecution – is generally a prerequisite to a principled application of exclusion. While acknowledging that State practice is not uniform, ECRE is of the view that using exclusion as a test of admissibility to a full examination of the need for protection is inconsistent with the exceptional nature of the exclusion clauses. Furthermore, seeking to determine exclusion from the outset and without exploring the need for protection prejudices the decision-maker’s capacity to come to a sound conclusion.<sup>76</sup> A growing number of States, however, seem to consider the application of the exclusion clauses before or even without looking at inclusion. In ECRE’s view, this is mistaken. Instead, if a case reveals an issue under the exclusion clause, a holistic approach to refugee status determination would require that inclusion and exclusion form integral parts of the asylum procedure in whatever sequence they are examined.

44. Legal as well as practical arguments speak in favour of beginning an asylum procedure with the consideration of the existence of a well-founded fear of persecution for a Convention ground.<sup>77</sup> It is normally during the process of determining a person’s refugee status that the facts leading to exclusion will emerge. In many cases a claimant will not reach the threshold for inclusion, thus eliminating the need to consider the highly complex issues of facts and law likely to arise in any examination of the exclusion clauses.<sup>78</sup> Furthermore, if a decision to

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<sup>74</sup> For the use of a proportionality concept see, for instance, *The State of the Netherlands v. V.*, UNHCR Data Bank CAS/NLD/013 (1988); CPRR (Belgium), W4403 and W4589 (1998); Swiss Asylum Appeals Commission, EMARK 1993/8; Joint Position of the Council of the European Union, 4 March 1996: “The severity of the expected persecution is to be weighed against the nature of the criminal offence of which the person is suspected...Particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes.” Against the concept particularly: House of Lords (U.K.) *T. v. Secretary of State for the Home Department* [1996] 2 All E.R. 865.

<sup>75</sup> See the European Council Directive on Minimum Standards on Temporary Protection (2001/55/EC), 20 July 2001, Article 28 (2) noting that the decision concerning the exclusion clauses shall be based on the principle of proportionality. See also the Siracusa Principles on the Limitation and Derogation of Provisions in the ICCPR, Annex, UN Doc. E/CN.4/1984/4; UNHCR Handbook, para. 156; See also Lawyers Committee for Human Rights, (2000) 12 IJRL Special Supplementary Issue, at 335; UNHCR Handbook, para. 156; UNHCR Background Note, para. 76.

<sup>76</sup> See also UNHCR Background Note, para. 99.

<sup>77</sup> See ECRE, Position on the Interpretation of Article 1 of the Refugee Convention, September 2000, para. 75.

<sup>78</sup> See also UNHCR Background Note, para. 100. In such cases however, it is preferable that States initiate criminal proceedings if there is reason to believe that Article 1 F crimes were committed. See also below VI.A.

exclude is overturned on appeal, there will be no need to remit the case to the determining body if the issue of inclusion has already been considered.

45. In very exceptional cases, the exclusion clauses may be considered without a detailed examination of the inclusion clauses, such as in cases where there is an indictment by an international tribunal. ECRE considers it the most appropriate solution in such cases to suspend and defer the asylum procedure until the outcome of the international criminal proceedings.

46. Principles of procedural fairness require that an applicant for asylum have the chance to present all information relevant to his/her case. While the decision-maker may well hold a special interview on the exclusion issue (respecting the procedural rights) or transfer the case to a special exclusion unit, this should under no circumstances prevent the applicant from presenting all the facts of his/her case under the inclusion clause. Otherwise, the procedure risks unduly associating asylum seekers with criminality and may create an exclusion culture on the part of the decision-maker, which needs to be avoided.<sup>79</sup> Finally, ECRE believes that making a final decision to exclude necessitates the inherent application of a meaningful balancing test (see above), which requires an understanding of all the circumstances of the case.

