

Harald Stabell (H)
Mette Y. Larsen (H)
Else S. Gjesti
Helene Braanen
Elisabeth Grøndahl
Morten Engesbak
Bendik Falch-Koslung (H)

Endre S. Refsdal
Maria Bergram Aas

Martin Eiebakke (adv. flm.)
Inga Laupstad (adv. flm.)

H: Møterett for høyesterett

Postboks 599 Sentrum,
0106 OSLO
Besøksadresse: Rosenkrantzgt. 7
Telefon: 22 40 41 40
Telefax: 22 40 41 49
www.advokatstabell.no
E- post: post@advokatstabell.no

Foretaksnummer: 983806031
Medlemmer av Advokatforeningen

EXCLUSION FROM REFUGEE STATUS

Rules and practices in Norway, Canada, Great Britain, The Netherlands and Denmark

A comparative study

Maria Bergram Aas (Attorney-at-law)

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Acronyms

The 1951 Convention	The UN Refugee Convention of 1951
CRC	The UN Convention on the Rights of the Child of 1989
CAT	UN Convention on Torture of 1984
CEAS	Common European Asylum System
CIC	Citizenship and Immigration Canada
CTC	Counter-Terrorism Committee (UN)
ECHR	The European Convention on Human Rights
ECtHR	The European Court on Human Rights
EU	The European Union
IAG	International Assistance Group (Canada)
IAT	Immigration Appeals Tribunal (Great Britain)
ICC	The International Criminal Court
ICTR	The International Criminal Tribunal of Rwanda
ICTY	The International Criminal Tribunal of Yugoslavia
IND	Immigration and Nationality Directorate of the UK Home Office
IRB	Immigration and Refugee Board (Canada)
IRPA	Immigration and Refugee Protection Act (Canada)
IS	Immigration Service (Denmark)
NCIS	National Criminal Investigation Service (Norway) (KRIPOS)
PST	Politiets sikkerhetstjeneste (Norway)
QD	Council Directive 2004/83/EC
RAB	Refugee Appeals Board (Denmark)
RCMP	Royal Canadian Mounted Police
RPD	The Refugee Protection Division (Canada)
SIA	Special Immigration Appeals Commission (Great Britain)
ICCPR	International Convention on Civil and Political Rights
UDI	Utlendingsdirektoratet (Norway)
UNE	Utlendingsnemnda (Norway)
UNGA	UN General Assembly
UNHCR	UN High Commissioner for Refugees

Sammendrag

Denne rapporten er skrevet på oppdrag for Utlendingsdirektoratet (UDI), med det formål å beskrive gjeldende forvaltningspraksis under Flyktningkonvensjonen artikkel 1 F sammenliknet med praksis i et utvalgt antall andre stater. Formålet har også vært å utarbeide råd og anbefalinger vedørende forvaltningspraksis og gjeldende rett.

Arbeidet med rapporten har dratt stor nytte av innspill fra en referansegruppe bestående av representanter fra UDI, UNE, Generaladvokatembetet samt Justis- og Beredskapsdepartementet. I tillegg har professor dr. juris Terje Einarsen bidratt med nyttige innspill og synspunkter.

Forfatteren står imidlertid alene ansvarlig for de synspunkter og drøftinger som fremgår i rapporten. Det samme gjelder eventuelle feil.

1. Bakgrunn

I 2006 utga Einarsen, Vevstad og Skaar en komparativ studie av praksis knyttet til både eksklusjon fra og opphør av flyktningstatus. Deres rapport undersøkte praksis i Norge, Kanada, Storbritannia, Nederland og Danmark i et komparativt perspektiv. En av hovedanbefalingene i rapporten var å etablere en egen eksklusjonsenhet internt i UDI, med ansvar for behandling av alle saker under artikkel 1 F. Rapporten anbefalte også en markant økning i bevilgninger til UDI for å styrke arbeidet knyttet til eksklusjon. På grunnlag av rapporten etablerte UDI i 2009 en egen eksklusjonsenhet (F 1), som nå er i full drift, og som mottar asylsaker for vurdering fra samtlige geografiske enheter i UDI herunder Barnefaglig enhet. Denne studien tar for seg praksis ved eksklusjonsenheten, slik den har krystallisert seg etter fire år i drift.

2. Tema og metode

Rapporten tar for seg både materielle og prosessuelle regler samt praksis relatert til eksklusjon. I den delen av rapporten som behandler norsk forvaltningspraksis undersøkes det hvorvidt UDI og UNEs praksis er samordnet, tolkning av rettsregler, forvaltningspraksis samt avgrensningen mellom de ulike hjemlene for eksklusjon i artikkel 1 F. Praksis vedrørende identifikasjon av saker blir også undersøkt. Funnene er basert på en gjennomgang av vedtak truffet av både UDI og UNE, intervjuer med saksbehandlere m.v.

Den komparative delen av rapporten tar for seg praksis i Kanada, Nederland, Storbritannia og Danmark, og baserer seg på tilgjengelige rettskilder, litteratur og rapporter samt informasjon fra nasjonale eksperter.

3. Hovedfunn

Fra studiens hoveddel om praksis ved UDI og UNE er følgende funn sentrale:

1. Antallet eksklusjonsvedtak steg markant etter etableringen av enhet F 1 i UDI i 2009. Et relativt lavt antall vedtak forut for 2009 indikerer at tiltaket har hatt vesentlig positiv innvirkning på arbeidet knyttet til identifisering av saker og dermed også implementering og gjennomføring av statens forpliktelser under Flyktningkonvensjonen artikkel 1 F.
2. Et vesentlig høyere antall saker blir henvist til F 1-enheten fra de øvrige enhetene ved UDI sammenliknet med antallet eksklusjonsvedtak som blir fattet. Dette omfatter søkere som ikke blir innvilget flyktningstatus men som i sitt asylintervju har informert om deltakelse i eller tilknytning til straffbare handlinger. Dette innebærer at terskelen for henvisning av saker til eksklusjonsenheten er lav. Årsaken til at de fleste vedtak likevel ikke behandles ved eksklusjonsenheten synes å være at søkeren under enhver omstendighet ikke vurderes å falle inn under Flyktningkonvensjonen artikkel 1 A. Fenomenet sier derfor lite om de geografiske enhetenes evne til å identifisere kompliserte eksklusjonssaker, f.eks. der søkeren selv forsøker å unngå identifisering som tidligere tilknyttet forbryterske regimer el.l.
3. Eksklusjonsvedtak fattes i asylsaker med bred landopprinnelse, herunder Irak, Eritrea, Statsløse palestinere, Sudan, Afghanistan, Somalia, Russland, Sri Lanka, Etiopia, Iran og Syria.
4. Nær alle vedtak var basert på informasjon gitt av søkeren selv i asylintervju. Andre kilder var konkrete straffedommer mot søkeren og generelle landrapporter.
5. Fra 2010 har det funnet sted en økning i omfanget av informasjon som er inntatt i forhåndsvarselet om eksklusjon. Ved siden av omtale av det faktum som vurderes som grunnlag for mulig eksklusjon gis det henvisning til relevante rettskilder under artikkel 1 F. Slik forhåndsvarselet praktiseres i dag, gir det søkeren en noe større mulighet til kontradiksjon enn det som fulgte av tidligere praksis, der det utelukkende ble gitt informasjon om at UDI vurderte eksklusjon på grunnlag av Flyktningkonvensjonen artikkel 1 F.
6. Artikkel 1 F b er klart det mest anvendte rettsgrunnlaget for eksklusjon etter norsk praksis. Bestemmelsen anvendes nær dobbelt så ofte som den nest hyppigst brukte hjemmelen, som er artikkel 1 F a, alternativet forbrytelser mot menneskeheten. Årsaken til at artikkel 1 F b er hyppigst anvendt er at bestemmelsen i henhold til UDIs praksis anvendes som grunnlag for eksklusjon av personer som har deltatt i væpnet konflikt uten å inneha formell kompetanse til å utøve makt (se pkt. 7). I relativt få saker ble eksklusjon besluttet på grunnlag av artikkel 1 F a, alternativet krigsforbrytelser. Ingen saker ble avgjort på grunnlag av artikkel 1 F a, alternativet folkemord. Heller ingen saker ble avgjort på grunnlag av artikkel 1 F c, forbrytelser mot FNs formål og prinsipper eller forbrytelser mot freden.
7. I henhold til UDIs praksis vurderes søkere som har deltatt i trefninger under væpnet konflikt som representant for en ikke-statlig aktør under artikkel 1 F b («alvorlige ikke-politiske forbrytelser»), ikke artikkel 1 F a («krigsforbrytelser»). Dette innebærer at personer som har deltatt aktivt i væpnet konflikt på vegne av slike grupper, uten å inneha formell voldskompetanse, ekskluderes også i tilfeller der vedkommende ellers har handlet innen rammene av krigens folkerett, eller det i det minste ikke foreligger indikasjoner om at krigsforbrytelser er begått. Eksempler på grupper hvis medlemmer UDI har ekskludert på grunnlag av artikkel 1 F b er:

- a. Eritreiske separatister i frigjøringskrigen mot Etiopia fra 1961-1991.
 - b. Medlemmer av Taliban og andre ikke-statlige aktører som deltar i trefninger mot internasjonale styrker i Afghanistan.
 - c. Medlemmer av JEM som deltok i angrepet på Omdurman i Sudan i 2008.
8. En klar majoritet av eksklusjonsvedtak truffet av UDI baserer seg på medvirkning til straffbare handlinger, ikke direkte gjennomføring av en straffbar handling («hovedhandling») fra asylsøkerens side. Presumsjon av individuelt ansvar basert på søkerens tidligere rolle / stilling i en organisasjon eller et regime fant sted i seks vedtak. I de tilfellene der eksklusjon fant sted på grunnlag av presumsjon av individuelt ansvar var det avgitt en særlig omfattende begrunnelse med henvisning til ulike landkilder.
 9. Det subjektive vilkåret tilknyttet paraplyvilkåret for forbrytelser mot menneskeheten («omfattende og systematisk») er sjeldent eksplisitt vurdert i eksklusjonsvedtak basert på forbrytelser mot menneskeheten.
 10. Minstealderen for strafferettslig ansvar i saker som vurderes under artikkel 1 F a) er 18 år under henvisning til ICC statuttene artikkel 26, mens minstealderen i saker som vurderes under artikkel 1 F b) er 15 år jf. Straffeloven § 46.
 11. I de fleste vedtak er beviskravet beskrevet som «alvorlig grunn til å tro», jf. Flyktningkonvensjonens autonome formulering. Kun i seks vedtak ble et alminnelig forvaltningsrettslig beviskrav sitert, og disse vedtakene omfattet både eksempler på krav om «alminnelig sannsynlighetsovervekt» og eksempler på krav om «klar / kvalifisert sannsynlighetsovervekt».
 12. Verken UDI eller UNE vurderer proporsjonaliteten mellom handlingen som danner grunnlag for eksklusjon og det søkeren risikerer ved retur til hjemlandet ved sin vurdering av hvorvidt eksklusjon bør besluttes. Bakgrunnen for dette er at søkere som ekskluderes under enhver omstendighet vil være vernet mot retur i medhold av EMK artikkel 3.
 13. Nødverge er den klart mest vanlige anførselen fra asylsøker etter mottatt forhåndsvarsel om eksklusjon. Nødverge har kun blitt gitt gjennomslag i ett vedtak ved UDI.
 14. Både UNHCRs Bakgrunnsnotat om eksklusjon (2003) og UNHCRs Veileder om eksklusjon (2003) er viktige kilder i UDI og UNEs tolkning av Flyktningkonvensjonen artikkel 1 F.
 15. Ved UNEs behandling av saker der eksklusjon kan bli et tema gjennomføres det alltid nemndmøte. Søkeren har anledning til å avgi muntlig forklaring for nemnda ved oppmøte sammen med sin advokat og tolk.
 16. Bevissituasjonen er i noen saker endret fra tidspunktet for UDIs vedtak til tidspunktet for UNEs nemndsmøte og vedtak. I de aktuelle tilfellene knytter dette seg til endringer i søkerens forklaring. Bevisene presenteres også ulikt for de to forvaltningsorganene, ved at UDI baserer sitt vedtak på dokumenter mens UNE baserer seg på bevisumiddelbarhet ved å høre søkerens forklaring i nemndmøte.

17. I tre av 13 saker konkluderte UDI og UNE ulikt hva gjelder spørsmålet om eksklusjon. De øvrige sakene hvor det foreligger vedtak både fra UDI og UNE fordelte seg som følger:
- a. Syv saker hvor UDI konkluderte med at søkeren i utgangspunktet ikke oppfylte vilkårene for flyktningstatus, men hvor UNE konkluderte med at søkeren i utgangspunktet oppfylte disse vilkårene. I disse sakene vurderte UNE at søkeren måtte ekskluderes etter artikkel 1 F. Forskjellene her knyttet seg altså til inklusjonsvurderingen, da kun UNE foretok en vurdering av eksklusjonsspørsmålet i disse sakene.
 - b. Tre saker hvor UDI og UNE konkluderte likt både i spørsmålet om søkeren oppfylte vilkår for vern som flyktning og om søkeren skulle ekskluderes.
18. UNE ga artikkel 1 F anvendelse i totalt åtte vedtak. Blant disse var fire basert på artikkel 1 F a) («forbrytelse mot menneskeheten») og fire på artikkel 1 F b) («alvorlig ikke-politisk forbrytelse»).
19. Med unntak av ett vedtak baserte alle UNEs eksklusjonsvedtak seg på en medvirkningshandling fra asylsøkerens side. Ingen av UNEs vedtak baserte seg eksplisitt på presumsjon av individuelt ansvar. UNE synes å ha en strengere terskel for presumsjon av individuelt ansvar enn UDI.
20. Basert på intervjuer med saksbehandlere ved UNE er beviskravet for eksklusjon «klar sannsynlighetsovervekt» ved klageorganet.
21. I motsetning til ved UDI blir ikke eksklusjonssaker ved UNE vurdert i en spesialisert enhet. Alle saker forberedes for nemnda av saksbehandlere ved de alminnelige geografiske enhetene. Vedtak fattes av nemnda bestående av nemndleder og to nemndmedlemmer.
22. I motsetning til andre land inkludert i studien har ikke norsk utlendingslovgivning tydelig hjemmel for eksklusjon fra andre oppholdstillatelser slik som familiegjenforening, arbeids- eller studietillatelser når det foreligger «alvorlig grunn til å anta» at søkeren har deltatt i handlinger som nevnt i artikkel 1 F (forbrytelser mot menneskeheten, krigsforbrytelser o.l.). Bestemmelser som har en grenseflate til en eventuell slik hjemmel er utlendingsloven § 7 første ledd som kan lede til avslag «når utenrikspolitiske hensyn eller grunnleggende nasjonale interesser gjør det nødvendig» (i andre saker enn asyl og beskyttelse etter EMK), § 31 annet ledd som hjemler avslag fra beskyttelse etter utlendingsloven § 28 første ledd litra a) dersom «det er grunnlag for å utvise utlendingen ut fra grunnleggende nasjonale interesser, eller utlendingen har fått endelig dom for en særlig alvorlig forbrytelse og av den grunn utgjør en fare for det norske samfunnet» eller § 31 tredje ledd «dersom utlendingen forlot hjemlandet kun for å unngå straffereaksjoner for en eller flere straffbare handlinger som kunne ha blitt straffet med fengsel dersom handlingene var blitt begått i Norge». Videre gir utlendingsloven § 59 første ledd hjemmel til å avslå oppholdstillatelse «dersom det foreligger omstendigheter som vil gi grunn til å nekte utlendingen adgang til eller opphold i riket i medhold av andre bestemmelser i loven».
23. Søkere som ekskluderes fra flyktningstatus er som hovedregel ansett som beskyttet etter utlendingsloven § 73 jf. EMK artikkel 3, ettersom de forutsetningsvis er ansett

å oppfylle vilkårene for vern som flyktninger. Det innvilges derfor som hovedregel midlertidig oppholdstillatelse jf. utlendingsloven § 74. De midlertidige tillatelsene må søkes fornyet hver sjette måned. Tillatelsene gir mulighet til å arbeide i Norge, men kan ikke danne grunnlag for familiegjenforening, permanent oppholdstillatelse, ny innreise til Norge eller reiser til andre stater i Schengen-samarbeidet.

24. Både UDI og UNE informerer KRIPOS rutinemessig når det fattes vedtak etter utlendingsloven § 31 jf. Flyktningkonvensjonen artikkel 1 F. KRIPOS' tilgang til utlendingsforvaltningens dokumenter vurderes på konkret grunnlag, etter søknad til UDI.

Funnene fra rapportens komparative del fremstår i figur 1.

Figur 1					
	Norge	Storbritannia	Nederland	Danmark	Canada
Rekkefølge inklusjon / eksklusjon	Inklusjon før eksklusjon.	Eksklusjon før inklusjon.	Eksklusjon før inklusjon.	Inklusjon før eksklusjon.	Eksklusjon før inklusjon
Hyppigst anvendt hjemmel	Artikkel 1 F b, deretter artikkel 1 F a. Artikkel 1 F c aldri anvendt.	Artikkel 1 F a. Deretter artikkel 1 F b og 1 F c.	Artikkel 1 F a og b. Artikkel 1 F c anvendes sjeldent.	Artikkel 1 F a og b.	Artikkel 1 F a og 1 F b. Artikkel 1 F c sjeldent anvendt.
Proporsjonalitetstest	Ingen	Ingen	Ingen	Anvendes.	Ingen.
Strafferettslig lavalder ved eksklusjon	15 år for eksklusjon etter artikkel 1 F b, 18 år etter artikkel 1 F a.	Ingen fast lavalder.	15 år.	15 år.	Ingen fast lavalder men anvendes ned til 12-årsalder, avhengig av «knowledge and mental capacity» på gjerningstidspunktet.
Beviskrav	Alminnelig sannsynlighetsovervekt ved UDI. Klar sannsynlighetsovervekt ved UNE.	Under strafferettens beviskrav men mer enn mistanke. "Realiteten er at det neppe vil foreligge tilstrekkelige alvorlige grunner for å anse søkeren skuldig med mindre beslutningstageren anser at det foreligger bevis ut over alminnelig sannsynlighetsovervekt" (min oversettelse) (Britisk Høyesterett)	Under strafferettens beviskrav men mer enn mistanke. "Serious evidence" tolkes i praksis som "plausible evidence."	"Serious reasons for considering"	"Reasonable grounds to believe" = "something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities. In essence reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information" (Supreme Court)

		The reality is that there are unlikely to be sufficient serious reasons for considering the applicant to be guilty unless the decision-maker can be satisfied on the balance of probabilities that he is” (Supreme Court).			
Anvendelse av presumsjon av individuelt ansvar	Anvendes ved UDI, ikke ved UNE.	Individuelt ansvar kan presumeres hvis det kan godtgjøres at vedkommende “contributed in a significant way to the organization’s ability to pursue its purpose of committing acts of terrorism / serious crime(s), aware that the assistance will in fact further that purpose”. Syv ikke uttømmende momenter gir veiledning ved vurderingen.	Individuelt ansvar kan presumeres for søkere som har hatt fremstående stillinger i visse organisasjoner definert som «brutal». Presumsjonen kan motbevises av søkeren, men ved anvendelse av presumsjon snus bevisbyrden.	—	Individuelt ansvar kan presumeres for søkere som har hatt fremstående stillinger i visse organisasjoner definert som «brutal». Presumsjonen kan motbevises av søkeren, men ved anvendelse av presumsjon snus bevisbyrden.
Anvendelse av artikkel 1 F a eller 1 F b overfor representanter for ikke-statlige aktører i intern væpnet konflikt.	Artikkel 1 F b danner grunnlag for eksklusjon av søkere som har deltatt i aktiv krigføring for ikke-statlige aktører, uten formell kompetanse til å utøve vold / makt.	Handlinger begått i væpnet konflikt og med tilstrekkelig sammenheng til den væpnede konflikten vurderes under artikkel 1 F a, uavhengig av om aktøren hadde formell kompetanse til å utøve vold / makt.	Handlinger begått i væpnet konflikt og med tilstrekkelig sammenheng til den væpnede konflikten vurderes under artikkel 1 F a, uavhengig av om aktøren hadde formell kompetanse til å utøve vold / makt.	—	Handlinger begått i væpnet konflikt og med tilstrekkelig sammenheng til den væpnede konflikten vurderes under artikkel 1 F a, uavhengig av om aktøren hadde formell kompetanse til å utøve vold / makt.
Betydning av at forholdet er oppgjort ved soning	Gjennomført soning innebærer ikke at artikkel 1 F ikke kan komme til anvendelse.	Gjennomført soning innebærer ikke at artikkel 1 F ikke kan komme til anvendelse.	Gjennomført soning innebærer ikke at artikkel 1 F ikke kan komme til anvendelse.	Gjennomført soning innebærer ikke at artikkel 1 F ikke kan komme til anvendelse.	Gjennomført soning er et relevant moment, men ingen automatikk i at eksklusjon ikke

					beslattes.
Oppholdsstatus / situasjon etter eksklusjon	Dersom vernet av EMK artikkel 3: midlertidig tillatelse av seks måneders varighet, som ikke danner grunnlag for bosettingstillatelser , familiegjenforening el.l.	Dersom vernet av EMK artikkel 3: Midlertidig tillatelse av maksimum seks måneders tillatelse, klare begrensninger vedrørende oppholdssted, muligheter til arbeid, studier m.v.	Ingen tillatelse.	—	Ingen tillatelse.