## B. Procedural Rights and Guarantees

47. Safeguards of procedural fairness, while essential in all status determination proceedings, are particularly crucial in the case of the application of the exclusion clauses. Hence, due to the complex nature of the merits of exclusion cases, the applicability of Article 1 F should neither be assessed in admissibility procedures nor channelled into accelerated procedures.<sup>80</sup> ECRE opposes any attempts to identify exceptions in this manner, in particular ‘*prima facie*’ exclusion.<sup>81</sup> Rather than attempting to channel cases suspected of falling under the exclusion clauses through accelerated or admissibility procedures, ECRE proposes to prioritise their examination within the regular procedure.<sup>82</sup>

48. When assessing the application of the exclusion clauses, the asylum procedure invariably takes on the character of a quasi-criminal investigation - the examiner is charged with enquiring into whether there are serious reasons for considering that the asylum seeker has committed an excludable crime. This makes fair trial standards important and entails certain rights typically triggered in criminal proceedings, such as the right to remain silent, the presumption of innocence and rights related to the defence. Notwithstanding the applicant’s general obligations to assist in establishing the facts of the asylum claim,<sup>83</sup> the burden of proof for establishing the necessary evidence for exclusion lies with the state.

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<sup>79</sup> See also UNHCR Lisbon Roundtable, para. 15.

<sup>80</sup> See ECRE Guidelines on Fair and Efficient Procedures for Determining Refugee Status, September 1999, para. 30 and 119.

<sup>81</sup> For instance: Commission Working Document on *The relationship between safeguarding internal security and complying with international protection obligations and instruments*, Brussels, 5.12.2001, COM (2001) 743 final, at para. 1.4.2.2 and 1.4.3.2. See also above V.A. on the relationship between Article 1 A (2) and Article 1 F.

<sup>82</sup> See also ECRE Comments on the Commission Working Document on *The relationship between safeguarding internal security and complying with international protection obligations and instruments*, Brussels, 5.12.2001, COM (2001) 743 final. May 2002.

<sup>83</sup> See UNHCR Handbook, para. 205.

49. Moreover, fair trial standards for the determination of criminal charges are contained in international and European human rights law.<sup>84</sup> In light of the similarities of the assessment of the exclusion clauses and criminal proceedings, ECRE believes that they should be applied. The provisions on investigation, prosecution and trial in the ICC Statute as well as the Rules of Procedure and Evidence may also provide useful guidance when identifying the procedural rights and safeguards of asylum applicants to whom the exclusion clauses may apply.

50. In ECRE's view, the following minimum rights need to be respected when assessing the applicability of the exclusion clauses:

- The decision maker must inform the asylum seeker that exclusion is being considered and advise him/her of the legal elements of the exclusion clause in question.<sup>85</sup>
- The decision-maker must also disclose the factual evidence on which s/he intends to rely and provide adequate time and facilities to respond.<sup>86</sup>
- The applicant should have the right to an oral hearing before the final decision-maker and s/he may object to the allegations, challenge the evidence presented and present evidence.<sup>87</sup>
- The applicant must have free legal assistance and/or advice in preparing his/her case during the procedure to examine the applicability of the exclusion clauses, including at any hearing.<sup>88</sup>
- A competent and impartial interpreter must be provided where required.<sup>89</sup>
- If the exclusion clauses are applied, the asylum seeker must be provided with a written decision, including reasons for the decision.
- There must be a right to an independent review of the decision with suspensive effect.

51. ECRE calls upon states to develop special capacities for responding to the specific requirements of a proper assessment of the exclusion clauses. Their examination requires a high degree of legal and factual expertise and specialised knowledge on the part of the determining authorities in order to give due consideration to the complexities involved and the potentially severe consequences for the applicant. The establishment of especially trained exclusion units within the competent authority for refugee status determination may be a way to allow states to concentrate their expertise and take well-researched decisions on exclusion.<sup>90</sup>

52. Nevertheless, while taking into account the different character of the asylum procedure when the exclusion clauses are assessed, the establishment of 'special exclusion procedures' should not infringe on the principle of the presumption of innocence equally enshrined in relevant international instruments.<sup>91</sup> ECRE calls upon States to elaborate clear guidelines for those examining applications for asylum, which apply at the moment in which an issue of

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<sup>84</sup> See Article 14 of the ICCPR and Article 6 of the ECHR, notwithstanding the fact that the case law of the European Court of Human Rights to date deems the Article not to be applicable to administrative procedures.

<sup>85</sup> Article 6 (3) (a) ECHR and Article 61 (3) (a) ICC Statute.

<sup>86</sup> Article 6 (3) (b) ECHR and Article 61 (3) (b) ICC Statute

<sup>87</sup> See Article 6 (1) ECHR; Articles 55 (2) (d) and 61 (1) and (6) ICC Statute.

<sup>88</sup> See Article 6 (3) (c) ECHR; Articles 55 (2) (c) ICC Statute and Rule 121 (2) (a) of the Rules of Procedure and Evidence.

<sup>89</sup> See Article 6 (3) (e); Article 55 (1) (c) ICC Statute and Rule 6 of the Rules of Procedure and Evidence.

<sup>90</sup> See also the Commission Working Document on *The relationship between safeguarding internal security and complying with international protection obligations and instruments*, Brussels, 5.12.2001, COM(2001) 743 final, at para. 1.5.1., and ECRE's Comments of May 2002.

<sup>91</sup> See Article 6 (2) ECHR; Article 66 ICC Statute.

criminal conduct arises in a particular case. Only skilled and highly trained adjudicators should be called upon to undertake the consideration of the exclusion clauses.

### C. Refugee Children

53. The exclusion clause makes no special provision for its application to minors. Individual criminal responsibility must be found in each particular case. Article 40 (3) of the Convention on the Rights of the Child itself does not set a precise age but asks States Parties to establish a minimum age below which children shall be presumed not to have the capacity to infringe penal law. The minimum age for individual criminal liability in the country of asylum and/or the country in which the alleged act was committed will therefore be relevant with respect to identifying individual responsibility. Additionally, ECRE recommends that the principle of the best interest of the child – the guiding principle in all actions concerning children - be considered the key element in the determination of the applicability of the exclusion clauses to minors. It is – in this regard – highly unlikely that exclusion from international refugee protection will ever be in conformity with the best interests of the child. ECRE therefore recommends in general cases not to apply the exclusion clauses to children below the age of eighteen. This view gains support from Article 26 of the ICC Statute, which precludes jurisdiction of the Court over offences committed by persons under the age of eighteen.

54. Cases of minors involved in Article 1 F crimes, however, often raise issues of child victimisation and abuse and may therefore require the determining authority to consider the necessity to make efforts towards the psychological recovery and social reintegration of the child in question.

### D. Exclusion in Mass Influx Situations

55. Applying the exclusion clauses in situations of mass influx can be highly problematic as the conflicts in Former Yugoslavia and in particular in Rwanda clearly demonstrated. *Prima facie* recognition of refugee status may result, for example, in the provision of international protection to perpetrators of crimes excluded under Article 1 F. This may be acceptable in the immediate term because in a situation of mass influx, the fundamental humanitarian imperative of preserving life and therefore providing asylum and reception support must take precedence over the need to identify persons who might be liable for exclusion from refugee status.

56. In order to maintain the integrity of the refugee protection concept, however, it is essential that the process of excluding persons undeserving of refugee status (often called ‘screening’) begin as soon as possible. While armed elements in a mass-influx situation will not necessarily be excludable they should be separated as a matter of priority from the wider refugee population, especially in areas that are hard to control such as refugee camps where they may constitute a serious threat to the *bona fide* refugees. If they have permanently laid down their arms and can hence be considered as civilians, they should be considered for refugee status, including as regards the potential applicability of the exclusion clauses in order to ascertain that protection is not granted to persons who fall under Article 1 F.