4. Anbefalinger

På bakgrunn av funnene i studien fremmes følgende anbefalinger:

1. Eksklusjonsenheten ved UDI demonstrerte sin kapasitet ved å fatte 29 eksklusjonsvedtak i 2011. Hva gjelder antall vedtak har utviklingen imidlertid stagnert, grunnet øket ansvar som også omfatter samtlige tilbakekallsaker i asylsammenheng ved UDI. For å sikre forsvarlig saksbehandlingstid og et høyt faglig nivå på eksklusjonsvurderingene anbefales det derfor å styrke tilgjengelige resurser til eksklusjonsenheten.
2. Styrke arbeidet med identifisering av eksklusjonssaker i hele Utlendingsdirektoratet, herunder implementering av et større fokus på faktiske tema knyttet til artikkel 1 F under asylintervjuene. Terskelen for å gjennomføre oppfølgingsintervjuer i regi av eksklusjonsenheten bør være lav, og bør under enhver omstendighet ikke påvirkes av manglende økonomiske bevillinger.
3. Vurdere implementering av en bestemmelse tilsvarende artikkel 1 F og utlendingsloven § 31 for samtlige oppholdstillatelser i Norge, herunder familiegjenforening, studie- og arbeidstillatelser. Slik lovendring forutsetter imidlertid at de faktiske forhold som subsumeres under nevnte bestemmelse forbeholdes de mest alvorlige forbrytelsene og at området for bestemmelsen ikke utvides gjennom forvaltningspraksis. Rettssikkerhetsgarantier må sikres i et eventuelt lovarbeid.
4. Sikre tilstrekkelig undersøkelse av bakgrunnen til overføringsflyktninger til Norge.
5. Videreføre og styrke nåværende praksis vedrørende konkret informasjon om grunnlaget for mistanken samt henvisning til aktuelle kilder i forhåndsvarselet om eksklusjon. Forhåndsvarselet bør i større grad enn i dag konkretisere hvilket faktum som danner grunnlaget for vurderingen, hvilken hjemmel som vurderes anvendt samt hvilket ansvarsgrunnlag søkeren vurderes ekskludert på bakgrunn av. Det bør særlig angis om søkeren vurderes ekskludert på grunnlag av en presumsjon av individuelt ansvar grunnet tilknytning til en organisasjon eller et regime.

6. Etablere en liste med asyladvokater med særlig kompetanse på rettsområder tilliggende artikkel 1 F, slik som strafferett, internasjonal strafferett og krigens folkerett. Etablere kurs for asyladvokater som skal arbeide med eksklusjonssaker.
7. Tydeliggjøre gjeldende bevisterskel for eksklusjon. Det er behov for en klargjøring av hvorvidt flyktningkonvensjonens terskel «alvorlig grunn til å tro» skal anvendes direkte som en egen autonom bevisterskel eller om denne skal tolkes i samsvar med det alminnelige forvaltningsrettslige beviskravet «sannsynlighetsovervekt» eller det strengere beviskravet «klar sannsynlighetsovervekt».
8. Tydeliggjøre praksis knyttet til eksklusjon på grunnlag av presumsjon av individuelt ansvar overfor asyladvokater, herunder hvilke momenter som anses relevante ved vurderingen, Dette foreslås gjennomført ved utarbeiding av et praksisnotat vedrørende eksklusjon og individuelt ansvar, samt tilbud om kurs til asyladvokater.
9. Generelt anbefales et styrket fokus på grunnleggende strafferettslige prinsipper ved både UDI og UNEs behandling av eksklusjonssaker.
10. Det anbefales å sikre konsistent anvendelse av grensegangen mellom artikkel 1 F a og artikkel 1 F b.
11. Sikre en grundig og synlig subsumsjon av samtlige vilkår for eksklusjon på grunnlag av artikkel 1 F a («forbrytelser mot menneskeheten»), herunder hvorvidt søkeren på tidspunktet for sin medvirkningshandling hadde kunnskap om de omfattende og systematiske overgrepene som hans handling utgjorde et ledd i.
12. Sikre lik behandling av søkere som vurderes for eksklusjon på grunnlag av handlinger som ble begått mellom alderen 15 til 18 år, uavhengig av hvorvidt handlingen vurderes under artikkel 1 F a eller artikkel 1 F b.
13. Sikre anvendelse av en lik minimumsalder for strafferettslig ansvar i alle geografiske enheter ved UDI som overfører saker for behandling ved enhet F 1, slik at unødvendige forsinkelser i saksbehandlingen av søknader fra mindreårige eller unge voksne unngås.
14. Tydeliggjøre praksis vedrørende nødverge for søkere som har begått eller medvirket til tortur under tvungen militærtjeneste i Eritrea.
15. Revurdering av gjeldende praksis hvor søkere som har deltatt i krigshandlinger på vegne av ikke-statlige aktører ekskluderes etter artikkel 1 F b på grunnlag av handlinger som ville utgjøre lovlige stridshandlinger i væpnet konflikt dersom de var begått av en statlig aktør. UDIs praksis vurderes å basere seg på en rettslig korrekt anvendelse krigens folkerett hva gjelder spørsmålet om kompetanse til voldsutøvelse og derav immunitet fra straffeforfølgning. UDI bør imidlertid foreta en grunnleggende vurdering av hvorvidt kompetansespørsmålene i krigens folkerett skal gis en sentral rolle ved tolkning av Flyktningkonvensjonen artikkel 1 F. Dette gjelder særlig i saker som vedrører asylsøkere som har deltatt i opprør mot regimer som har stått for systematiske menneskerettighetsbrudd (f.eks. Derg-regimet i Etiopia). Basert på de utgangspunkter som skisseres i rapporten anbefales det at konkrete retningslinjer etableres for anvendelsen av et unntak fra eksklusjon for denne typen handlinger. Retningslinjene bør etableres i dialog med relevante

nasjonale ekspertmiljøer innen flyktningrett, krigens folkerett og internasjonal strafferett.

16. Ettersom asylsøkere som har blitt ekskludert men er vernet mot retur etter EMK artikkel 3 ikke kan forutsettes å skulle returnere til opprinnelseslandet eller tvangsmessig utsendes, anbefales det å videreføre dagens ordning der disse innvilges midlertidige oppholdstillatelser av seks måneders varighet, herunder anledning til arbeid. Utlendingsforvaltningen samt politiet bør i hver enkelt sak vurdere hvorvidt foreliggende hjemler for ileggelse av meldeplikt eller krav om bestemt oppholdssted skal benyttes.
17. Tydeliggjøre administrative rutiner mellom UDI og UNE.
18. Tydeliggjøring av praksis ved UNE, herunder
 - a. Utarbeiding av en generell oversikt over praksis over artikkel 1 F («praksisnotat»).
 - b. Gjennomføre jevnlig møter på tvers av geografiske enheter for å sikre enhetlig praksis.
 - c. Henvise en eller flere eksklusjonssaker til behandling i Stornemnd, særlig med tanke på følgende problemstillinger:
 - i. Skillet mellom krigsforbrytelser og alvorlige ikke-politiske forbrytelser, herunder hvorvidt ellers lovlige stridshandlinger begått av representanter for ikke-statlige aktører uten formell voldskompetanse skal vurderes under artikkel 1 F a eller 1 F b.
 - ii. Tydeliggjøre en felles minimumsalder for strafferettslig ansvar som skal gjelde for saker både under artikkel 1 F a og 1 F b.
19. Generelt styrke ressurser tilgjengelig i eksklusjonssaker i UNE, for å videreføre og sikre det arbeidet som nedlegges per i dag.

Forfatteren står alene ansvarlig for de synspunkter og drøftinger som fremgår i rapporten. Det samme gjelder eventuelle feil.

Resumé

This report was commissioned by the Norwegian Directorate of Immigration (UDI). The objective has been to provide the UDI with updated knowledge on how the rules regarding exclusion are practiced in Norway compared to other countries, and to provide concrete recommendations on national legislation and practice.

The process of creating this report has benefited greatly from ideas and discussions having taken place within a reference group consisting of representatives from the UDI, UNE, the Office of the Advocate General of the Norwegian Armed Forces as well as the Ministry of Justice and Police. In addition, professor Terje Einarsen has contributed with valuable insight and advice.

The author is responsible for the statements and deliberations in this report. Likewise, all mistakes are the responsibility of the author alone.

1. Background

In 2006, Einarsen, Vevstad and Skaar published a comparative study of the rules pertaining to exclusion and cessation. That report considered practice in Norway, Canada, the UK, the Netherlands and Denmark in a comparative perspective. One of the main recommendations in the 2006 report was the establishment of a specialized unit within the UDI that should work specifically on exclusion cases. In addition, a significant increase in the resources allocated to the administrative work related to exclusion cases was recommended. On this basis, a specialized unit was established within the UDI in January 2009, with the specific responsibility of considering exclusion cases (the F 1 unit). The unit is now fully operational, and receives cases for consideration from all geographical units within the UDI. This report describes the administrative practice at the exclusion unit, as it has been established over four years of implementation.

2. Scope and methodology of the study

The report focuses on both material and procedural rules and practices relating to exclusion. In the section focussing on national practice, the report considers whether UDI and UNE practice is unified, interpretation of legal terms and standards, practice on delimitation between article 1 F a) – c), administrative practice regarding identification of cases and other issues. The findings are based on a review of decisions provided by the UDI, including both UDI and UNE decisions.

The comparative section of the study covers Canada, the Netherlands, the UK and Denmark, and is based on legal sources, literature, reports and reviews as well as information provided by national experts.

3. Main findings

The main findings in the report regarding Norwegian administrative practice are summarized as follows:

1. The number of exclusion decisions increased significantly following the establishment of the UDI F 1 unit in 2009. Based on the low number of exclusion decisions prior to 2009, this indicates that significant improvement has taken place concerning identification of cases and consequently implementation of the obligations under article 1 F.
2. A significantly larger number of cases are referred to unit F1 compared to the actual number of exclusion decisions. This includes individuals who are not granted refugee status or temporary permits on the basis of ECHR article 3, but who have informed of prior involvement or affiliation with crimes. This shows that the threshold for referring cases to the exclusion unit is low. The explanation behind the divergence between number of cases referred to the unit and actual exclusion decisions met must be that the requirements of article 1 A (inclusion) are not considered to be met in most cases. Thus, this phenomenon does not say much about the capability of case workers at geographical units at identifying exclusion cases, e.g. where the applicant himself attempts at avoiding identification as having been affiliated with repressive regimes or criminal organizations.
3. Countries of origin in exclusion cases are diverse, including among other Iraq, Eritrea, Stateless Palestinians, Sudan, Afghanistan, Somalia, Russia, Sri Lanka, Ethiopia, Iran and Syria.
4. Almost all exclusion decisions were based on information provided by the applicant in the asylum interview. Other commonly used sources of evidence were criminal convictions and country reports.
5. From 2010, an increase may be seen in the amount of information provided in the pre-notifications of potential application of article 1 F. In addition to referral to the facts which constitutes the basis of the consideration under article 1 F, the pre-notification provides reference to legal sources and academic references. The pre-notification, as it is practiced today, provides the applicant with a better possibility of contradiction than did the previous versions.
6. The dominant basis for exclusion is article 1 F b), which more or less doubles the next category, article 1 F a) (crimes against humanity), in size. This is explained by the practice described under finding no. 7. A relatively low number of cases were decided on the basis of article 1 F a) (war crimes). No cases were decided on the basis of article 1 F a) (genocide). No cases were decided on the basis of crimes contrary to the purposes and principles of the UN or crimes against the peace.
7. According to UDI practice, individuals not holding immunity from having committed otherwise lawful acts of war, who participate in concrete violent incidents during armed conflict, are considered for exclusion under article 1 F b). This means that individuals who have participated actively in armed conflict on behalf of non-state actors, albeit without holding formal competency to apply force, are excluded also where he or she otherwise acted within the parameters of the law of armed conflict, or where there are no indications that war crimes were committed. Examples of groups whom the UDI considers under this category are:

- Eritrean separatists fighting in the liberation war against Ethiopia (1961-1991)
 - Taliban and other non-state actors targeting the ISAF forces in Afghanistan
 - Members of the JEM having taken part in the 2008 attack on the city of Omdurman (Sudan)
8. A majority of exclusion cases are based on acts of complicity of the applicant, i.e. the applicant is in most cases not the main perpetrator of a crime. A presumption of individual responsibility was applied in six decisions. Where exclusion was decided on the basis of a presumption of responsibility, the UDI provided a particularly thorough reasoning on the basis of country of origin information reports.
 9. The subjective element (*mens rea*) regarding the chapeau requirement of “widespread and systematic” under crimes against humanity is seldom explicitly considered in exclusion decisions based on that category of crime.
 10. The applied minimum age of criminal responsibility in cases considered under article 1 F a) is 18 years as stipulated by the ICC statutes article 26, while the minimum age in cases considered under article 1 F b) is 15 years as stipulated by the Norwegian Penal Code § 46.
 11. In most decisions, the burden of proof was described in the autonomous wording of the refugee convention (“serious reason to believe”). Only in six cases was reference made to domestic administrative law standards of proof, and among these both “a balance of probability” and “a clear / qualified balance of probability” was applied.
 12. Neither UDI nor UNE apply a balancing / proportionality test in assessing whether exclusion should be decided.
 13. Duress is a commonly argued defense, but has only been accepted in one case.
 14. Both the UNHCR Background Note (2003) and Guideline (2003) on exclusion are important sources in the UDI and UNE interpretation of article 1 F.
 15. Exclusion cases at UNE are always considered by the Board, consisting of three members. The applicant may provide an oral statement to the board.
 16. The evidence in a case often changes from the time of the UDI decision until the time of the UNE decision. In some cases this is due to changes in the statement of the applicant following the UDI exclusion decision. The mode of consideration of evidence is also significantly different in UNE than in the UDI. Where UDI must base its decision on written material only (including the asylum interview), UNE renders a decision also on the basis of an oral, direct statement from the applicant.
 17. In three of 13 cases UDI and UNE concluded differently as to the question of exclusion.¹ The remaining cases where both UDI and UNE have rendered decisions may be described as follows:
 - a. Seven cases where the UDI did not consider the applicant as protected under Section 28 first paragraph (refugee), and thus did not consider

¹ 5, 37, 43

exclusion at all, whereas UNE considered 28 first paragraph to be applicable and considered exclusion.² The differences in these cases related to the inclusion assessment alone, as only UNE considered the question of exclusion.

b. Three cases where UDI excluded the applicant, whereas UNE did not.³

18. In total, UNE concluded on application of article 1 F in 8 cases. Among these, 4 were based on crimes against humanity and 4 on serious non-political crimes. No cases were based on war crimes or crimes against the peace.
19. All but one decision at UNE were based on accessorial liability (complicity). No decisions in UNE practice are explicitly based on a presumption of individual responsibility. UNE appears to apply a higher threshold for invoking a presumption of responsibility, compared to the UDI.
20. The level of proof required for exclusion at UNE is, according to interviews, “a clear balance of probability”.
21. As opposed to UDI, exclusion cases at UNE are considered within the geographical units. All exclusion cases are considered by the UNE Board, i.e. none are considered by a Board Leader alone. No exclusion cases have yet been considered by the UNE Grand Board.
22. As opposed to other countries included in the survey, Norwegian legislation does not include provisions aimed at excluding or barring entry of foreign citizens applying for leave to stay on other basis such as family reunification, work or study, specifically on grounds similar to article 1 F. Still, rejection is mandated where “foreign policy interests” or “fundamental national interests” necessitate it, or where the facts of the case indicate grounds for rejecting the applicant at a port of entry or expulsion from the country.⁴
23. Applicants who are excluded from refugee status are as a main rule considered to be protected under ECHR article 3, which is implemented in the Immigration Act Section 73. In such instances, temporary residence permits are granted on the basis of the immigration act Section 74. The permits have a validity of six months, after which renewal must be sought. The permits provide permit to work in Norway, but may not serve as the basis for family reunification, permanent residency, new entry into Norway (i.e. the holder may not leave Norway and expect to return), or visits to other Schengen states.
24. The National Criminal Investigation Service (KRIPOS) is routinely informed, in writing, of article 1 F cases by the UDI and UNE. Their access to UDI or UNE information in each case is assessed on a concrete basis, and only following concrete requests from KRIPOS.

The findings in the comparative section of the report may be summarized in the following overview (figure 1):

² 1, 4, 6, 10, 48, 55, 74

³ 15, 16, 75

⁴ Immigration Act section 7, 31 second and third paragraph and 59

Figure 1					
	Norway	Great Britain	The Netherlands	Denmark	Canada
Order of inclusion / exclusion	Inclusion before exclusion.	Exclusion before inclusion.	Exclusion before inclusion.	Inclusion before exclusion.	Exclusion before inclusion.
Most commonly used basis for exclusion	Article 1 F b, followed by article 1 F a. Article 1 F c has never been applied.	Article 1 F a, followed by article 1 F b and 1 F c.	---	Article 1 F a and b.	Article 1 F a and b. Article 1 F c is rarely applied.
Proportionality test	None	None	None	Applied	None
Minimum age of criminal responsibility within the exclusion assessment	15 years in article 1 F b cases, 18 years in article 1 F a cases.	No fixed minimum age.	15 years.	15 years.	No fixed minimum age, exclusion is decided for children as young as 12 at the time of the act, based on "knowledge and mental capacity".
Burden and level of proof	UDI: Balance of probability. UNE: Clear balance of probability.	Below the criminal law requirement but more than mere suspicion. According to the Supreme Court "the reality is that there are unlikely to be sufficient serious reasons for considering the applicant to be guilty unless the decision maker can be satisfied on the balance of probabilities that he is".	Below the criminal law requirement but more than mere suspicion. Dutch practice has translated "serious reasons" into a requirement of "plausible evidence".	"Serious reasons for considering".	"Reasonable grounds to believe" = "something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities. In essence reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information" (Supreme Court)
Use of presumption of responsibility	Presumption applied in some cases by UDI, none by UNE.	Presumption may be applied if it can be proven that the individual "contributed in a significant way to the organization's ability to pursue its purpose of	Presumption may be applied. The ministry of justice has designated several organizations as such that membership at a certain level	---	Presumption of responsibility is often applied as basis for exclusion of individuals having held membership in certain

		committing acts of terrorism / serious crime(s), aware that the assistance will in fact further that purpose". Seven non exhaustive factors have been established in the case law.	leads to a rebuttable presumption of knowing and personal participation in the crime(s).		organizations or regimes.
Use of article 1 F a or 1 F b when considering exclusion of representatives of non-state actors having taken part in internal armed conflict	Article 1 F b constitutes grounds for exclusion of applicants who have participated actively in armed conflict as representatives of non-state actors, without holding formal competency to apply force / violence (e.g. targeting government soldiers is considered attempt at murder under article 1 F b).	Acts committed in armed conflict and with sufficient nexus to the conflict are considered under article 1 F a, requiring war crimes, regardless of whether the applicant held formal competency to apply force / violence.	---	---	Acts committed in armed conflict and with sufficient nexus to the conflict are considered under article 1 F a, requiring war crimes, regardless of whether the applicant held formal competency to apply force / violence.
The applicant has served a sentence for the act which is considered as basis for exclusion.	Article 1 F may still apply.	Article 1 F may still apply.	Article 1 F may still apply.	---	A relevant factor, although article 1 F may still apply.
Residence status / situation post exclusion	Where refoulement would be in violation of ECHR article 3: temporary work and residence permit valid for 6 months which may not form the basis of family reunification, permanent residence etc.	Where refoulement would be in violation of ECHR article 3: temporary work and residence permit valid for 6 months with clear restrictions on area of residence, work, studies etc.	No residence permit.	---	No residence permit.

4. Recommendations

Based on the findings in the report, a number of recommendations are made:

1. The UDI exclusion unit demonstrated its capacity by rendering 29 decisions on exclusion in 2011. However, the development as to numbers of exclusion decisions has slowed down due to an increase in the designated area of responsibility of the unit. In order to ensure consideration of the cases within reasonable time, further allocation of resources to the 1 F unit is recommended.
2. Strengthening the screening process in order to ensure identification of potential article 1 F cases, including a strengthened focus on article 1 F in asylum interviews. The threshold for conducting follow up interviews should be low, and such interviews should not be hindered by the general resource situation within the section.
3. Consider implementation of a provision similar to article 1 F and Section 31 of the Immigration Act that would apply in the consideration other residence permits such as family reunification, study and work permits. Such a provision should explicitly be limited to the most serious crimes which are included also in article 1 F. Procedural rights which would strengthen rule of law in such cases should be considered, e.g. access to a public lawyer.
4. Ensure sufficient screening of applicants requesting resettlement through the UNHCR.
5. Continue the current practice regarding the level of information, including references to legal sources, provided in the letter of pre notification to the applicant (contradiction).
6. Establish an exclusion specific list of asylum lawyers that are appointed in 1 F cases, and establish relevant courses.
7. Clarify the burden of proof, *i.e.* whether an autonomous definition based on the refugee conventions should be applied, a balance of probability or a clear / strong balance of probability.
8. Clarify practice vis à vis asylum lawyers, e.g. by establishing practice guidelines or notes which are publicly accessible, as well as courses for asylum lawyers. This is particularly important regarding exclusion on the basis of a presumption of individual responsibility.
9. Strengthening focus on fundamental principles of criminal law within both UDI and UNE.
10. Ensure consistent application of the delimitation between article 1 F a and 1 F b.
11. Ensure a thorough and clear consideration of all requirements for exclusion on the basis of article 1 F a, crimes against humanity, including whether the applicant, at the time of the act, held knowledge of a widespread and systematic attack which his act constituted part of.

12. Ensure equal treatment of applicants considered for exclusion on the basis of acts having been committed between the age of 15 and 18 years, regardless of whether the act is considered under article 1 F a or 1 F b.
13. Ensure application of such common age of minimum criminal responsibility within all geographical units who identify cases for transfer to section F 1, in order to avoid unnecessary delays in case handling time for minors or young adults who should not be considered for exclusion.
14. Clarify practice regarding “duress” for applicants having committed or been complicit to torture while under forced conscription in the Eritrean army.
15. Reconsideration of the current practice of excluding under 1 F b in instances of otherwise lawful acts of armed conflict committed by individuals not holding competency to carry out such acts (non-state actors in the context of armed conflict). The UDI practice is considered to be in line with principles of competency to apply armed force as stipulated by the law of armed conflict. However, consideration should be made as to whether the issue of competence *ratione personae* within LOAC should hold a decisive role within refugee law. This is in particular relevant in the case of asylum seekers having taken part in rebellions against repressive regimes and regimes having committed serious human rights violations (e.g. the Derg regime in Ethiopia). Based on the various potential approaches to this question which is discussed in the report, concrete guidelines should be established for the application of an exception from exclusion for this group. Such guidelines should be established in dialogue with relevant national expertise within refugee law, law of armed conflict and international criminal law.
16. Asylum seekers who have been excluded from refugee status may often not be refouled due to the provision in ECHR article 3. The current practice of providing temporary residence permits with a validity of six months, including the possibility of work, is therefore recommended to be continued. The immigration authorities and the police should in each case consider whether the individual should report at the police at regular intervals, or whether a mandatory area of location should be imposed.
17. Clarify administrative routines between UDI and UNE.
18. Consolidation of practice at UNE, including:
 - Establishment of a general overview of practice within the area of article 1 F (“praksisnotat”)
 - Conduct regular meetings including all geographical units in order to consolidate practice.
 - Consideration of 1 F cases within the context of the Grand Board (“Stornemnd”)
 - Delimitation between war crimes and serious non-political crimes, including whether otherwise lawful acts of armed conflict committed by non-state actors should be considered under article 1 F a or 1 F b.
 - Clarification of a common minimum age of criminal responsibility to be applicable in both article 1 F a and 1 F b cases.

2. General strengthening of resources allocated to article 1 F cases at UNE.

Part I: Introduction

1. Objective of the study

This study has been commissioned by the Norwegian Directorate of Immigration (UDI). The objective was to provide the immigration authorities with updated knowledge on how the rules regarding exclusion are practiced in Norway compared to other countries, and to provide concrete recommendations to national legislation and practice.

Exclusion under refugee law entails the denial of refugee status to individuals who would otherwise be considered *de jure* refugees. In its broad sense, refugee exclusion requires denial of refugee status on the basis of the criteria listed in article 1 D-F of the 1951 Refugee Convention (1951 Convention), *i.e.* that the individual (D) receives protection or assistance from other UN organs than the UNHCR at the time of application, (E) has been recognized by the authorities of the country in which he or she resides as “having the rights and obligations which are attached to the possession of nationality in that country”, or (F) there are “serious reasons for considering” that the applicant has committed certain grave crimes or acts, rendering him or her undeserving of refugee status. This report focuses only on the latter ground for exclusion. The report provides an overview of the law relating to exclusion, both from the perspective of international and national law.

The objective of this study is to provide an overview of the current legislative framework and administrative practice relating to exclusion from refugee status in Norway, and to discuss this in a comparative perspective. The study will focus on both material and procedural rules and practices relating to exclusion.

The overall objectives are

1. To discuss diverging national practices in the light of international refugee law and the developing European asylum *aquis*. Which factors may explain differences between the various jurisdictions?
2. To consider the legislative framework and administrative practice in the various comparative countries, hereunder pinpoint similarities and differences.
3. If amendments to the law, regulations or administrative practice are recommended: provide concrete recommendations in this regard.
4. Provide recommendations regarding the process of identifying exclusion cases and sharing information both at the national and international level.

The Comparative study was asked to cover Canada and the Netherlands, including two other comparative countries chosen by the researcher. On the basis of several factors, continuity in research being one, the study has considered the rules and practices in Canada, the Netherlands, the UK and Denmark.

In accordance with the tender, the study of practice within the Norwegian Directorate of Immigration and the Norwegian Appeals Board for Immigration (UNE) focuses on the following issues:

1. Is there a unified practice between the administrative bodies?
2. Interpretation of legal terms and standards
3. Administrative practice regarding identification of cases

2. Context

In 2006, Einarsen, Vevstad and Skaar published a comparative study of the rules pertaining to exclusion and cessation.⁵ The study was commissioned by the Ministry for Work and Inclusion, and had a slightly wider scope than the current study which will focus only on exclusion including the relationship between exclusion and expulsion, as well as the relationship with universal rights such as the right to family life.

In the 2006 report, practice in Norway, Canada, the UK, the Netherlands and Denmark was highlighted in a comparative perspective. This report will continue this perspective, first in order to identify long term trends in the respective national jurisdictions, but also because these jurisdictions traditionally have dealt with a significant number of exclusion cases per anno. Knowledge of the practice in Denmark is important also in order to ensure the Scandinavian perspective.

One of the main conclusions in the 2006 report was the establishment of a specialized unit within the UDI which should work specifically on exclusion cases. In addition, a significant increase in the resources allocated to the administrative work related to exclusion cases was recommended. These recommendations were implemented, and the current report will consider whether and how these allocations have impacted on the number of exclusion cases in Norway.

Another recommendation in the 2006 report was to establish institutional co-operation between the UDI, KRIPOS, PST, the Public Prosecutor and other relevant stake holders with the objective of identifying both potential exclusion cases and criminal cases. This report will consider *status quo* in this respect, as well as practice on this area in the comparative states.

Other recommendations from the 2006-report will be considered in the light of the current context within Norwegian refugee law. These include the establishment of a “suspicion document” in exclusion cases, recommendations relating to the reasoning in exclusion decisions and clarification of the relationship between exclusion, expulsion, extradition and criminal responsibility.

In both main preparatory documents leading to the adoption of the current Norwegian immigration law in 2008, an increase in the significance of the exclusion procedure was expected due to a higher general focus on liability for international crimes.⁶ In addition, the Ministry expected that a greater number of asylum seekers would obtain refugee status. The expected increase related to a legislative change where a certain group of applicants who were previously granted residence status on humanitarian grounds, should under the new practice be granted refugee status. This would, in effect, also lead to an increase in the number of cases that had to be screened in order to fulfill national obligations under article 1 F.⁷ This report will consider whether such development has taken place.

The signatories to the 1951 Convention are obliged to apply the exclusion provisions. However, they are also obliged to apply them “in a restrictive manner” so that unfounded exclusion does not take place.⁸ Application of the exclusion provisions provide a number of

⁵ Einarsen, Terje, Vevstad, Vigdis and Skaar, Elin: Flyktningkonvensjonens artikkel 1 C-F: Folkerettslig og komparativ studie av eksklusjons- og opphørsgrunnene (Christian Michelsens Institutt (2006) - CMI R 2006:2)

⁶ NOU 2004: 20 (page 124) and Ot.prp 75 (2006-2007) p 112

⁷ Ot.prp 75 (2006-2007) p 461

⁸ UNHCR, Guidelines on international protection, Application of the Exclusion Clauses: Article 1 F of the 1951 Convention relating to the Status of Refugees (2003) + Background Note on the Application of the Exclusion Clauses: Article 1 F of the 1951 Convention relating to the Status of Refugees (2003)

legislative challenges, in particular the application of rules pertaining to individual criminal responsibility which will also be the subject of analysis and discussion in this report.

One example relates to the assessment of applicants who have been members of international organisations listed on the UN or EU list of terrorist organizations. This topic has been at focus in the international development the past years, in particular in Canada, the UK and at the European Court of Justice (ECJ). On November 9th 2010, the ECJ rendered a judgment where it considered mere membership in an illegitimate organization as insufficient as grounds for exclusion based on the EU Qualification directive. The court stated that an individual and concrete assessment of the alleged complicity of the applicant had to be considered.⁹

3. Metodology

The findings in the report are based on a review of decisions provided by the UDI, including both UDI and UNE decisions. In order to provide the full overview of practice I requested copies of all decisions rendered where exclusion was decided in the time period 2006 – 2011. Due to reasons related to personal information security the selection was made by the UDI. I was also provided with copies some decisions from 2012. In addition to cases where exclusion was decided, I requested access to cases where exclusion had been considered but not decided. I was rendered copies of seven such decisions. In addition to the decisions, each file was to contain copies of the asylum interview(s), the pre-notification of possible exclusion provided to the applicant, comments from the asylum lawyer as well as an appeal to UNE where relevant.

Names and dates of birth were removed from the copies before I was rendered access to them. The review was made within the UDI localities in Oslo, and the documents were not removed from those premises during the process.

The comparative sections are based on legal sources, literature, reports and reviews as well as information provided by national experts.

⁹ Joined Cases C-57/09 and C-101/09, Germany v. B and Germany v. D, 9.11.2010

Part 2: The international legal and structural framework

The concept and practice of excluding individuals considered undeserving of protection from asylum has a long history, starting on the multilateral level with UNGA resolution 8 (1) of 14 February 1946 on refugees and the Constitution of the International Refugee Organization (IRO) which was adopted later that year. The latter document specified who would be ineligible for its protection by referring to, among other categories, “war criminals, quislings and traitors”, those having “assisted the enemy in persecuting the civil populations of countries” and “ordinary criminals who are extraditable by treaty”. Reference was also made to persons who, since the end of the hostilities of the Second World War, had “participated in any terrorist organization”.¹⁰ Parallel to the establishment of the IRO, the text of article 14 (2) of the 1948 Universal Declaration on Human Rights was agreed upon.¹¹ This provision stipulates that the right to seek and enjoy asylum, as guaranteed in article 14 (1), “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”.¹² The subsequent 1949 statutes of the UN High Commissioner for Refugees (UNHCR) specified an exclusion mechanism relating to three categories of applicants, namely those “[i]n respect of whom there are serious reasons for considering that he has committed a crime covered by the provisions of treaties of extradition or a crime mentioned in article VI of the London Charter of the International Military Tribunal or by the provisions of article 14, paragraph 2, of the Universal Declaration of Human Rights.”¹³ Two years later, the 1951 Convention was adopted with the still valid version article 1 F:

Article 1 F

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

(a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make 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.

The adoption of article 1 F was rooted in the recognition that states were unlikely to sign and ratify a treaty that would oblige them to protect “undeserving” refugees.¹⁴ Another

¹⁰ United Nations, Constitution of the International Refugee Organization, 15 December 1946. United Nations, Treaty Series, vol. 18, p. 3

¹¹ UNGA res. 217A (III), 10 Dec. 1948

¹² A review of the drafting history of this provision is provided by Sibylle Kapferer in “Article 14 (2) of the Universal Declaration of Human Rights and Exclusion from International Refugee Protection”, *Refugee Survey Quarterly*, Vol. 27, 2008, No. 3

¹³ Statute of the Office of the United Nations High Commissioner for Refugees (A/RES/428), paragraph 7(d)

¹⁴ UNHCR: Guidelines on international protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees (2003) paragraph 2, UNHCR: Background Note on the Application

objective was to prevent such perpetrators from abusing the institution of asylum in order to avoid criminal liability for their actions, as well as to uphold the general respect for the institution of asylum.¹⁵

1. The refugee convention

Today, article 1 F has reached its 62st year. Migration patterns and the nature of armed conflicts have evolved significantly during the elapsed time since its adoption. It has been argued that the exclusion clause is not tailored to meet the challenges of the contemporary international society,¹⁶ but also that the provisions of the 1951 Convention provide ample grounds for exclusion of those undeserving of refugee status.¹⁷

1.1 Refugee status

Persons who fulfil the requirements of article 1 of the 1951 Convention shall be considered as refugees. Article 1 A (2) provides the primary requirements which must be met, hereinafter referred to as the requirements pertaining to *inclusion*. This report will not give an account of the inclusion requirement.

Legal status as a refugee is afforded by both national jurisdictions and by the UNHCR. In cases of mass influx, the UNHCR will often afford refugee status based on *prima facie* elements in the case at hand, such as flight across an international border, the material needs of the group in question and clear evidence of persecution.¹⁸ At the domestic level, the implementation of the Convention is left at the discretion of the States party to the Refugee Convention, albeit within the parameters of general international law.¹⁹

The procedural approach advocated by the UNHCR is to consider the inclusion requirements in article 1 A (2) before considering whether article 1 F provides for exclusion.²⁰ However, jurisdictions such as the UK and the Netherlands do not follow this approach.

Where refugee status assessment agencies follow this recommendation and only apply the exclusion test to those who fulfill the inclusion test, applicants who base their claim of asylum on persecution based on fear of prosecution for *e.g.* acts of terror or for having committed murder or rape will likely not be affected by the exclusion clauses. Fear of legitimate prosecution for criminal acts, regardless of the subjective political nature of the crime, does not constitute grounds for refugee status. Every state has, within the framework of its international obligations, the right to enact and implement its own domestic criminal legislation. It is when enactment and implementation of such legislation is in conflict with human rights obligations that prosecution also may constitute persecution *e.g.* in the case of discriminatory legislation, physical abuse of prisoners or the use of punishment disproportional to the crime in question.²¹ In cases where this is not an issue, the applicant will simply be refused as a refugee, without further consideration of the crime committed.

of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees (Protection Policy and Legal Advice Section, Department of International Protection, Geneva, 4 September 2003) paragraph 3

¹⁵ UNHCR Guidelines paragraph 2

¹⁶ Vrachnas, Boyd and Dimopoulos: Migration and Refugee Law: Principles and Practice in Australia (Cambridge University Press 2005) p 287

¹⁷ Goodwin-Gill, Guy S. And McAdam, Jane: The Refugee in international law (Oxford 2007) p 195

¹⁸ *ibid* p 53

¹⁹ *ibid* p 54

²⁰ UNHCR Guidelines paragraph 31

²¹ *supra* (13) p 103 *et seq*

The Refugee Convention is first and foremost a convention regulating the rights of refugees in the receiving states (whether being so *ipso facto* or following formal determination). Thus the convention both confirms and supplements the application of what is today considered fundamental human rights, for refugees. Most important among these rights is the prohibition of expulsion or return of refugees to “the frontiers of territories where his life or freedom would be threatened” on account of one of the Convention grounds, as included in article 33 of the Convention (provision of *non-refoulement*). This principle is also engrained in the European Convention on Human Rights article 3, which applies also in situation where article 1 F of the 1951 Convention leads to exclusion.

1.2 Exclusion from Refugee Status

Exclusion under article 1 F is peremptory. Thus, not only may states apply the exclusion clauses - they have an obligation to do so. However, states also hold an obligation to interpret the provisions in good faith, and to refrain from excluding persons with respect to whom the requirements are not fulfilled. In 2007 the UNHCR expressed concern that some States apply the exclusion clauses collectively, and “in a manner which has considerably broadened their scope and narrowed the applicable procedural rights”.²² On several occasions, the UNHCR has emphasised the importance of applying the exclusion clauses scrupulously, in order to “protect the institution of asylum”, but at the same time to only apply them with great caution and “in a restrictive manner”.²³ Article 1 F should be interpreted dynamically, thus including the development having taken place within international criminal law, extradition law and human rights law subsequent to its adoption.²⁴

1.2.1 Crimes against peace

The first category of crimes mentioned in article 1 F (a), crimes against the peace, is rarely applied.²⁵ In including crimes against peace as grounds for exclusion from refugee status, the plenipotentiaries of the Refugee Convention had article 6 of the IMT Charter in mind. Until the present, this has been the only international instrument relevant to article 1 F (a) defining crimes against peace.²⁶ The 2003 Guidelines on exclusion of the UNHCR defines the crime by reference to article 6 letter (a) of the charter,²⁷ which contains the following wording:

²² UNHCR Background Note. See also “Preserving the Institution of Asylum and Refugee Protection in the context of Counter-Terror: the Problem of Terrorist Mobility”, 5th Special Meeting of the Counter-Terror Committee with international, regional and sub-regional organizations, 29-31 October 2007, Nairobi, Kenya, paragraph 12

²³ UNHCR Guidelines paragraph 2

²⁴ UNHCR: Summary Conclusions Adopted at the Expert Roundtable Organized by the United Nations High Commissioner for Refugees and the Carnegie Endowment for International Peace: Exclusion from Refugee Status, EC/GC/01/2Track/1 (30 May 2001), General Consideration 2

²⁵ UNHCR Guidelines paragraph 11 *in fine*

²⁶ Crimes against peace are also defined in article 2 Control Council Law No. 10, and in draft article 16 of the ILC Draft Code. However, it is questionable whether these sources may be considered “international instruments” in the context of article 1 F.

²⁷ UNHCR Guidelines paragraph 11

“Crimes against peace: planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing”.

In contemporary international criminal law, crimes against the peace have been replaced by “crimes of aggression”. One soft law instrument has also been adopted on the matter; the 1974 UNGA Resolution on the Definition of Aggression, defining the crime of aggression as “[t]he 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 this Definition.”²⁸

The crime of aggression has now (by resolution of 11 June 2010) been defined in Article 8 (bis) of the Rome Statute as: “the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations”.

Crimes of aggression may in other words only be committed by individuals acting as state agents.²⁹ However, its 2003 Guidelines, the UNHCR indicated a middle way in accepting that crimes against peace may be committed by “state-like” entities:

“It is evident that crimes against peace can only be committed in the context of the planning or waging of a war or armed conflict. As wars or armed conflicts are only waged by States or State-like entities in the normal course of events, a crime against peace can only be committed by individuals in a high position of authority representing a State or State-like entity.”³⁰

Based on the article 1 F a) wording “as defined in international instruments drawn up to make provision in respect of such crimes”, it is questionable whether the UNHCR interpretation including non-state entities is valid today.