57. Those who engage in unlawful activities in the country of asylum are however not necessarily excludable as Article 1 F (b) only applies to crimes committed outside the country of refuge. The response may be to screen them out, to separate or intern them according to

humanitarian law, to expel them in line with Article 32, or else to initiate criminal prosecution under domestic law.<sup>92</sup>

58. In situations in which a temporary protection scheme has been established in consultation with the United Nations High Commissioner for Refugees, the above considerations as to the screening of beneficiaries and separation of those coming within the realm of Article 1 F apply accordingly.<sup>93</sup>

## **VI. Consequences of Exclusion**

### A. National Prosecution or Extradition

59. ECRE believes that the State, which finds an asylum applicant to be excludable under Article 1 F, should initiate criminal proceedings against the individual for the committed crime.<sup>94</sup> For some of the crimes under Article 1 F (a) or (c), international law has established universal jurisdiction.<sup>95</sup> Furthermore, for a number of crimes, the principle *aut dedere aut judicare* is embedded in a series of relevant multilateral Conventions.<sup>96</sup> ECRE calls therefore upon states to introduce the necessary legislative means in order to exercise jurisdiction over the most serious crimes in accordance with recognised principles of international law.

60. Alternatively and in line with the above-mentioned principle to extradite or to prosecute, a person who is properly excluded from refugee status may – in principle and provided no other human rights provision conflict therewith - be returned to his or her home country or conceivably another country in order to face justice there by way of extradition. Excludable crimes are usually committed outside the country of refuge (explicitly required in Article 1 F (b)) and the national authorities of the host country may lack jurisdiction to inquire, indict and trial the suspect before their own judicial institutions. In Europe, the Council Framework Decision on the European arrest warrant and the surrender procedures between Member States provides for a special multilateral framework on conditions and the procedure of extradition.<sup>97</sup>

61. The extradition of an excluded person to the country of origin, however, raises questions of human rights protection, as the applicant (whose well-founded fear of persecution has already been established) fears serious violations of his/her human rights upon return. International human rights obligations, such as Article 3 of the European Convention on Human Rights (ECHR); Article 3 of the Convention against Torture; Article 7 of the International Covenant on Civil and Political Rights, as well as extradition law therefore

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<sup>92</sup> See Article 2 of the 1951 Geneva Convention; see also UNHCR Doc. EC/50/SC/INF.4 “Ladder of Options”.

<sup>93</sup> See, for instance, Article 28 of the EU Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting the balance of efforts between Member States in receiving such persons and bearing the consequences thereof, 2001/55/EC, of 20 July 2001.

<sup>94</sup> See also ECRE Position on the Interpretation of Article 1 of the Refugee Convention (September 2000), para. 75.

<sup>95</sup> See, for instance, Article 129 GC III and Article 146 GC IV and Article 5 of the ICC Statute.

<sup>96</sup> See, for instance, 1970 Convention for the Suppression of the Unlawful Seizure of an Aircraft, Article 7; 1973 Convention on the Prevention and Punishment of Crimes against International Protected Persons, Article 7; 1979 Convention on the Physical Protection of Nuclear Material, Article 10; 1979 Convention against the Taking of Hostages, Article 8; 1984 Convention against Torture, Article 7; 1998 Convention on the Suppression of Terrorist Bombing, Article 8.

<sup>97</sup> European Council Framework Decision on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) of 13 June 2002.

preclude extradition in these cases.<sup>98</sup> Extradition may, however, be possible to another third country, which may claim jurisdiction. In this case, extradition should only be granted upon conclusion of the corresponding legal proceedings and where it has been shown that the extradition is not being requested as a means to return a person to a country for purposes which in fact amount to persecution not prosecution. Upon completion of the trial if acquitted and of the sentence if found guilty, access to a procedure, in which the application for asylum will be examined, must be guaranteed.