1.2.2 War Crimes

When dealing with the scope of article 1 F (a), Goodwin-Gill and McAdam defines war crimes as “violations of the laws or customs of war, including “murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.”³¹ The statement contained in the 2003 UNHCR Guidelines is in this respect more precise: “*Certain* breaches of international humanitarian law constitute war crimes” (emphasis added).³²

A general definition of war crimes is known as “*serious* violations of international

²⁸ December 1974 UNGA Res. 3314 (XXIX), 69 AJIL 480 (1975). It is questionable whether this resolution may be considered as an “international instrument” in the sense of article 1 F. It is mentioned here as a means of interpretation of article 6 (a) of the IMT Charter.

²⁹ Ref. the state centered approach in the UNGA 1974 resolution.

³⁰ UNHCR Background Note paragraph 28

³¹ *supra* (13) p 166

³² UNHCR Guidelines paragraph 12

humanitarian law”,³³ which entails under customary or conventional law, “the individual criminal responsibility of the person breaching the rule”. The basis for this definition is, among other elements, the inclusion of the adjective “serious” in the Statutes of the International Criminal Tribunal for Rwanda (ICTR), the Statutes of the Special Court of Sierra Leone (SCSL), UNAET Regulation No 2000/15 for East Timor and in the practice of the International Criminal Tribunal of the former Yugoslavia (ICTY). The example used in the first Decision of the ICTY on the matter, the *Tadic* Decision on Interlocutory Appeal, described a “non-serious” violation as that of a combatant appropriating a loaf of bread in an occupied village in violation of art 46 (1) of the 1907 Hague Regulations on Land Warfare.³⁴ Comparably, the *extensive* appropriation of property *not justified by military necessity* is listed in the Fourth Geneva Convention article 147 as a *grave breach*, and may accordingly constitute a war crime if other requirements for individual criminal responsibility are established. According to Ackerman and O’Sullivan, “it is generally agreed that a serious breach is one that constitutes a breach of a rule protecting important values and this breach must involve grave consequences for the victim”.³⁵ The ICRC study on customary international humanitarian law shows that violations are treated as serious “if they endanger protected persons or objects or if they breach important values”.³⁶ In addition, an individual must be found to have acted with the requisite *mens rea* (subjective element / guilt) in order for the act to constitute a war crime.

A clear notion of war crimes is provided in the Statutes of the International Criminal Court (ICC), which defines war crimes in article 8 (Annex I).

War crimes may be committed within the context of an international (IAC) or non-international armed conflict (NIAC). The legal regimes governing the two forms of armed conflict are not identical, although in essence the same basic principles of military necessity, distinction and proportionality apply.

Although military activities may by nature be incompatible with the concept of refugee protection, asylum claims from individuals who have taken part in hostilities must be assessed on an individual basis. UNHCR has defined combatants as “persons taking active part in hostilities in both international and non-international armed conflict who have entered a country of asylum”.³⁷ In UNHCR’s Resettlement Handbook of 2005, it is stated that “former combatants who request asylum should be admitted into asylum procedures once it has been established that they have genuinely and permanently renounced military activities”, and that “having taken part in armed conflict does not in and of itself constitute a ground for exclusion, nor does it as such establish a presumption of responsibility for acts within the scope of an exclusion clause, although an assessment of the applicant’s conduct during armed conflict will be required”.³⁸

1.1.2.1 *Mens rea*

³³ ICRC rule 156

³⁴ ICTY Prosecutor v. Tadic, *Decision on Defense Motion for Interlocutory Appeal on Jurisdiction*, 2 October 1995, paragraph 94

³⁵ Ackerman, John E and O’Sullivan, Eugene: *Practice and Procedure of the International Criminal Tribunal for the Former Yugoslavia*, With Selected Materials from the International Criminal Tribunal for Rwanda (Kluwer Law International 2000) p 27

³⁶ Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, Volume I: Rules, p 569

³⁷ ExCom Conclusion No. 94 (LIII) of 2002

³⁸ UN High Commissioner for Refugees, *Resettlement Handbook (country chapters last updated September 2009)*, 1 November 2004, p. 55

The subjective requirement of war crimes is defined in the ICC statute article 30, and entails that the individual must have held “intent and knowledge” with relation to the crime. The provision defines intent as “(a) In relation to conduct, that person means to engage in the conduct” and (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”. Knowledge is defined as “awareness that a circumstance exists or a consequence will occur in the ordinary course of events”.

1.2.3 Crimes against humanity

Crimes against humanity were first included as a category in ICL in article 6 (c) of the Charter of the International Military Tribunal. This provision referred to

“...murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian populations, before or during the war; or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated”.

Subsequent provisions on the crime were included in article 5 of the Statutes of the ICTY and article 3 of the Statutes of the ICTR, which included additional underlying offences as well as the *chapeau*-requirement “widespread or systematic attack”.

The latest restatement of crimes against humanity is contained in article 7 of the ICC Statute. This provision lists eleven classes of serious offences, which, when perpetrated as “part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”, are considered crimes against humanity (see annex I).³⁹ Crimes against humanity may be perpetrated both in peace time and in the context of an armed conflict.

A suggestion to include terror on the list of underlying offences of crimes against humanity was proposed at the Rome Conference, but was not adopted.⁴⁰ Acts of terror may however still fall under several of the underlying offences included in article 7.

1.2.3.1 The Chapeau Requirement

In addition to falling under the definition of one of the underlying offences, the *chapeau* requirements of crimes against humanity must be fulfilled. The act must have been “committed as part of a widespread or systematic attack directed against any civilian population” with “knowledge of the attack” (*mens rea*). “Attack” is in this respect

³⁹ The underlying crimes as defined in article 7 include: a) murder, b) extermination, c) enslavement, d) deportation or forcible transfer of population, e) imprisonment or other severe deprivation of liberty in contravention of fundamental rules of international law, f) torture, g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity, h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court, i) enforced disappearance of persons; j) the crime of apartheid and k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

⁴⁰ Proposal put forward by India, Sri Lanka and Turkey, see U.N. Doc. A/CONF183/C.1/L.27/Rev.1.

understood as “a course of conduct involving the commission of acts of violence”⁴¹ or comparably, “involving the multiple commission of acts referred to in article 7, paragraph 1.”⁴² It is not required that the acts of violence in question involve the use of armed force: any maltreatment of the civilian population may constitute an act of violence.⁴³ It is also required that the attack is “widespread or systematic”. Widespread is in this respect understood as referring to a multiplicity of victims, while systematic refers to implementation in accordance with a preconceived plan or policy.⁴⁴ In essence, it excludes “random or isolated acts”.⁴⁵

Article 7 of the ICC Statute does not indicate who may be the perpetrators of crimes against humanity. The prevalent opinion has been that State action or policy is required, consequently excluding perpetration by non-state actors.⁴⁶ However, both case law and theorists suggest that non-state actors may be held responsible for the crime, so long as “some sort of official action remains associated with the concept”.⁴⁷

Another question pertaining to the *ratione personae* scope of the crime is who may be considered the victims of a crime against humanity. According to the Statutes of the *ad hoc* tribunals and the ICC, crimes against humanity may only be perpetrated against “a civilian population”.⁴⁸ This qualifier refers to the overarching “widespread or systematic attack”, and not to the underlying offence (a “widespread or systematic attack” committed against armed forces is easily a legitimate act of war).

1.2.3.2 The Mens Rea Requirement

Crimes against humanity differ from war crimes in that the perpetrator must fulfil two separate *mens rea* requirements: both that of the underlying offence, e.g. *intent* to commit murder, and that of the *chapeau* element widespread and systematic attack, which is *knowledge*.

In the Elements of Crimes of the ICC it is specified that the *mens rea* requirement “should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization. In the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack.”⁴⁹

⁴¹ E.g. *Prosecutor v. Blagojević & Jokić*, Trial Chamber Judgment, 17 January 2005, paragraph 543

⁴² Elements of Crimes article 7, Crimes against humanity, Introduction, nr. 3

⁴³ See *Prosecutor v. Kunarac et al*, Appeals Chamber Judgment, 12 June 2002, paragraph 86

⁴⁴ E.g. *Prosecutor v. Tadić* Trial Chamber, Judgment, 7 May 1997, IT-94-1-T, paragraph 648 and *Prosecutor v. Akayesu*, Judgment ICTR Trial Chamber, 2 September 1998, paragraph 580, defining “widespread” as “massive, frequent, large-scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims” and “systematic” as “thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources”.

⁴⁵ *ibid* (*Prosecutor v. Tadić*) paragraph 648

⁴⁶ e.g. M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (1999) pp 257 *et seq*

⁴⁷ Stephen Ratner and Jason Abrahams, *Accountability for Human Rights Atrocities in International Law, Beyond the Nuremberg Legacy* (2001) p 69

⁴⁸ At the Rome Conference, some delegations advocated the term “any population” rather than “any civilian population”. The latter was however maintained, as a part of the general compromise reflected in the current text, and because this was considered consistent with customary international law (The International Criminal Court, *The Making of the Rome Statute, Issues – Negotiations – Results*, P 97)

⁴⁹ Elements of Crimes, article 7, crimes against humanity, Introduction, nr. 2

1.2.4 Serious non-political crimes

Article 1 F (b) is often referred to as the “common law criminality clause”, although it has little to do with common law as such. It constitutes the basis for exclusion of serious crimes such as murder, rape, arson, acts of terror etc.

1.2.4.1 The qualifier “Serious”

According to UNHCR’s Handbook on Procedures and Criteria for Determining Refugee Status, a “serious” crime refers to a “capital crime or a very grave punishable act”.⁵⁰ It also considers that “international rather than local standards are relevant” when determining whether a non-political crime is sufficiently serious.⁵¹ The UNHCR also points at relevant factors, including “the nature of the act, the actual harm inflicted, the form of procedure used to prosecute the crime, the nature of the penalty, and whether most jurisdictions would consider it a serious crime”.⁵² This is exemplified by crimes such as “murder, rape and armed robbery”, which “undoubtedly” qualify as serious offences.⁵³ Other concrete examples are acts of hijacking, homicide, rape, arson and armed robbery and, of course, torture,⁵⁴ as well the “use of deadly weapons, serious injury to persons, evidence of habitual criminal conduct and other similar factors”.⁵⁵ It is also relevant whether the offence “attract a long period of imprisonment”, and whether it includes “direct and personal involvement”.⁵⁶ “Petty theft” and “possession and use of soft drugs” are used as examples of non-serious crimes.⁵⁷

A natural interpretation of the convention text (“he has committed”) indicates that in cases of indirect liability to non-political serious crimes, it is the nature of the act of the asylum seeker which must be considered, not the act of the primary perpetrator. This is also in line with the criminal law principle that an individual may incur responsibility for his own acts, not the acts of others. As stated by the UNHCR regarding the act of providing funds to “terrorist groups”: “although providing funds to “terrorist groups” is generally a criminal offence (...) such activities may not necessarily reach the gravity required to fall under article 1 F (b). The particulars of the specific crime need to be looked at – if the amounts concerned are small and given on a sporadic basis, the offence may not meet the required level of seriousness”.⁵⁸ Nevertheless, by reference to the nature of the act, harm inflicted and nature of the penalty, complicity to serious crimes must often be considered “serious” crimes *sui generis*. The assessment must also include any elements of coercion or other grounds which may have impact on the assessment of individual criminal responsibility.

⁵⁰ UNHCR: Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979 paragraph 155

⁵¹ UNHCR Guidelines paragraph 14

⁵² *ibid*

⁵³ *ibid*

⁵⁴ UNHCR: The Exclusion Clauses: Guidelines on their application, Geneva, December 1996 paragraph 51 (note that these guidelines were formally superseded by the 2003 Guidelines. The examples provided should however still be relevant)

⁵⁵ *ibid*

⁵⁶ UNHCR: Summary Conclusions: exclusion from refugee status, global consultations on international protection, paragraph 11

⁵⁷ *ibid*

⁵⁸ UNHCR Background note paragraph 82

1.2.4.2 The concept of non-political crimes

In determining whether a crime is of a non-political nature or not, the UNHCR requires that the *predominant motive* of the crime must have been of a non-political nature (referred to as the *predominance test*).⁵⁹ In this consideration, context, methods, motivation, and proportionality of a crime to its objectives are important.⁶⁰ The Handbook states in this respect that there should be a “close and direct causal link between the crime committed and its alleged political purpose and object”. Furthermore, it is stated that the “political element of the offence should also outweigh its common-law character”.⁶¹ If the acts committed are “grossly out of proportion to the alleged objective”, this requirement is not fulfilled. The political goal must in itself be consistent with human rights and fundamental freedoms.⁶² These considerations have explicitly been included in article 12 (2) of the EU Qualification Directive, stating that “particular cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes”.⁶³

According to the UNHCR, most acts prohibited under international anti-terror instruments (e.g. hijacking of aircrafts or indiscriminate bombings) will “almost certainly” qualify as non-political under article 1 F b.⁶⁴ However, the act and the claim for protection must be considered individually. As stated by Kälin and Künzli; an act which is defined as “terror” under international instruments may have been “the only means of opposing very grave encroachments by the government authority in a State where the rule of law does not prevail”.⁶⁵

1.2.5 Acts contrary to the purposes and principles of the United Nations

Article 1 F c calls for exclusion of applicants who have been “guilty of an act contrary to the Purposes and Principles of the United Nations”. The principles may be found in article 1 and 2 of the UN Charter, although several of them are difficult or impossible to apply in the context of refugee law exclusion. Among the purposes and principles that may be considered in the refugee law context are:

- *maintaining international peace and security (article 1 (1))*
- *developing friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples (article 1 (2))*
- *peaceful settlement of international disputes (article 2 (3))*
- *refraining from the threat or use of force against the territorial integrity or political independence of another State (article 2 (4))*⁶⁶
-

⁵⁹ UNHCR Background note paragraph 41 – referred to as the “predominance test”

⁶⁰ *supra* (48) paragraph 10

⁶¹ *supra* (44) paragraph 152

⁶² *ibid*

⁶³ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, Article 14(2)(b)

⁶⁴ UNHCR Background note paragraph 85

⁶⁵ Kälin and Künzli, Article I F (b): Freedom Fighters, Terrorists, and the Notion of Serious Non-Political Crimes, 12 International Journal of Refugee Law, Special Supplementary Issue (2000) at pages 64-65

⁶⁶ See Simma, Chapter I for commentaries to the various purposes and principles

The purposes and principles are vague compared to criminal law provisions, and must be interpreted with particular care and restriction.⁶⁷

Both theorists and courts have argued that the purposes and principles of the UN may be found elsewhere than in article 1 and 2 of the Charter, *e.g.* in UN resolutions. In addressing the issue of applying article 1 F (c) to acts of terror, the Background Note to the 2003 UNHCR Guidelines refer to Resolution 1373 (2001) of the Security Council in which acts, methods and practices of terror” and “knowingly financing, planning and inciting terrorist acts” are deemed contrary to the purposes and principles of the United Nations.⁶⁸ Reference is also made to Resolution 1377 of the same year, and resolution 1624 (24) of 14 September 2005, both pertaining to terror. The UNHCR has expressly noted that these provisions must be read in light of other sections of the Resolution which stresses that measures taken to combat terror must be in accordance with international law, including refugee law and humanitarian law (preambular paragraph 2 and operative paragraph 4).⁶⁹

According to the UNHCR, defining any action contrary to an instrument adopted by the UNGA or Security Council as an act contrary to the purposes and principles of the UN would “be inconsistent with the object and purpose of this provision”.⁷⁰ Focus should not be on whether an act falls within a certain definition of terrorist activities, but rather on whether the act itself “impinges on the international plane – in terms of its gravity, international impact, and implications for international peace and security”. In a conclusive manner, the UNHCR formulates its view as follows: “only terrorist acts that are distinguished by these larger characteristics, as set out by the aforementioned Security Council Resolutions, should qualify for exclusion under Article 1 F (c)”.⁷¹ Furthermore, the provision only applies to acts that offend the purposes and principles of the UN in a *fundamental way*, such as “crimes capable of affecting international peace, security and peaceful relations between states” or “serious and sustained violations of human rights”.⁷²

The interpretation of the UNHCR has been that only individuals who have been in positions of power - the leaders and main organizers in their countries or in State-like entities - fall within the ambit of the clause.⁷³ Goodwin-Gill and McAdams have taken a different position on this question. They see no reason why non-state actors could not be covered by article 1 F (c) when they were clearly covered by the exclusion clause contained in the statutes of the IRO. They do however consider the question to be “somewhat academic” as such instances could likely lead to exclusion under letters (a) or (b). With specific reference to terrorism, they consider that the application of article 1 F (c) in such cases “must now be read subject to international action in regard to terrorism” – *i.e.* article 1 F (c) may reasonably constitute a viable ground for exclusion in such instances.⁷⁴

⁶⁷ *Grahl-Madsen, Atle: The Status of Refugees in International Law Vol. I (Sijthoff Leyden 1972) p 283*

⁶⁸ UNHCR Background note paragraph 49

⁶⁹ UNHCR: Note on the Impact of Security Council Resolution 1624 (2005) on the Application of Exclusion Under Article 1 F of the 1951 Convention Relating to the Status of Refugees, 9 December 2005

⁷⁰ *ibid* paragraph 47. Reference should at the same time be given to a statement in paragraph 80 of the Background note: “Where an individual has committed terrorist acts as defined within the international instruments mentioned in Annex D and a risk of persecution is at issue, the person *may* be excludable from refugee status” (emphasis added).

⁷¹ *ibid* paragraph 49

⁷² UNHCR Guidelines paragraph 17

⁷³ *supra* (44) paragraph 163 and UNHCR Guidelines paragraph 17. It was specified at the Conference of Plenipotentiaries that the provision was not aimed at the “man in the street”, but rather on those in charge of the act in question.

⁷⁴ *supra* (13) p 189

1.2.6 Balancing test

Both the UNHCR Guidelines on exclusion⁷⁵ and the UNHCR Handbook⁷⁶ emphasize that a proportionality test should be applied to crimes covered by article 1 F litra b) and those crimes included in the lower spheres of litra a). The test should include an assessment of the seriousness of the crime versus the consequences of exclusion for the individual. However, national practice and case law is differentiated when it comes to this question, with common law countries to a large degree dismissing the balancing test, whereas some civil law countries still applies it.⁷⁷ Godwin-Gill⁷⁸ and Kälin and Künzli⁷⁹ all support the use of a proportionality test. Within the context of EU law, the question was settled with the Judgment of the ECJ Grand Chamber on the 9th of November 2010, where the court concluded that no balancing test should be applied.⁸⁰

1.2.7 Burden and standard of proof

Clearly, the burden of proof rests with the host state.⁸¹ The standard of proof must be adduced from the article 1 F phrase “serious reasons for considering”, which is unusual compared to wordings of standards of proof applied within other areas of law. In other words, it must be interpreted in an autonomous manner. According to the UNHCR “clear and credible evidence is required” *e.g.* reliable confessions and testimony of witnesses. On the other hand, the standard of proof required in criminal law (*beyond a reasonable doubt*) need not be met.⁸² As with the inclusion assessment, the benefit of the doubt should be afforded the applicant in the context of exclusion.⁸³ In domestic jurisdictions the standard is implemented on varying levels, ranging from somewhere between “more than mere suspicion, but less than the balance of probabilities” as applied in Canadian practice and supported by Goodwin-Gill,⁸⁴ to a *strong* or *clear* balance of probability as applied by the Immigration Appeals Board in Norway and supported by Einarsen, Vevstad and Skaar.⁸⁵

1.2.8 Relationship between exclusion and expulsion

Individuals to whom article 1 F is applied may not be recognized as refugees. According to the EU QD, they are also excluded from subsidiary status. The legal framework and practice differs from jurisdiction to jurisdiction regarding the possibility of regulating leave to stay on

⁷⁵ UNHCR Guidelines paragraph 24

⁷⁶ *supra* (44) paragraph 156

⁷⁷ Rikhof 2012 p 122

⁷⁸ *supra* (13) pp 180 *et seq*

⁷⁹ *supra* (59) pp 46-78

⁸⁰ Joined Cases C-57/09 and C-101/09 B and D. 9 November 2010, paragraph 109. In paragraph 109, the Court stated: “*Since the competent authority has already, in its assessment of the seriousness of the acts committed by the person concerned and of that person’s individual responsibility, taken into account all the circumstances surrounding those acts and the situation of that person, it cannot – as the German, French, Netherlands and United Kingdom Governments have submitted – be required, if it reaches the conclusion that Article 12(2) applies, to undertake an assessment of proportionality, implying as that does a fresh assessment of the level of seriousness of the acts committed.*” In paragraph 110 the Court also emphasized that the question of *de facto* deportation to the country of origin (application of ECHR article 3) was an altogether different question.

⁸¹ UNHCR Guidelines paragraph 34

⁸² *ibid*

⁸³ *ibid*

⁸⁴ See *e.g. Sivakumar v. Minister of Employment and Immigration*, [1994] 1 F.C. 433 (F.C.A.). Online availability of all domestic case law is provided under “Sources”. See also Goodwin-Gill and McAdams p 165

⁸⁵ Utlendingsnemnda (The Immigration Appeals Board) “Flyktningkonvensjonens art. 1 F”, fagnotat, 13 September 2002, updated 10 February 2005. See also *supra* (45)

the basis of other, national provisions. As shown in the comparative section, some jurisdictions do not regularize they stay of excluded individuals in any manner and expel or ban the individual from the realm, whereas others provide temporary permits.

In a number cases, the international and regional human rights instruments such as the UN Convention on Civil and Political Rights (UNCCPR) article 7 and the European Convention on Human Rights (ECHR) article 3 set up effective bars against effectuating negative decisions. In states where inclusion is considered before exclusion as in Norway ECHR article 3 may as a principle be considered as applicable to all exclusion cases. As such expulsion is not possible.

Exclusion from refugee status and expulsion of foreign citizens from Norway are formally two very separate segments of immigration law, one dealing with international obligations under the refugee convention and the other with national rules established for the sake of upholding public order. As opposed to exclusion, expulsion is considered a reaction of penal character.⁸⁶ However, the ordinary expulsion and removal provisions may constitute grounds for refusing entry for applicants who have committed serious crimes.⁸⁷

An interesting question is whether exclusion and expulsion in theory may cover the same array of (unwanted) acts. This must be answered in the negative. While exclusion may be decided on the basis of acts committed several years before entry into the host state as a refugee (criminal law statute of limitations do apply), expulsion or rejection of other permits than refugee status may only be decided where the applicant fulfils the requirements included in the Immigration Act section 66 and 67, e.g. "less than five years previously while abroad has served or received a penalty for an offence which under Norwegian law is punishable by imprisonment for a term exceeding three months", or "when the foreign national has while in the realm received a penalty or special sanction for an offence which is punishable by imprisonment for a term exceeding three months, or has on several occasions in the course of the last three years received prison sentences" as well as on the basis of breaches of the immigration law, terror related offences etc..⁸⁸

As to the consequences following decisions on exclusion *vis a vis* decisions on expulsion, it is noteworthy that whereas the Schengen Information System (SIS) requires registration of those expelled, no parallel system of registration exists within the area of exclusion. However, such registration may not logically be inferred from the objectives of refugee law exclusion. It is rather principles of international criminal law such as the principle of universality and *aut dedere aut judicare* which underpins a need for communication to national police services, who on their part may open investigation where possible.

2. Principles of Individual Criminal Responsibility

Article 1 F a) and b) call for exclusion on the basis of criminal acts, and can only be applied in cases where individual criminal responsibility is established. Because these two provisions are applied far more often than article 1 F c, this aspect of the determination process is important.

Individual criminal responsibility requires a concrete assessment of whether the applicant has committed, co-perpetrated or aided and abetted in the commission of an act, whether

⁸⁶ Arild Humlen in Vevstad (Red.), Utlendingsloven, Kommentarutgave, s 422

⁸⁷ Immigration Act Section 59

⁸⁸ Immigration Act Section 66 and 67

the applicant did this with the requisite *mens rea* (acted with knowledge or intent), and clarification that no grounds for exemption of criminal liability are present in the case.

An important prejudicial consideration in this respect is whether individual liability under article 1 F should be inferred on the basis of the modes of liability found in international criminal law or on the basis of domestic standards. For exclusion on the basis of article 1 F (a), international standards are clearly to be applied.

The question is less clear under article 1 F (b). The wording of the provision does not indicate that the criminal law applicable must be one of international law. From this it may be inferred that the state parties were provided with discretion as to how the matter should be resolved. An argument *a contrario* is that the application of domestic general law counteracts a harmonized application of the provision, and increases the fragmentation of international law.

Canadian case law provides for a reasonable clarification in this regard. In *Zrig v. Canada*, the Canadian Federal Court stated that modes of liability having been developed in international criminal law which do not have their counterpart in traditional criminal law, such as joint criminal enterprise in its extended version (JCE III), should not be applied to the common law criminality clause in article 1 F (b).⁸⁹ By this approach, individual criminal liability under this provision may only be inferred in the presence of “traditional” modes of liability.

2.1 Committing

Direct perpetration in the form of physically carrying out a crime (committing murder, rape or detonating a bomb), while holding the requisite *mens rea*, clearly leads to the establishment of individual responsibility also within refugee law exclusion.

2.2 Joint criminal enterprise

Joint criminal enterprise is a form of direct perpetration, and may be applied based on the jurisprudence following article 7 (1) of the ICTY Statutes. Consistent practice of the tribunal has applied three subcategories of JCE as a form of co-perpetration. The first category, referred to as *basic* or JCE I, applies to the classic situations of a group acting with a common intentional purpose. The example provided by Cassese is that of a group of servicemen who, for some reason decides to (intentionally) deprive civilians of food and water.⁹⁰ The second, referred to as *systemic* or JCE II entails individual liability for participation in a criminal design implemented through an institution, such as an internment camp or a prison.⁹¹ The third category, extended JCE, entails incidental liability based on foresight and voluntary assumption of risk: the accused is in this case held liable for a crime which was not part of the common design to which he agreed to and joined in on, but whose commission he “was in a position to foresee” and “willingly took the risk” that would take place in the course of the conduct to which he participated.⁹² A type-example provided by Cassese is individual liability for one member of a paramilitary unit of rape committed by another member, if that crime was “committed during occupation of a village for the purpose of detaining all the

⁸⁹ Canadian Federal Court, *Zrig*, (2003), paragraph 146

⁹⁰ Cassese, *Antonio*: International Criminal Law, Oxford 2008, p 192

⁹¹ *ibid* p 195

⁹² *ibid* p 199

women and enslaving them”.⁹³ The challenge lies in establishing the requisite *mens rea* on the part of the accused. JCE III is disputed as a basis of criminal responsibility, and has been rejected by the ICC. It should not be used as basis for exclusion under article 1 F.

The *actus reus* of the three categories is wide, and applies equally to them all. In short, it requires “a plurality of persons; the existence of a common plan, design or purpose; and the participation of the accused in the JCE by any form of assistance in, or contribution to, the execution of the common purpose”.⁹⁴ The *mens rea* requirement is however different for the various categories. JCE I requires the shared *intent* of the co-perpetrators, JCE II the personal *knowledge* of the serious abuses being perpetrated, and JCE III the perpetrator’s “intention” to i) participate in the criminal purpose and further this purpose and ii) contribute to the commission of a crime by the group. JCE III as developed by the ICTY has due to this low requirement received a great deal of criticism.⁹⁵ Its status under the fourth *Tadic* requirement is still unclear, particularly because article 25 (3) (d) of the ICC statute did not build on the practice on JCE developed at the ICTY. Thus its application as basis for exclusion under article 1 F (a) or (b) should, as a main rule, not take place.

2.3 Aiding and abetting

Accomplice liability, or more precisely “aiding, abetting or otherwise assisting”,⁹⁶ may be inferred from a number of international instruments. Following article 7 (1) of the ICTY Statute, a person who “otherwise aided and abetted in the planning, preparation or execution of a crime” may be held individually liable. Based on the practice of the Tribunal, the *actus reus* of aiding and abetting can be summarized as rendering “practical assistance, encouragement, or moral support which has a *substantial effect* on the perpetration of the crime” (emphasis added).⁹⁷ The requirement of substantial effect implies that “there is no requirement that the aider or abettor have a causal effect on the act of the principal”.⁹⁸ Neither physical presence or assistance, nor presence in time is required: mere encouragement or moral support is sufficient.⁹⁹

The *mens rea* requirement of aiding and abetting as applied by the ICTY is one of double intent, and was formulated as follows in *Prosecutor v. Krnojelac*:

“The *mens rea* of aiding and abetting requires that the aider and abettor knew (in the sense that he was aware) that his own acts assisted in the commission of the specific crime in question by the principal offender. The aider and abettor must be aware of the essential elements of the crime committed by the principal offender,

⁹³ *ibid* p 200

⁹⁴ See e.g. Kai Ambros, Joint Criminal Enterprise and Command Responsibility and Command Responsibility, *Journal of International Criminal Justice* 5 (2007) p 171 considering that JCE III “constitutes only a form of aiding and abetting the JCE”. Opposite, Cassese (2008) p 199 *et seq*, who considers all three forms of JCE sound and reasonable

⁹⁵ *ibid* (Ambros) p 160

⁹⁶ Aiding and abetting are only two aspects of the larger notion of complicity. Aiding means giving physical assistance to someone, whereas abetting is assistance in the form of sympathy and psychological support (*Prosecutor v. Akayesu*, Judgment ICTR Trial Chamber, September 2, 1998, paragraph 484).

⁹⁷ *Prosecutor v. Furundžija* (supra footnote 67) paragraph 238

⁹⁸ *ibid* paragraph 232, see also *Prosecutor v. Aleksovski*, Trial Chamber, Judgment, 25 June 1999, IT-95-14/I-T, paragraph 61

⁹⁹ *ibid* paragraph 199, *Prosecutor v. Blaškić*, Appeals Chamber, Judgment, February 25 2004, paragraph 102, *Prosecutor v. Krnojelac*, Trial Chamber, Judgment, March 15 2002, paragraph 88. From ICTR practice, see *Prosecutor v. Akayesu*, Trial Chamber, Judgment, September 2 1998, paragraph 484

including the principal offender's *mens rea*. However, the aider and abettor need not share the *mens rea* of the principal offender."¹⁰⁰

Also the ICC Statute establishes liability for aiding and abetting, based on article 25 (3) c).

"[f]or 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".

The *actus reus* of this provision is, in essence, the same as that articulated in the case law of the ICTY. The *mens rea* requirement - "purpose to facilitate the commission of the main crime" - is however stricter than that applied by the ICTY; it implies more than *knowledge*.¹⁰¹

2.4. Co-perpetration

Article 25 (3) (d) of the ICC Statute establishes liability for "co-perpetrators", and includes as responsible anyone who

"[I]n any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

- (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
- (ii) Be made in the knowledge of the intention of the group to commit the crime."

The *actus reus* follows from the first sentence of the provision, which merely calls for "contribution to the commission or attempted commission" of a group crime. The *mens rea* requirement, as designated in the second sentence of the provision, including sub-numbers i) and ii), is on the other hand stricter than is the case with accomplice liability. First, it requires that the contribution is *intentional*. The exact classification of this *dolus* is, as shown by Ambros,¹⁰² difficult to establish. Secondly, two alternative requirements must also be met; either a *dolus specialis* of *aim* of furthering the criminal activity or purpose of the group, or an alternative *knowledge* with regards to the intention of the group. It is insufficient in this respect to establish that the accessory was *aware* of the probability that the crime will be committed (e.g. *dolus eventualis*), *i.e.* what was established by the ICTY as "JCE III" may not constitute grounds for liability under the ICC Statute.

¹⁰⁰ *Prosecutor v. Krnojelac*, Trial Chamber, Judgment, 15 March 2002, IT-97-25-T, paragraph 90; see also *Prosecutor v. Brđanin*, Trial Chamber, Judgment, 1 September 2004, IT-99-36-T, paragraph 272

¹⁰¹ This understanding follows from the clear wording of article 25 c), compared to the case law of the ICTY. It is supported by Ambros in Triffterer, Otto (ed.): *Commentary on the Rome Statute of the International Criminal Court* (Hart Publishing 2008), p 757 and by Eser in Cassese, Antonio, Gaeta, Paola, Jones, John R. W.D. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, volume I, (Oxford 2002), p 933

¹⁰² *Supra* (89) (Ambros) p 758-759

2.5 Planning, instigating, ordering and command responsibility

Planning may be established where the applicant alone or together with others contemplated designing the commission of a crime at the preparatory and execution phases.¹⁰³ *Mens rea* requires that the applicant as a minimum was aware of the concrete likelihood that the crime would be committed on the basis of the plan.¹⁰⁴

Instigation is to “urge or encourage” someone to commit a crime.¹⁰⁵ The instigation must have substantially contributed to the criminal conduct (a nexus between the instigation and the *actus reus* of the crime must be established).¹⁰⁶ Instigation does not require a superior-subordinate relationship.

Establishment of a formal superior-subordinate relationship is not necessary in order to establish responsibility on the basis of ordering.¹⁰⁷ *De facto* authority is sufficient. Ordering requires that the ordered person commits the elements of the crime in question. As for planning, the applicant must have held an awareness of a substantial likelihood that the crime would take place as a consequence of the order.¹⁰⁸

Command responsibility does not entail responsibility of the acts of others; rather responsibility of one’s own failure to carry out a duty as a superior in preventing the acts of others.¹⁰⁹ The purpose of command responsibility is to deter unlawful behaviour within the military. The ICC statutes article 28 (1) require that the individual “effectively” acted as a military commander over forces under his or her “effective command and control”. On the subjective level it is required that the commander either knew or should have known that his or her forces were committing crimes. As for the individual act or omission of the commander, it is required that he or she “failed to take all necessary and reasonable measures within his or her power” to prevent the crime or to submit the case for prosecution.

2.6 Membership in organizations

In the post 9/11 era, the question arose within refugee law as to whether individuals could be excluded from refugee status on the basis of mere membership in certain organizations, most notably those designated at the UN or EU so called terror lists.

In the 2003 Guidelines on Exclusion, the UNHCR presented its view on the matter:

“The fact that a person was at some point a senior member of a repressive government or a member of an organization involved in unlawful violence does not in itself entail individual liability for excludable acts. A presumption of responsibility may, however, arise where the individual has remained a member of a government clearly engaged in activities that fall within the scope of Article 1 F. Moreover, the purposes, activities and methods of some groups are of a particularly violent nature,

¹⁰³ Jean-Paul Akayesu, Case No. ICTR-96-4-T, Trial Judgment, 2 Sept. 1998, para 480

¹⁰⁴ *Milošević*, Appeals Judgment, para 268;

¹⁰⁵ Ignace Bagilishema, Case No. ICTR-95-1A, Appeal Judgment, 3 July 2002, paragraph 30

¹⁰⁶ *Ibid*

¹⁰⁷ *Gacumbitsi*, AJ paragraf 181-3.

¹⁰⁸ Tihomir Blaškić, Case No. IT-95-14-A, Appeal Judgment, 29 July 2004, paragraph 42;

¹⁰⁹ Milorad Krnojelac Case No. IT-97-25-A, Appeal Judgment, 17 Sept. 2003, paragraph 171.

with the result that voluntary membership thereof may also raise a presumption of individual responsibility.”¹¹⁰

It is furthermore emphasized that “caution must be exercised when such a presumption of responsibility arises” and that “such presumptions in the context of asylum are rebuttable”.¹¹¹

The concept is expanded on in paragraphs 59-62 in the Background notes:

“Where membership in such a group is voluntary, it raises a presumption that the individual concerned has somehow contributed significantly to the commission of violent crimes, even if this is simply by substantially assisting the organization to continue to function effectively in pursuance of its aims”.¹¹²

The UNHCR also underlines that exclusion is not automatically justified when an individual is associated with an organization included in the so-called blacklists of the international community or individual states.¹¹³ However, such a circumstance is an indication that close consideration of the exclusion clauses should be made.¹¹⁴

An up to date restatement of the UNHCR view may be found in the 2012 eligibility guidelines on Iraq, which states that “mere membership in government security forces, political parties or armed groups is not a sufficient basis in itself to exclude an individual from refugee status, particularly in light of the documented practices of forced recruitment, including of children, and the widespread membership in the former Ba’ath Party. It is necessary to consider whether the individual concerned was personally involved in acts of violence or other excludable acts, or knowingly contributed in a substantial manner to such acts. A credible explanation regarding the individual’s non-involvement with, or disassociation from, any excludable acts should, absent reliable evidence to the contrary, remove the individual from the scope of the exclusion clauses”.¹¹⁵

The ICTY has explicitly rejected mere membership as, in and of itself, constitutive of JCE. In *Stakic*, the Trial Chamber emphasised that “joint criminal enterprise cannot be viewed as membership in an organization because this would constitute a new crime not foreseen under the Statute and therefore amount to a flagrant infringement of the principle *nullum crimen sine lege*.”¹¹⁶ In *Simic*, the Trial Chamber phrased the same point of view, albeit differently: “Joint criminal enterprise is not a liability for mere membership of a criminal enterprise as it is concerned with the *participation* in the commission of a crime as part of a joint criminal enterprise”.¹¹⁷

¹¹⁰ UNHCR Guidelines paragraph 19

¹¹¹ *ibid*

¹¹² UNHCR Background note paragraph 60

¹¹³ UN: The Consolidated List Established and Maintained by the 1267 Committee with respect to Al-Qaeda, Usama bin Laden, and the Taliban and other Individuals, groups, undertakings and entities associated with them, last updated 23 December 2008; EU: Council Common Position 2006/380/CFSP, 29 May 2006 Annex: List of persons, groups and entities referred to in Article 1

¹¹⁴ UNHCR Guidelines paragraph 62

¹¹⁵ UNHCR eligibility guidelines for assessing the international protection needs of asylum-seekers from Iraq, 31 May 2012, HCR/EG/IRQ/12/03

¹¹⁶ *Prosecutor v. Stakic*, Trial Chamber, Judgment, 31 July 2003, IT 97-24-T, paragraph 433

¹¹⁷ *Prosecutor v. Simic*, Trial Chamber, Judgment, 17 October 2003, IT-95-9, paragraph 158

Within domestic jurisdictions, practices differ from the Canadian approach of assessing membership on the basis of various categories of organizations (“brutal”, “hybrid” and “non-brutal” respectively) to a more concrete assessment required in the UK (see chapter 4).

2.7 Grounds for exemption from criminal responsibility

Before concluding the question of exclusion, case holders must assess whether grounds for exemption from criminal responsibility are present. The most common grounds argued are duress and superior orders, as well as low age at the time of the commission of the crime. Other defences less common in the refugee law context are mistake of fact, mistake of law and mental illness, which will not be elaborated on here. The ICC statutes article 31 – 33 lay out an overview of the relevant provisions.

2.7.1 Duress

Based on the ICC statutes article 31, duress is present when the applicant acted under “duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm” against his or her person or another person. Furthermore it is required that the person acted “necessarily and reasonably” to avoid the threat. It is also required that the applicant had not “intended to cause a greater harm than the one sought to be avoided”, *i.e.* a proportionality test assessing the act of the applicant *vis a vis* the danger he or she was facing. In most cases the defence of duress is inapplicable because the applicant could have left the area, organization or group in which the threat was present at an earlier point. The test for duress is strict, and requires that there were no alternative adequate means of averting the crime.

2.7.2 Superior orders

Duress is commonly argued together with superior orders, *e.g.* based on an applicant’s or defendant’s subordinate role in armed services. Committing crimes based on an order from a superior may only relieve that person of criminal responsibility in cases where the person was “under a legal obligation to obey”, “the person did not know that the order was unlawful” and “the order was not manifestly unlawful” (ICC statutes article 33). The requirements are seldom met.

2.7.3 Minimum age of criminal responsibility

The fundamental principle upon which the minimum age of criminal responsibility is fixed is the consideration that individuals (children) under a certain age lack the capacity of fully grasping the consequences, *i.e.* mental element, of a crime. As an example one may question whether a child is at all in a position to commit a crime of genocide, where the *mens rea* requirement stipulates that ‘the perpetrator intended to destroy, in whole or in part, ... [a] national, ethnical, racial or religious group, as such’ (ICC Elements of Crimes, article 6).