#### B. Exclusion, Expulsion and Non-refoulement

62. One of the very difficult questions relating to exclusion concerns the situation in which an excludable applicant for asylum cannot be sent back to his/her country of origin due to Article 3 of the ECHR or the Convention against Torture, the host country has no jurisdiction over the allegedly committed crimes, and no other country requests his/her extradition. ECRE believes that such persons should benefit from some form of legal status.<sup>99</sup> This takes into account that while falling outside of the scope of the Refugee Convention, these individuals require other international and national human rights protection. In this regard, it is vital to bear in mind that the non-refoulement protection in Article 3 of the ECHR is in fact wider than the one offered by Article 33 of the 1951 Convention. The European Court of Human Rights confirmed in the case of *Chahal v. UK* that the non-refoulement protection in Article 3 of the ECHR is absolute by stating that “the issues concerning national security are immaterial” since “given the irreversible nature of the harm that might occur if the risk of ill-treatment materialised and the importance the Court attaches to [the prohibition of torture] the notion of an effective remedy under Article 13 requires independent scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3. The scrutiny must be carried out without regard to what the person may have done to warrant expulsion or to any perceived threat to the national security of the expelling state.”<sup>100</sup>

63. ECRE firmly believes that the most appropriate solution lies in the development of jurisdiction, in particular the concept of universal jurisdiction, at national and international level for those crimes contained in Article 1 F, which are amenable to universal jurisdiction. In this context it is important to recall that a finding of exclusion is equivalent neither to a finding of culpability nor to an indictment: the outcome of a trial may in fact be “not guilty”, a reality which creates a greater onus on a State to seek to subject the excludee to a trial.

64. It is important to appropriately distinguish between exclusion, expulsion and the withdrawal of the protection of the principle of non-refoulement (Article 1 F and Articles 32, 33 (2) of the 1951 Refugee Convention). While there is a certain overlap in that exclusion may lead to removal from the State, all three concepts have different legal consequences. Article 1 F relates to the question of qualification thresholds for refugee status and the possible individual responsibility for the commission of serious crimes; Article 32 and 33 (2) apply to persons who have been recognised as refugees, implicating determinations about the effect of the continued presence of an individual refugee on a State and its people. Article 32 deals with the expulsion of a recognised refugee on grounds of national security or public order, Article 33 (2) removes the non-refoulement protection from a refugee and allows the State to remove him or her, because s/he is regarded as a danger to the security or the community of the country. The 1951 Convention stipulates certain safeguards for the

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<sup>98</sup> See *Chahal v. UK*, Judgment of 15 November 1996, 1996-V Eur.Ct.H.R. Rep. Judgments & Dec. 1831 (1996).

<sup>99</sup> See also *H.L.R. v. France*, Judgement of the Eur. Ct. H. R. of 29 April 1997.

<sup>100</sup> See above, Footnote 98, paras. 150 and 151.

expulsion of a refugee, i.e., the decision to expel must have been reached in accordance with due process of law and authorities shall allow the refugee a reasonable period to seek legal admission to another country.<sup>101</sup> Finally, the same international human rights obligations that prevent removal of a person excluded under Article 1 F to certain countries also apply to Articles 32 and 33 (2).

### C. Treatment of Family Members

65. The UNHCR Handbook states that the principle of family unity operates in favour of dependents. In the case of a person excluded from refugee status, the dependents and family members should still be eligible to apply for and be granted asylum if they can invoke reasons on their own account for fearing persecution. Exclusion status should not be derivative for family members.<sup>102</sup> Where family members have been recognised as refugees, the excluded applicant cannot, however, rely on his/her right to family unity to secure protection or assistance as a refugee. This notwithstanding, the excluded applicant may be protected against expulsion based on his or her right to family life in accordance with Article 8 of the ECHR.

March 2004

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<sup>101</sup> See Article 32 (2) and (3) of the 1951 Refugee Convention.

<sup>102</sup> UNHCR Background Note, para. 95.