Based on the ICC statutes article 26, the minimum age of criminal responsibility within the jurisdiction of the court is 18 years. However, other international instruments such as the Statutes of the Special Court for Sierra Leone article 7 fixes a minimum age or responsibility

at 15 years. Furthermore, the stipulation of 18 years as a minimum age for criminal responsibility in the ICC statute was not intended to reflect custom, but was rather a compromise between the convention states. A simple reference to “international instruments” does therefore not provide clear guidance.

The UN Convention on the Rights of the Child (CRC) article 40 (3) a) merely provides that state parties must establish a minimum age below which children are presumed not to have the capacity to infringe the criminal law. A more substantive, but still flexible provision is presented in Rule 4 of the UN Standard Minimum Rules on the Administration of Juvenile Justice (“the Beijing Rules”).¹¹⁸ Here, it is stipulated that “In those legal systems recognising the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age limit, bearing in mind the facts of emotional, mental and intellectual maturity.”

The minimum age of criminal responsibility in the various national jurisdictions vary a great deal from 15 years in Norway¹¹⁹ and Denmark,¹²⁰ 10 years in the UK¹²¹ and 12 years in Canada and the Netherlands.¹²² The Belgian minimum age of 18 is also worth mentioning.¹²³

In the 2003 Guidelines, the UNHCR states that “The exclusion clauses apply in principle to minors, but only if they have reached the age of criminal responsibility and possess the mental capacity to be held responsible for the crime in question. Given the vulnerability of children, great care should be exercised in considering exclusion with respect to a minor and defences such as duress should in particular be examined carefully. Where UNHCR conducts refugee status determination under its mandate, all such cases should be referred to Headquarters before a final decision is made.”¹²⁴

In establishing the minimum age of criminal responsibility under article 1 F within a national jurisdiction, several possible interpretations or approaches may be followed:

- Application of the legal standards of the ICC statutes in cases falling within article 1 F a, b and c (18 years for all cases)
- Application of the national minimum age in all cases
- Principal application of a minimum age which may be derived from an “international instrument” in exclusion cases based on article 1 F a, based on the convention text, while applying the domestic norm in cases based on article 1 F b

Stakeholders should be aware of the inherent asymmetries which may arise following the various approaches. With the example of Norway, an assessment based on the domestic age limit differs by three years to that of the ICC. The administrative law principle of equal treatment of equal cases should indicate that one overall approach is chosen rather than application of an international standard to cases under article 1 F a and a domestic standard to cases under article 1 F b.

¹¹⁸ United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”), 25 November 1985, A/RES/40/33

¹¹⁹ Criminal Code of 1902 § 46

¹²⁰ Age and Criminal Responsibility, Gerry Maher, Ohio State Journal of Criminal Law Vol 2, 493 p. 494

¹²¹ *ibid*

¹²² *ibid*

¹²³ *ibid*

¹²⁴ UNHCR Guidelines, paragraph 28

The question of minimum age of criminal responsibility must not be confused with the age under which individuals are considered as child soldiers, of which conscription and use is criminalized.¹²⁵

3. EU *acquis* within the area of refugee law

In October 2009, the EU Commission proposed an amendment to the so called Qualification Directive, Council Directive 2004/83/EC of 29 April 2004 (hereinafter the QD).¹²⁶ The proposal aimed primarily at “clarifying certain legal concepts used to define the grounds for protection, eliminating differences in the level of rights granted to refugees and beneficiaries of subsidiary protection, and enhancing effective access to rights already granted by the Directive by taking into account the specific integration challenges faced by beneficiaries of international protection”.¹²⁷ In December 2011, the new amended version of the QD was adopted. Member states must transpose the new provisions in their national legislation within 21 December 2013. Both the UK and Denmark opted out of the new amended version.

The updated version of the QD contains two provisions providing for exclusion from “international protection”: article 12 (2) requiring exclusion from “refugee status” in accordance with article 1 F of the 1951 Convention, as well as article 17 which requires exclusion from subsidiary protection. In other words, the QD requires states to consider an exclusion mechanism in a significantly broader array of cases than what would follow from the 1951 Convention alone. However the exclusion provisions are not identical.

The Court of Justice of the European Communities has considered cases under the 2004 QD, including one case pertaining to exclusion.¹²⁸

3.1 Exclusion from refugee status

According to the QD article 2 a, the term “international protection” involves both “refugee status” and subsidiary protection. “Refugee” is defined in article 2 d as *“a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply;”*

Article 12 (2) transposes the provision in article 1 F of the 1951 Convention, but also provides a new formulation of the article 1 F b criterion relating to the time at which the

¹²⁵ *Prosecutor v Samuel Hinga Norman*, Case No. SCSL-2004-14-AR729E, Appeals Chamber, Special Court for Sierra Leone, Decision on preliminary motion based on lack of jurisdiction (child recruitment), 31 May 2004

¹²⁶ Proposal for a directive of the European parliament and of the council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted Brussels, 21.10.2009
COM (2009) 551 final 2009/0164 (COD)

¹²⁷ http://ec.europa.eu/home-affairs/policies/asylum/asylum_subsidary_en.htm

¹²⁸ *Salahadin Abdulla (C-175/08) and Others*, Grand Chamber 2 Mars 2010 and Case C-31/09 *Bolbol* [2010] ECR I-0000

crime was committed and a third paragraph indicating that not only main perpetrators of crimes may be excluded:

“Article 12

Exclusion

1. (...)

2. A third country national or a stateless person is excluded from being a refugee where there are serious reasons for considering that:

(a) he or she 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 or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee; which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes;

(c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.

3. Paragraph 2 applies to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein.

Preambular paragraph 4 and 22 state that the provisions must be interpreted in line with the 1951 Convention.

The UNHCR has considered the phrase in section 12 (2) b which defines “prior to admission as a refugee” to mean the time of issuing a residence permit based on the granting of refugee status as contrary to the 1951 Convention principle that granting refugee status is a declaratory act (thus admission as a refugee takes place when the person enters the territory of the asylum state).¹²⁹ However, the provision stands. As seen in section 4.2, the UK has implemented the provision in line with the QD standard. Article 12 (3) also differs from the Refugee Convention, and should be interpreted in line with the guidelines in the UNHCR Handbook.¹³⁰

In addition to the provision contained in article 12 (2) and 17, recital 22 to the QD provides a definition of “acts contrary to the purposes and principles of the United Nations:

‘Acts contrary to the purposes and principles of the United Nations are set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations and are, amongst others, embodied in the United Nations Resolutions relating to measures combating terrorism, which declare that “acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations” and that “knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations”.’

Based on a 2010 judgment by the Court of Justice (CJEU) in *B and others*, no balancing test in assessing the consequences of return versus the gravity of the crime is required for exclusion under article 12 (2) b or c.¹³¹

¹²⁹ Also, Recital 14 of the EU Qualification Directive 2011 establishes that granting refugee status is a declaratory act

¹³⁰ UNHCR Note July 2009

¹³¹ *B and Others* C-57/09 and C-101/09, 9 November 2010

3.2 Exclusion from subsidiary status

In addition to article 12 (2) which implements the 1951 Convention article 1 F, article 17 of the QD requires exclusion also from subsidiary status. Subsidiary status is defined in article 2 e) of the directive as an applicant in *“in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15”*.

Article 15 defines “serious harm” as

“(a) death penalty or execution; or

(b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or

(c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.”

The provisions on subsidiary status has been subject to interpretation and discussion since their introduction, in particular article c) which refers to refugees originating from areas of ongoing armed conflict. The CJEU stated in one judgment that the provision held an autonomous meaning,¹³² while legal commentators have argued that article 15 c) only restates a scenario who is in any case covered by article 15 b), which again reflects the standard engrained in ECHR article 3.¹³³

Article 17 of the QD requires exclusion also of individuals falling within the area of subsidiary protection. The provision states that:

“1. A third country national or a stateless person is excluded from being eligible for subsidiary protection where there are serious reasons for considering that:

(a) he or she 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 or she has committed a serious crime;

(c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations;

(d) he or she constitutes a danger to the community or to the security of the Member State in which he or she is present.

2. Paragraph 1 applies to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein.

3. Member States may exclude a third country national or a stateless person from being eligible for subsidiary protection, if he or she prior to his or her admission to the Member State has committed one or more crimes, outside the scope of paragraph 1, which would be

¹³² *Elgafaji v. Staatssecretaris van Justitie* [2009] Case C-465/07.

¹³³ Paul Tiedemann, Subsidiary Protection and the Function of article 1 F c, *Refugee Survey Quarterly*, Vol. 31, No. 1, pp. 123–138

punishable by imprisonment, had they been committed in the Member State concerned, and if he or she left his or her country of origin solely in order to avoid sanctions resulting from these crimes.”

On the material level, QD article 17 supersedes article 1 F in allowing exclusion on the basis of national security (17 (1) d) as well as less than “serious” crimes (17 (3)) .

Clearly, individuals excluded from subsidiary status may not be forcibly returned to their country of origin in violation of ECHR article 3, and therefore risk remaining in the host state as illegal residents unless provisions on temporary leave are established within the domestic jurisdictions. For member states not having opted out of the QD, exclusion under article 17 is mandatory.

From a Norwegian perspective, the EU Common Rules on asylum have held an increasingly important impact on the national legislation and practice. Although Norway is not bound by the Qualification Directive, the instrument has constituted an important reference in the review of Norwegian legislation within the area of refugee law.¹³⁴

The Norwegian immigration act does not include a direct counterpart to the concept of “subsidiary status”, but rather includes those protected by ECHR article 3 within the domestic law definition of “refugee status” in order to prevent a notion of A- and B-refugees.¹³⁵ Individuals who would be excluded from subsidiary status under the EU QD are therefore likely to be excluded from refugee status in Norway, based on the implementation of article 1 F in the immigration act Section 31. However, where such individuals must be excluded due to reasons of national security or on the basis of having committed a less than serious crime under the QD, this is not the case in Norway. Instead, Section 31 second paragraph of the Norwegian Immigration law stipulates that individuals who may be expelled on the basis of “fundamental national interests” or who have been sentenced for a “particularly serious crime”, and for that reason “constitutes a danger to Norwegian society”, are not entitled to refugee status as defined in Section 28 (1) b (similar to subsidiary status within the QD). In other words, decision makers must separate instances of refugee status under Section 28 (1) a and b in order not to exclude convention refugees on the basis of national security or other reasons.

3.3 Individual responsibility under the QD

As under the 1951 Convention, exclusion on the basis of QD article 12 (2) or 17 requires the establishment of individual criminal responsibility, either as a main perpetrator or as a co-perpetrator. According to a judgment rendered by the CJEU Grand Chamber in November 2010, membership in or active support of an organization listed on the list forming the Annex to Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, is not sufficient for exclusion. The ECJ stated the following in this regard:

“[...] The finding, in such a context, that there are serious reasons for considering that a person has committed such a crime or has been guilty of such acts is conditional on an assessment on a case-by-case basis of the specific facts, with a view to determining whether the acts committed by the organisation concerned meet the conditions laid down in those provisions and

¹³⁴ St. mld. nr. 9 (2009-2010), Chapter. 4.1

¹³⁵ Immigration Act Section 28 (1) b

whether individual responsibility for carrying out those acts can be attributed to the person concerned, regard being had to the standard of proof required under Article 12(2) of the directive.”¹³⁶

The case concerned two Turkish nationals of Kurdish origin, one having supported armed guerilla warfare by DHKP/C and the other having served as a senior officer in the PKK. In further elaborating on the concept of individual responsibility, the court found that all relevant circumstances had to be examined. If the applicant occupied a prominent position within the organization, the court found that the state would be entitled to presume responsibility for acts committed by that organization during the relevant period of time.

Elements to be considered were:

- “the true role played by the person concerned in the perpetration of the terrorist acts;
- his position within the organisation;
- the extent of the knowledge he had, or was deemed to have, of its activities;
- any pressure to which he was exposed;
- other factors likely to have influenced his conduct”¹³⁷

3.4 Is QD article 14 in line with the 1951 Convention?

QD article 14 pertains to revocation of, ending of or refusal to renew refugee status. As such it bears impression of implementing article 1 C of the 1951 Convention. However, the provision contained in article 14 no. 4 and 4 is in effect an exclusion clause. It allows Member States to “revoke, end or refuse to renew” on the basis of the applicant constituting “a danger to the security of the Member State in which he or she is present” or when the applicant has been “convicted by a final judgment of a particularly serious crime” and “constitutes a danger to the community” of the receiving state. These provisions have been subject to critique by INGO as well as publicists.¹³⁸

As to the relationship between the QD and the 1951 Convention, it follows clearly from the Treaty on European Union and the Treaty establishing the European Community (article 63 (1)) that the EU common policy on asylum law shall be in accordance with the 1951 Convention and the 1967 Protocol. This was later confirmed in the Treaty of Lisbon (article 63). This principle also follows from recital three in the preamble of the QD.

4. International Human Rights

International refugee law is by its nature part of international human rights law. State parties to the 1951 GC must therefore consider the fundamental human rights upheld by the individual, including by those who may fall within the ambit of one of the exclusion clauses. From a practical point of view, the right to family life and the prohibition on torture and degrading or inhuman treatment constitute important aspects of the legal assessment of

¹³⁶ Bundesrepublik Deutschland v B (C-57/09) and D (C-101/09), 9 November 2010

¹³⁷ Case summary contained in Press Release No 111/10, 9. November 2010

¹³⁸ Refugee status, subsidiary protection, and the right to be granted asylum under EC law María-Teresa Gil-Bazo, New issues in refugee research, Research Paper No. 136, UNHCR Policy Development and Evaluation Centre, November 2006 as well as ECREs Comments on the Recast of the Qualification Directive, <http://www.ecre.org/topics/areas-of-work/protection-in-europe/148.html>

residency applications lodged by persons within the sphere of article 1 F. The core conventions are the European Convention on Human Rights (ECHR) and the UN International Convention on Civil and Political Rights (ICCPR).

4.1 The right to family life

The right to family life is a fundamental human right established in the international conventions. Both ECHR article 8 and ICCPR article 17 contain a provision which protects the sphere of “family life”. According to the interpretation of the ECtHR, the term “family life” is not a fixed concept, but rather one that includes “close, personal ties” of the individual. Examples are parties who are lawfully and genuinely married, parties cohabiting (unmarried relationships), parents and children and siblings.¹³⁹ The term has also been extended to include grandparents and cousins, based on a concrete assessment of the relationship between the parties.¹⁴⁰

According to ICCPR article 17, the term “family” must be given a broad interpretation comprising all those included in the concept of family in the State concerned.¹⁴¹ Interference in the sphere of “family life” may only take place when certain strict requirements are met. ECHR article 8 requires that interference must be in accordance with the law (principle of legality), necessary in a democratic society (requirement of proportionality) and conducted the objective of a legitimate aim defined in the convention (requirement of legitimacy). ICCPR article 17 also requires adherence to the principle of legality,¹⁴² and that the interference must be “in accordance with the provisions, aims and objectives of the Covenant” and “reasonable in the particular circumstances”.¹⁴³

4.2 The prohibition on torture, inhuman and degrading treatment (non refoulement)

The prohibition on torture, inhuman and degrading treatment is a cornerstone within human rights. It applies not only when such treatment takes place within the “territory” or “area of effective control”¹⁴⁴ of the convention party, but also where there is a “real risk” of subjection to such treatment upon return to another territory (*non refoulement*), or upon return to another territory which may transfer the applicant to a territory where such treatment may take place (*chain refoulement*). The provision in article 3 is absolute.

Although ECHR article 3 does not cover all forms of refugee law persecution,¹⁴⁵ it prohibits refoulement to “torture, inhuman and degrading treatment”. It must be demonstrated that there are “substantial grounds” for believing that the individual faces a “real risk” of being subjected to treatment contrary to Article 3 in the country to which the applicant is to be returned.¹⁴⁶

¹³⁹ See Kilkelly, Ursula: “The right to respect for private and family life, A guide to the implementation of article 8 of the European Convention on Human Rights”, ECHR Human Rights Handbooks no. 1

¹⁴⁰ *ibid*

¹⁴¹ ICCPR General Comment no. 16, paragraph 5

¹⁴² ICCPR General Comment no. 16, paragraph 3 and 8

¹⁴³ *ibid* paragraph 4

¹⁴⁴ ECHR, *Loizidou v. Turkey*, 23.3.1995 (application no. 15318/89)

¹⁴⁵ Hathaway, «Framing Refugee Protection in the New World Disorder» (2001) 34 *Cornell International Law Journal* (257)

¹⁴⁶ *Soering v. United Kingdom*, paras. 88, 91

4.3 The right to fair trial

Asylum seekers who are excluded from refugee status will in most cases risk criminal prosecution upon return to their country of origin or another country. This may give rise to legal considerations. Contemporary examples are applicants who face prosecution for participation in genocide in Rwanda, members of PKK, LTTE and Hamas who face prosecution for alleged acts of terror in Turkey, Sri Lanka or Israel respectively.

In the case of exclusion from refugee status, the determining authority must also consider the relationship to ECHR article 6 in these cases. Based on the case law of the ECtHR, the provision applies extraterritorially in cases where a “real risk” of a “flagrant denial of fair trial” is established.¹⁴⁷ The term “real risk” implies a risk that is concrete, as opposed to theoretical. In requiring a “flagrant” denial of fair trial, the court has established a strict assessment where only the most serious breaches of article 6 may lead to extraterritorial application, *e.g.* lack of right to present witnesses or lacking independence of the courts. However, the burden of proof is a mere balance of probabilities.¹⁴⁸

5. UNHCR sources

The Office of the UN High Commissioner for Refugees (UNHCR) was established in 1951 with a mandate of *“providing international protection, under the auspices of the United Nations, to refugees who fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees [...]”*.¹⁴⁹ In addition, the UNHCR was given the mandate to supervise the application of international conventions established for the protection of refugees.¹⁵⁰ The competence of the UNHCR extends to all *de jure* refugees, excluding those *“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 of Human Rights.”*¹⁵¹

The UNHCR has published a number of instruments regarding the interpretation of the 1951 Convention. One important source is the 1972 “Handbook on Procedures and Criteria for Determining Refugee Status”. The Handbook was reedited in 1992, and provides an overview of the main legal issues regulating exclusion. Other important sources are the various legal guidelines, advisory opinions, position papers and statements on legal issues of the UNHCR. Other important sources are the 2003 Guidelines on International Protection; Application of the Exclusion Clauses: Article 1 F of the 1951 Convention relating to the Status of Refugees (hereinafter the UNHCR Guidelines) and the 2003 Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees (hereinafter the UNHCR Background Note).

Although no international court is established in order to try legal issues falling under the 1951 Convention, the state parties to the 1951 Refugee Convention are obliged to co-operate with the UNHCR.¹⁵² With reference to this duty of co-operation (article 35), the soft

¹⁴⁷ *ibid*

¹⁴⁸ *ibid*

¹⁴⁹ Statutes of the UNHCR article 1 no. 1

¹⁵⁰ *ibid* article 8 a)

¹⁵¹ *ibid* article 7 d)

¹⁵² 1951 Convention article 35

law instruments of the UNHCR should be afforded both relevance and weight in the national interpretation of the convention and its obligations.

Part 3: Law and practice in Norway

1. Applicable law

Norway adopted a new and revised Immigration Act in 2008 (hereinafter referred to as the Immigration Act).¹⁵³ Whereas the old provision in section 16 second paragraph of the Immigration Act of 1998 stated that a refugee falling under article 1 C-F of the 1951 convention could wholly or partly be excluded from the rights and protection following from the chapter relation to refugee status,¹⁵⁴ the new provision provides a full legislative transformation of the text in article 1 F.¹⁵⁵

The Norwegian Immigration Act, Section 31 “Exclusion from the right to recognition as a refugee pursuant to section 28”

“A foreign national shall not be entitled to recognition as a refugee pursuant to section 28, first paragraph, if he or she falls within the scope of Article 1D or E of the Geneva Convention relating to the Status of Refugees of 28 July 1951, or where there are serious reasons for considering that he or she

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

(b) has committed a serious non-political crime outside Norway’s borders, prior to his or her admission to Norway as a refugee, or

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

Nor shall a foreign national be entitled to recognition as a refugee pursuant to section 28, first paragraph (b), apply if there are grounds for expelling him or her based on fundamental national interests, or the foreign national, having been convicted by final judgment of a particularly serious crime, thereby constitutes a danger to Norwegian society.”

As opposed to other countries included in the survey, Norwegian legislation does not include provisions aimed at excluding or barring entry of foreign citizens applying for leave to stay on other basis such as family reunification, work or study, specifically on grounds similar to article 1 F. However, such rejection is mandated where “foreign policy interests” or “fundamental national interests” necessitate rejection, or where the facts of the case indicate grounds for rejecting the applicant (“bortvisning”) or expulsion from the country.¹⁵⁶ The latter provision requires not only establishment of the objective elements required for expulsion, but also an assessment of proportionality as required by Section 70.¹⁵⁷

¹⁵³ Lov om utlendingers adgang til riket og deres opphold her (utlendingsloven), LOV-2008-05-15-35

¹⁵⁴ “Flyktning som går inn under flyktningekonvensjonen art. 1 C-F kan helt eller delvis utelukkes fra de rettigheter og det vern som er fastsatt i dette kapittel og som ikke gjelder saksbehandlingen.”

¹⁵⁵ The legislative technique applied when implementing the provision in article 1 F into the immigration act must be seen as “transformation” rather than “incorporation”, as there may potentially be some linguistic differences between the English and the Norwegian text. See NOU 1972: 16.

¹⁵⁶ Immigration Act section 7 and 59

¹⁵⁷ Immigration Act Section 59, Henrik Bull in Vevstad (Red.), Utlendingsloven, Kommentarutgave, p. 389

Applicants who are excluded from refugee status are as a main rule considered to be protected under ECHR article 3, which is implemented in the Immigration Act Section 73. In such instances, temporary residence permits are granted on the basis of the immigration act Section 74, which stipulates the following:

“A foreign national whose protection against refoulement under section 73 is his or her sole basis for residence in the realm may be granted a temporary residence permit until the impediment to his or her return no longer applies. It may also be stipulated that the permit shall not confer the right to take employment. Residence permits under this section shall not confer the right to visit other Schengen countries. The King may by regulations make further provisions, including the duration and renewal of permits under this section.”

The Immigration Regulations Section 15-2 stipulates that such permit is “normally granted for a period of up to six months at a time, but may in special cases be granted for a period of up to one year”. Upon renewal, protection under ECHR article 3 is still the necessary requirement, which may or may not still be present. If the applicant leaves Norway, the permit is no longer valid.

This approach is compatible with the Court of Justice of the European Union (CJEU) opinion on granting alternative forms of residence permits to excluded individuals: On the question of whether it would be compatible with Directive 2004 /83 for a Member State to recognize that a person excluded from refugee status pursuant to Article 12 (2) has a right to asylum or other kinds of protection under the domestic law of the Member State, the CJEU answered in the affirmative, “provided that that other kind of protection does not entail a risk of confusion with refugee status within the meaning of the directive”¹⁵⁸

2. The Directorate of Immigration (UDI)

This section will provide a description of UDI administrative practice. Similarities and differences compared to UNE administrative practice and the practice of comparative states will also be discussed.

2.1 Methodology

The survey was conducted at the premises of the UDI. Names and date of birth of the applicants were deleted from all copies. In most cases I was provided copies of the following documents:

- Asylum interview(s)
- Pre-notification to the applicant’s lawyer that exclusion would be considered
- UDI decision
- Appeal to UNE

In total I was provided access to documents originating from 77 cases. The UDI decision was not included in two of these cases.¹⁵⁹ Among the 77 cases, 8 included cases where UDI considered that the applicant did not fulfill the requirement of article 1 A, and where article

¹⁵⁸ CJEU, 9 November 2010, paragraph 121

¹⁵⁹ 59 Iraq, 67 Afghanistan

1 F was consequently not considered. Among these 8 cases, UNE came to a different conclusion on the question of application of article 1 A (inclusion) in 7 cases.¹⁶⁰ This may indicate that the threshold for inclusion is lower for UNE Boards when a preliminary consideration indicates that the applicant in any case would be excluded, or it could be due to new facts provided at the time of consideration of the appeal. One case is still pending before UNE.¹⁶¹ Of these 7, UNE excluded 4.¹⁶² I was provided access to in total 13 decisions rendered by UNE.

7 of the 76 cases included decisions where UDI considered the applicant included as a refugee, but did not exclude.¹⁶³ In three of these decisions internal considerations regarding article 1 F were made available through access to “internal memos” (“interne merknader”).¹⁶⁴ In four of the cases, no explicit article 1 F consideration was made, although case workers informed in interviews that article 1 F had been considered (Iran, activities within MKO / PMO).¹⁶⁵

Exclusion was explicitly considered in 67 cases, i.e. article 1 F was applied or – where it was not applied – a rudimentary assessment of article 1 F was provided in internal memos. The exclusion consideration is only visible in the decision when exclusion has in fact been the conclusion. Based on interviews with caseworkers, it was clear that exclusion is in fact considered, but not applied, in a significantly higher number of cases. Except for the 7 cases mentioned above, cases where the UDI considered but did not apply exclusion were not made available for the survey (assumable due to technical challenges in identifying these cases, or because the numbers would be too high).

Among the 67 cases, exclusion was decided in 59. These 59 cases constitute the basis of the analysis of UDI practice regarding exclusion.

¹⁶⁰ 1 Afghanistan, 4 Afghanistan, 6 Russia, 10 Russia, 48 Russia, 55 Afghanistan, 74 Afghanistan.

¹⁶¹ 31 Bosnia and Hercegovina

¹⁶² 1 Afghanistan, 6 Russia, 55 Afghanistan, 74 Afghanistan. In case 10 and 48 Russia which involved a married couple, the UNE first rendered a decision on exclusion, which was reversed a few years later due to errors in law in the original decision.

¹⁶³ 23 Somalia, 25 Yemen, 26 Sri Lanka, 32 Iran, 50 Iran, 51 Iran, 52 Iran

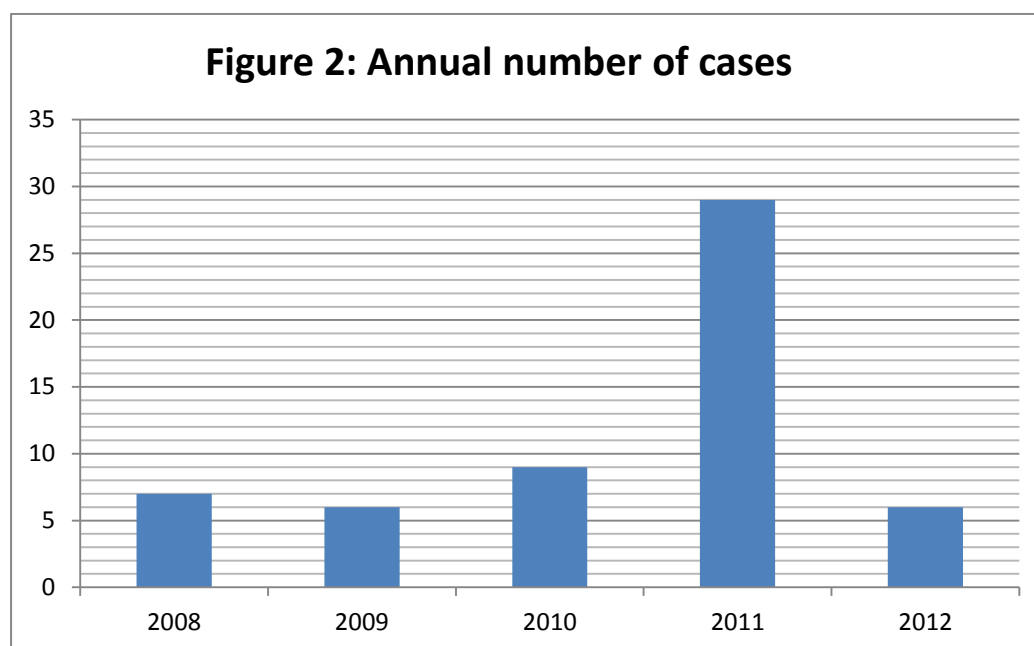
¹⁶⁴ 23, 25, 26

¹⁶⁵ 32, 50, 51, 52

2.2 Facts and figures

2.2.1 Number of exclusion decisions per year

Figure 2 shows the annual number of exclusion decisions, based on the decisions made available for the survey.¹⁶⁶ With the exception of 2009 and 2012, these numbers correspond with the formal statistics of the F 1 unit.¹⁶⁷



The diagram shows a steady number of decisions from 2008-2010, and a significant rise in 2011. Based on interviews at UDI, the rise in numbers in 2011 is explained by the fact that the F1 unit was properly established at that point, and routines for identifying cases at the geographic units had been properly implemented. Another explanation was a backlog from earlier years, which resulted in high numbers in 2011. The number relating to 2012 is based on the decisions made available to the survey, which only included a few decisions in the second half of the year. In total, 12 decisions were rendered in 2012. The decrease in numbers from 2011 to 2012 is explained by a transfer of responsibility of all cases regarding withdrawal of refugee status to the unit, including withdrawal for other reasons than article 1 F. This increase in responsibility has impacted on the annual number of article 1 F decisions. The numbers indicate that the F 1 unit established a high level of productivity within rendering article 1 F decisions by 2011, but that the added responsibility of withdrawal cases has impacted negatively on annual number of exclusion decisions rendered.

The F 1 unit has been operational with a particular focus on exclusion cases for four years. As the establishment of the unit more or less coincided with the entry into force of the 2008 immigration law, it difficult to identify positively whether the increase in exclusion cases is

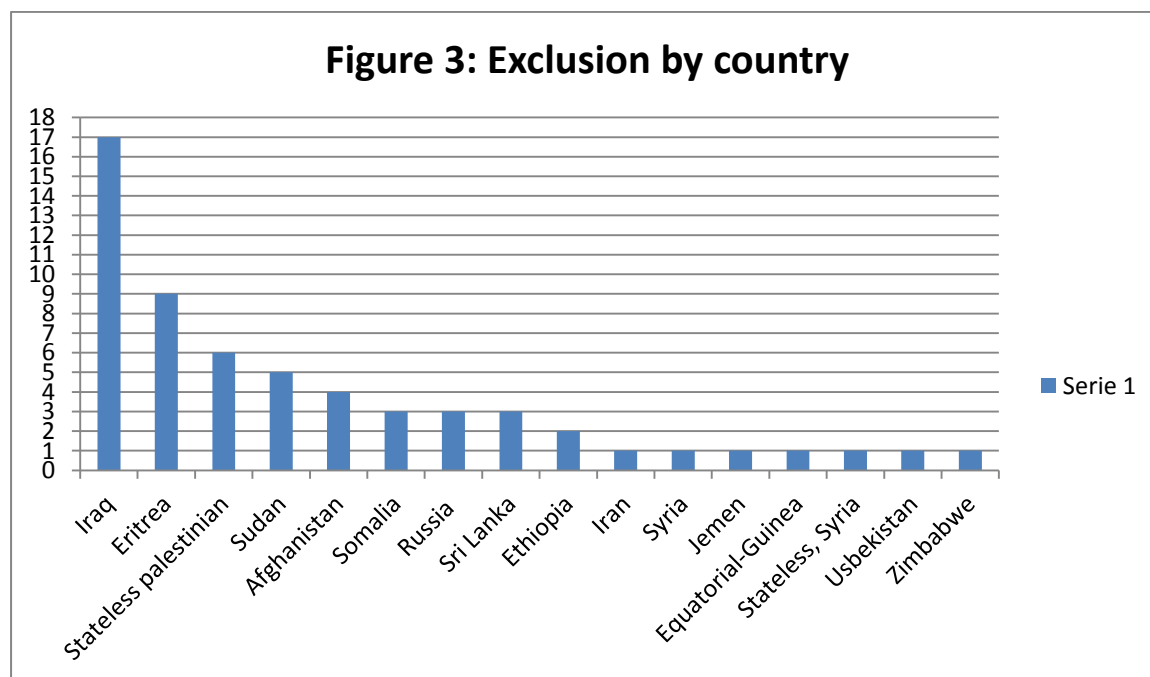
¹⁶⁶ The total number counted in Figure 1 is 57, as in two decisions the date was not visible.

¹⁶⁷ E-mail from officer at the F 1 unit, 5.3.2013. According to the statistics of the F 1 unit, five decisions were rendered in 2009, and 12 were rendered in 2012.

based on a higher number of convention refugees in Norway or on the functioning of the F 1 unit. It is however likely that the establishment of the unit and a more streamlined system for identification of exclusion cases has been the main factor explaining the rising numbers of exclusion cases.

2.2.2 Countries of origin

Among the 59 UDI decisions on exclusion, the division by country of origin was as described in Figure 3.



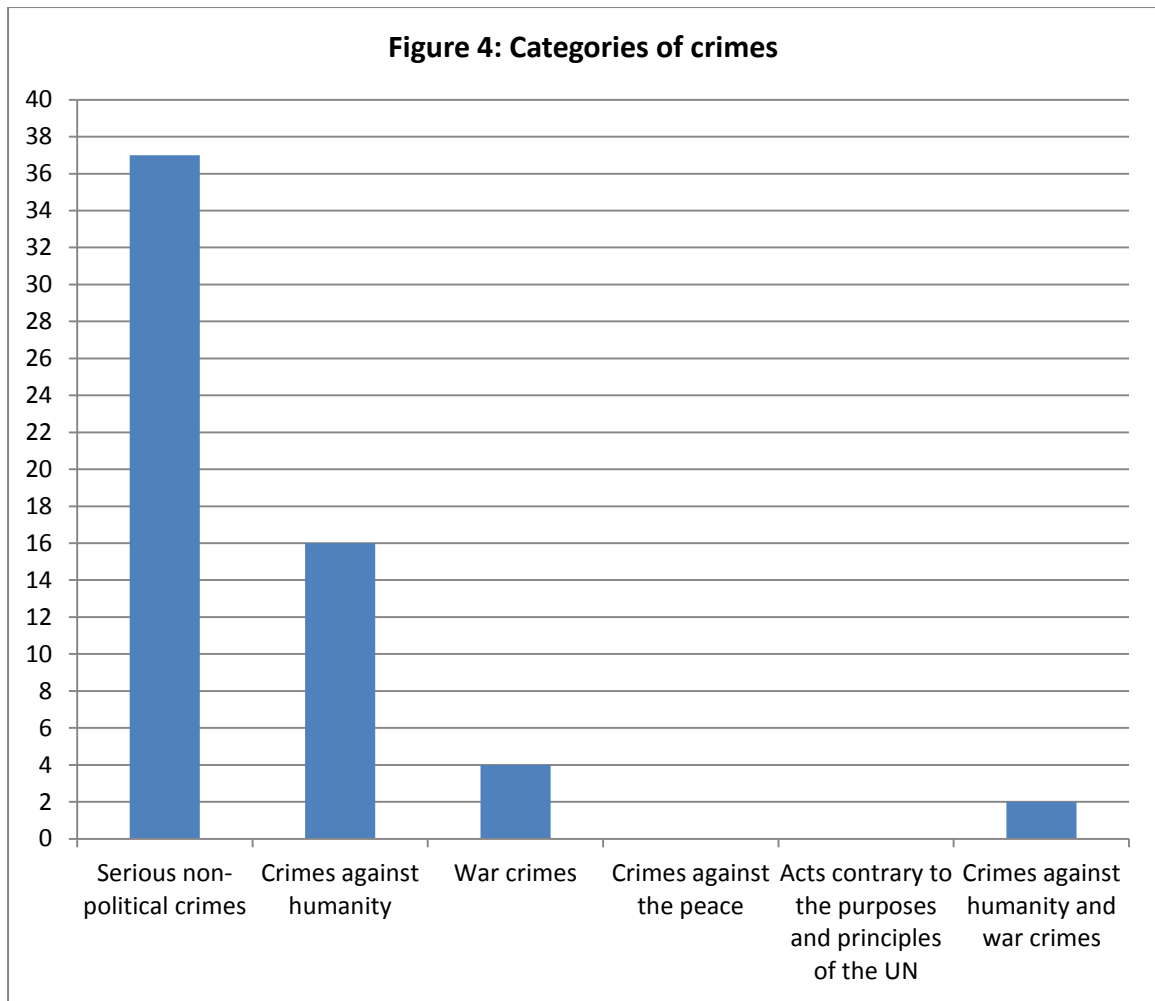
The following provides a brief overview of a few case types from the most common countries of origin:

- Among the 17 Iraq cases, 12 cases dealt with former members in the Baath party under the regime of Saddam Hussein, where the applicant was excluded on the basis of having committed or aided and abetted crimes against humanity. Two cases related to commission or aiding and abetting crimes against humanity in the Kurdish areas, one related to a former prison guard who was excluded on the basis of having aided and abetted torture (article 1 F b), and one related to a man who had worked as a private security guard, who had participated in killings and unlawful detention (article 1 F b).
- Among the 9 Eritrea cases, five concerned former conscripts to the army who had been complicit to torture. One concerned an applicant who had participated in attacks against Ethiopian government forces in the period 1984-1990, one concerned war crimes having been committed against Ethiopian POWs in Eritrean camps during the war from 1998 - 2000. Another case of interest from Eritrea concerned an officer in the army for whom individual responsibility for complicity to crimes against humanity was presumed, due to his high rank and administrative position.

- Of the six cases concerning stateless Palestinians, two related to participation in shooting rockets into Israel as well as attacks against Israeli tanks and armed personnel (one was based on article 1 F a and one on article 1 F b), one related to an applicant having assisted a Palestinian organization in coding and decoding information resulting in attacks into Israeli territory, two related to complicity to torture by handing individuals over to Palestinian organizations which made use of torture during interrogations and one an instance of private revenge resulting in serious injury and possible death for the victim.
- Among the cases originating from Sudan, some related to applicants having participated in the attack against Omdurman in 2008, while one had worked in the general command providing armed equipment and other necessities for government forces operating in the Darfur region. Another had been an active member of the SLA operating in Darfur. This applicant was *not* excluded for having participated in armed fighting where members of the Janjaweed militia and government forces had been targeted, but for participation in torture of both civilians and fighters.

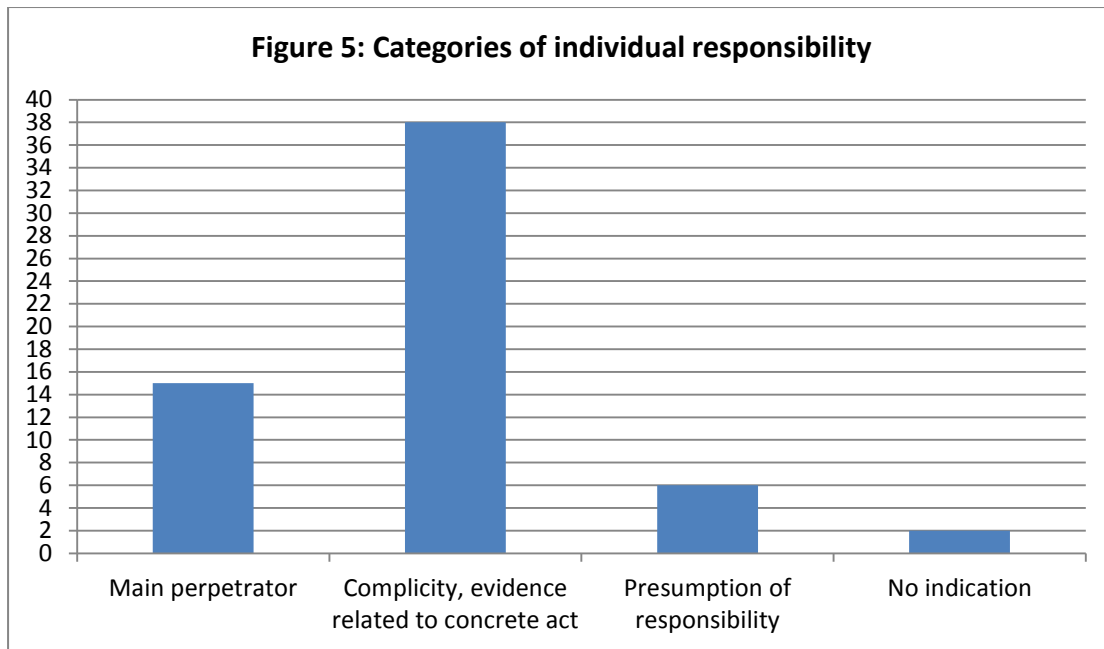
2.2.3 Categories of crimes

In the UDI practice, the dominant basis for exclusion is article 1 F b), which more or less doubles the next category, crimes against humanity, in size. No cases were decided on the basis of crimes contrary to the purposes and principles of the UN or crimes against the peace. Two cases were based on having established both crimes against humanity and war crimes. This is seen in figure 3.



2.2.4 Categories of individual responsibility

The dominating category of individual responsibility was clearly that of complicity. As seen in Figure 4, complicity was established in 38 of 59 cases, followed by 15 cases where the applicant had been a main perpetrator. Exclusion was decided on the basis of a presumption of liability in 6 cases. Direct participation or joint criminal enterprise was not applied. Two decisions did not provide indication as to the basis for individual responsibility.



2.3 General overview of the administrative procedure

Exclusion cases are identified at the geographical units within the UDI, and sent to the F 1 unit. At that point the asylum interview has been conducted. Experienced senior officers at unit F 1 screen all case files, and return those where exclusion clearly is not an issue. In all cases where exclusion will be considered, a pre-notification to the applicant is sent together with early appointment of a lawyer (normally the applicant will be appointed a lawyer after having received a negative decision on asylum). Additional interviews may be conducted at this point. After having received comments to the pre-notification from the lawyer, cases are considered by a minimum of two case handlers, one providing a primary and the other a secondary consideration. The decision is signed by both case handlers.

2.3.1 Identification of potential exclusion cases

In order to describe the process within which exclusion cases are identified at the UDI, interviews were conducted also with representatives from six regular geographical units within the organization. Based on these interviews the following may be said:

All cases where the Immigration Act Section 31 may be applicable are sent to the F 1 unit. However, cases where refugee status should clearly be rejected are considered within the geographical unit without regard to the act that could constitute grounds for exclusion. The approach of most geographical units is to forward too many rather than too few cases to F 1.

One unit informed that 9 out of 10 cases which were forwarded to F 1 were returned, *i.e.* neither article 1 A or 1 F was considered applicable. Other units supported this assessment, stating that “more or less all” decisions were returned, “a significant amount of cases were returned” or “quite a number of cases were returned”.

Two units stated that case workers would often make phone calls to the F 1 unit in specific cases, in order to clarify whether they should be forwarded for exclusion consideration. One unit indicated that exclusion cases were identified on the basis of an “indicator list” which was not mentioned by other units. This informant doubted that officers conducted interviews within the unit held sufficient knowledge about the content of the “indicator list”.

The various geographical units confirmed the existence of cases where the applicant provided information indicated that he or she had committed serious crimes (*e.g.* murder) but where the application for protection clearly would be rejected (*i.e.* exclusion would not become an issue). Cases relating to war crimes or crimes against humanity were not included among such examples.

As to the evidence required before cases were sent to unit F 1, most units stated that this was a low threshold indicating that mere suspicion could be sufficient for referral. However, as the facts in most cases both at this and a later stage were based on information provided by the applicant in the course of interview(s), the factual evidential situation was the same for the geographical units as it would be for unit F 1. The geographical units underlined that the actual assessment of the evidence would be conducted at F 1.

The unit dealing with asylum applications from children (“Barnefaglig enhet”) did not apply a specific rule as to the minimum age at the time of the commission of the act in question in cases that were sent to unit F 1. This should be clarified in order to ensure that the time of handling cases which in any cases are not subject to exclusion is not prolonged due to communication with unit F 1.

Based on the above, it is clear that the number of cases forwarded to the F 1 unit from the geographical units within the UDI is considerably higher than the number of cases which actually lead to exclusion. Most of these cases are instances where the inclusion requirement is not met. This indicates the existence of a segment of cases where article 1 F should not be applied according to the Norwegian practice, but where there may still be reason to suspect that the applicant has committed crimes that objectively would fall within article 1 F a, b or c. This is not problematic from the point of view of refugee law. However, where the information is deemed credible, the UDI should ensure that notification is provided to the police so that necessary action may be taken.

Based on the experience from the UK and NL, increased knowledge on article 1 F within the regular units could be ensured through the use of intranet solutions, dissemination of COI-papers specifically highlighting which organizations or acts to look for, courses on article 1 F and / or establishment of focal points within the geographical unit with particular responsibilities related to screening / article 1 F.

2.3.2 Interviews

As to the factual situation in exclusion cases, it can be noted that all exclusion decisions included in the survey were decided on the basis of information provided by the applicant in the asylum interview.¹⁶⁸ From this it is clear that focus on article 1 F should be high also during the asylum interviews.

¹⁶⁸ In one case, new interviews were conducted on the basis of information provided by the applicant during appeal to UNE (24)

During the survey, access was provided to interviews in most cases where article 1 F was applied. Approximate descriptions of the length of the interview and the length of the section involving information regarding potential excludable acts was noted, as well as whether follow up questions were posed by the interviewing officers.

Based on this assessment, no cases were found where follow up questions lead to answers which revealed acts falling under article 1 F. Most information about 1 F – relevant acts was provided on the basis of the applicant’s own initiative, with follow up question (when provided) only relating to details of this segment of the case facts. Accordingly, an asylum applicant who is aware of the exclusion provision may avoid exclusion by avoiding topics or subjects which gives rise to suspicion. Other evidence relating to 1 F acts was rarely found in the cases.

Follow up interviews were made in cases where the main interview had not provided sufficient clarification of the facts relevant under the article 1 F assessment. This was the case with approximately half of the interviews. In other words, by increasing focus on article 1 F among the officers conducting the interview, resources spent on follow up interviews by unit F 1 may be saved, in addition to the more important objective of ensuring identification of exclusion cases.

Some of the follow up interviews were conducted by the F 1 unit, whereas others were conducted by the regional UDI offices based on instruction from unit F 1. The qualitative interviews at UDI showed that the latter approach was often considered insufficient, as the UDI regional offices were not in a position to identify necessary follow up questions during the interview.

Only in one interview was the applicant informed specifically about his duty to provide correct information, not to withhold information, the criminalization of providing false information and the possibility of exclusion from refugee status if criminal acts have been committed.¹⁶⁹

Caseworkers stressed the challenges that are present in interviewing former members of intelligence units of the states of origin, *e.g.* former members of the Baathist intelligent units in Iraq. This underlines the importance of ensuring thorough coursing of officers in interviewing techniques. In Norway, courses in KREATIV (interview process and technique developed at the National Police College) should be continued.

2.3.3 Pre-notification to the applicant

According to the Norwegian Administrative Act Section 16, pre-notification to the individual should be provided when decision is considered made in a “case” to which the individual has not provided a statement or point of view. Based on interviews with both UDI and UNE officers, both administrative organs consider the assessment of inclusion (article 1 A) and exclusion (article 1 F) as the same “case”. However, by granting the applicant with the opportunity to comment on the matter of application of article 1 F, both contradiction and clarification of the facts of the case is ensured.

¹⁶⁹ 19

Pre-notification is conducted by appointment of a public lawyer for the applicant. A letter of appointment and pre-notification of exclusion is sent to the lawyer, who receives the documents of the case, including the interview, upon accepting the client. A deadline of three weeks is fixed within which a statement from the applicant must be provided.

Copy of the pre-notification to the applicant was provided in 44 cases included in the survey. In 4 cases, the pre-notification only informed the applicant that there was reason to consider whether article 1 F b should be given application, without providing further concrete factual or legal basis.¹⁷⁰ These pre- notifications were delivered in 2009 (two cases), 2010 and 2011.

In most cases, the pre-notification informed the applicant that article 1 F would be considered in the case, including reference to a description of the basis of the suspicion, usually only one sentence (e.g. "... due to information provided that the applicant was a commander in X organization from 1992-1996"¹⁷¹ or "due to his work as a prison warden in X prison"¹⁷²). The pre-notifications in this group were provided during the years 2007-2011.¹⁷³ A few cases included a more in depth description of the basis of the suspicion, including three or four sentences. These were provided in 2010 and 2011.¹⁷⁴

In 5 cases the pre-notification referred briefly to the factual basis for the suspicion, as well as included reference to various legal sources such as the UNHCR Guidelines and Background note, country specific recommendations from the UNHCR, legal commentaries and theory.¹⁷⁵ Four of these pre-notifications were provided in 2011 while one was provided in 2010.

The material illustrates that an increase in the information provided in the pre-notifications has taken place starting in 2010, where some, if not most, of the pre-notifications provide more information as to the basis of the suspicion as well as reference to the most important legal sources. I have not examined the content of pre-notifications rendered in 2012, as the respective decisions have not been made yet.

Only in one case did the pre-notification provide specific information that the UDI did not consider the acts of the applicant as legal participation in warfare (civil war in Sudan) and that the case for that reason would be considered under article 1 F b.¹⁷⁶

As it is practiced today, the pre-notification to the applicant does to a large degree serve the same function as a "suspicion document", which was recommended by Einarsen, Vevstad and Skaar in their 2006 report.¹⁷⁷ Einarsen, Vevstad and Skaar did not recommend introduction of a "certification" as is used in the UK, but rather a document in which the concrete suspicion against the applicant is described, which would ensure contradiction.

¹⁷⁰ 2, 30, 38, 54

¹⁷¹ 3

¹⁷² 7

¹⁷³ 3,7,8,9,12,15,16,19,20,27,33,34,35,39,40,41,42,44,45,46,47,53,56,57,61,64,65,66,73

¹⁷⁴ 18, 57, 65

¹⁷⁵ 13, 14, 18, 24, 72. Reference is made to Vevstad (Red.) «Utlendingsloven, Kommentarutgave» and Einarsen, «Retten til vern som flyktning»

¹⁷⁶ 18

¹⁷⁷ Einarsen, Vevstad, Skaar section 2.7

The development described should be continued, and future pre-notifications should provide reference to the legal basis (article 1 F a, b or c), provide a short description of the basis for the assessment, as well as reference to the most important legal sources and theory. The basis for potential individual responsibility under article 1 F should also be highlighted, in particular where the UDI considers exclusion on the basis of a presumption of responsibility.

2.3.4 Comments from the applicant / lawyer

In 21 cases among the 59 where exclusion was decided, copies were provided of the asylum lawyer's comments to the pre-notification. The comments are both of varying degrees of length and thoroughness and show great variation in the level of specialization among asylum lawyers.

On a general basis, the survey showed that not all lawyers provided comments which were adequate in all aspects and which could indicate that the lawyer had invested sufficient time in understanding both facts and law of the concrete case. The survey also showed a very limited number of lawyers who had not prioritized the 1 F case to which he or she was assigned, e.g. by providing extremely short comments of only one or two sentences and/ or irrelevant legal arguments.

In 7 cases (*i.e.* 1/3 of the cases examined), the comments only provided additional factual information delivered from the applicant to the lawyer, without specific legal references or legal arguments.¹⁷⁸ In these cases, comments from the lawyer hold the same function as would an additional interview, by providing the UDI with a broader factual basis for considering the case. However, the main objective of appointing legal counsel to asylum seekers in exclusion cases is to ensure that all relevant arguments are brought to the table, including both factual and legal aspects.

Duress was argued in 5 cases.¹⁷⁹ In none of these instances did the lawyer base the argument on a legal provision, e.g. ICC article 31 - 33.

Superior orders were argued in 3 cases.¹⁸⁰ In two of these cases, the arguments were not based on legal provisions and it was not clear whether they were argued as grounds for not finding that a crime had been committed in the first place, or as a form of mitigating factor to be considered under article 1 F.

In the third case the argument was put forward in a thorough manner by providing reference to the potential consequences for the applicant if he had refused as well as his lacking possibilities of leaving the situation during which the excludable act was committed. However, this case did not provide reference to the legal basis for the argument or relevant case law.¹⁸¹

In 5 cases where the pre-notification stated that the case would be considered under article 1 F b, it was argued either implicitly or explicitly that the act in question had been

¹⁷⁸ 8,9,14,15,42,46,47

¹⁷⁹ 8,9,13,14,19

¹⁸⁰ 15, 46, 74

¹⁸¹ 74

committed in the context of an armed conflict and therefore had to be considered as lawful. Examples of arguments were that “the applicant only fought against legitimate targets, he did not attack civilians”¹⁸² or “the applicant could not know whether his acts were in accordance with IHL”¹⁸³. In all five cases including the case referred to above, the argument directed at application of article 1 F a rather than 1 F b is rudimentary and short. None of the comments touch upon the specific question of competency to commit violence against combatants of the opposing forces. At most, reference was made to the fact that the individual had distinguished between combatants of the opposing forces and / or other fighters in the generic sense of the word, vis à vis civilians. This indicates that unless UDI specifies in the pre-notification its practice of considering most non-state actors participating in internal armed conflicts under article 1 F b, this question may not be subject to effective contradiction.

In one additional case, the lawyer stated in general terms that the peoples of the region in question had a moral right to defend themselves against an oppressive regime and that the outside world should take care so as to not judge the acts of individuals who were in the situation of the applicant.¹⁸⁴ It was not explicitly argued that the acts should have been considered as lawful acts of war, although the argument presented by the lawyer clearly springs from this point of view.

This report has not sought to identify the quality of legal counsel within immigration law nor to provide means for its improvement. However, a general impression is that the quality of services provided by asylum lawyers in exclusion cases varies a great deal, from those who seem specialized to those who do not.¹⁸⁵ The reason behind the varying quality of comments may be diverse, including factors such as lack of time (payment structure) or lack of specialized training within article 1 F related areas (international criminal law, international humanitarian law). In order to ensure solid legal counsel in exclusion cases, UDI should consider the establishment a list of specialized exclusion lawyers holding documented competency within domestic criminal law and ICL, to whom all exclusion cases are directed. Furthermore, courses should be provided within article 1 F, criminal law and ICL for lawyers applying for inclusion on the list.

2.4 Application of law

2.4.1 Crimes against humanity

Among the 59 exclusion cases, 15 were based on an assessment that there were serious reasons for considering that the applicant had committed or been complicit to crimes against humanity. 13 of these pertained to applicants originating from Iraq, who had been affiliated with the Baath regime under Saddam Hussein or with Kurdish security forces in Northern Iraq,¹⁸⁶ while one case originated from Eritrea¹⁸⁷ and one from Zimbabwe¹⁸⁸.

¹⁸² 44

¹⁸³ 13

¹⁸⁴ 18

¹⁸⁵ One case shows a lawyer arguing that article 1 F b has as its only objective to protect the security of the host state (24), other lawyers provide what must be described as unclear and vague arguments related to duress, superior orders, targeting legitimate combatants and more.

¹⁸⁶ 8,9,29,36, 38-43, 61, 72, 73, 75

¹⁸⁷ 70

¹⁸⁸ 5

Application of the chapeau requirement

In one case, UDI excluded a Zimbabwean applicant on the basis of both war crimes and crimes against humanity, stating that "for an act to amount to a war crime, it must have been committed as part of a plan or policy by the authorities or as part of a widespread attack (...). Similar requirements apply for crimes against humanity (...)" (my translation).¹⁸⁹ It appears from the decision that a chapeau requirement was required for both categories of crimes, although this is not necessary for war crimes.

In another case, UDI concluded that an Eritrean had committed crimes against humanity by being responsible for carrying out punishment and prison terms against family members of army deserters in his region. His acts were considered to fall under the ICC statute article 7 letter e and k. The chapeau-requirement was described by reference to an ECCC trial chamber judgment referring to "widespread" as requiring acts and victims of a large impact while systematic refers to acts being of an organized nature.¹⁹⁰ The factual side was considered fulfilled by reference to several human rights reports which documented that "Eritrean authorities arbitrarily arrested family members of army deserters since 2005", one example being the arrest of over 500 family members of young men and women who had deserted or fled from army service.¹⁹¹ UDI considered that such arrests were of a widespread nature and that they were organized by the authorities. Furthermore, UDI considered that the family members of army deserters were to be considered "civilians", by reference to Additional Protocol I to the Geneva Conventions and article 4 A in the Geneva conventions. Furthermore, UDI considered that human rights violations in Eritrea had escalated since 1993, in particular after the Ethiopia – Eritrea war from 1998-2000.¹⁹² UDI also stated that human rights violations in Eritrea include unlawful executions, unlawful arrests and other forms of punishment and that torture and inhuman treatment is common and systematic in the army. Prison conditions are inhuman and in some cases life threatening. Families of army deserters have been arrested and detained in containers.

In the Iraq cases, UDI applied a standard description of the widespread and systematic human rights violations under the Baath regime:

"The Baath regime in Iraq was internationally known and criticized for its use of submissive and brutal methods which refused basic human rights to the population. A climate of fear and oppression was created where criminal reactions against anyone suspected of disagreeing with or not supporting the regime could range from interrogations, imprisonment, torture, disappearances and death. Examples on the acts and methods of the regime against its own citizens are provided in a number of reports and resolutions from international organizations. A number of the acts by the former Baath regime must be considered as "crimes against humanity" as defined in the ICC Statutes article 7. Reference is made to the significant and institutionalized human rights violations such as torture (ICC article 7 (1) f), imprisonment in violation of fundamental principles of international law (ICC article 7 (1) e), enforced disappearances (ICC article 7 (1) i) and other inhuman and

¹⁸⁹ 5

¹⁹⁰ Kaing Guek Eav alias Duch Trial Judgment, Extraordinary Chambers in the Courts of Cambodia, ECCC Trial chamber av 26 . juli 2010

¹⁹¹ HRW «Service for life, state repression and indefinite conscription in Eritrea» april 2009, US Department of State «Country report on HR Practices» March 2010, Refugee Documentation Centre Ireland Legal Aid Board "Eritrea - Treatment of military deserters and their families" January 2010

¹⁹² Reference is made to HRW «Service for life, state repression and indefinite conscription in Eritrea» april 2009 and US Department of State «Country report on HR Practices» March 2010.

degrading forms of treatment that cause great suffering or serious injury to body or to mental or physical health".¹⁹³

Crimes against humanity as committed by Kurdish security forces were described as follows:

"Asayish is the KDP internal security force which has jurisdiction over financial and political crimes such as smuggling, espionage, sabotage and terrorism. Parasin is the domestic intelligence service. Together with the Peshmerga, Asayish and Parasin hold villages, cities and regional control posts under surveillance. In Erbil, Asayish and Parastin run special prisons outside the control of the Iraqi government, but under the control of the KDP. Akre is the most known among these prisons run by Asayish, and Salaheddin the most known prison run by Parastin. The acts of Kurdish security and intelligence services vis a vis its own population is described in a number of reports from international organizations. The conditions which are criticized include the widespread and institutionalized use of grave torture and other inhuman and degrading treatment, unlawful detention and long term pretrial detention without a final conviction. The treatment of persons suspected of taking part in international terrorism is particularly criticized. Reference is made to the UNHCR Eligibility Guidelines for Assessing the international protection needs of Iraqi Asylum-seekers (April 2009) which states: "(...) arbitrary arrests, abductions, incommunicado detention and torture attributed to the Kurdish Peshmerga, security and intelligence agencies". Reference is also made to the reports of the UN Assistance Mission from 2008 and 2007. The first report shows that persons in the Kurdish regions have been arrested on the basis of suspicion of involvement in terror have been "routinely singled out for violent treatment amounting torture during investigations".¹⁹⁴

The underlying crimes which led to exclusion on the basis of crimes against humanity was most often complicity to torture by arresting opponents of the regime or providing information which led to such arrests. Some cases also excluded senior officers of the regime on the basis of a presumption of responsibility (see section 2.6.6 below).

2.4.2 War crimes

Exclusion on the basis of war crimes has been decided in only 7 cases, which is a relatively low number.

In a decision rendered in 2009, UDI considered that a former officer in Hezb-e Islami in Afghanistan was responsible for war crimes committed by the organization during the civil war from 1992-1996.¹⁹⁵ Exclusion was based on a presumption of responsibility.

In two similar decisions rendered in august 2011 UDI concluded somewhat differently, by applying both article 1 F a and 1 F b in cases dealing with applicants who had been officers in the same organization during the same civil war. In these decisions UDI concluded on one hand that Hezb-e Islami were responsible for war crimes committed during the civil war, and on the other hand that the acts in question should be considered as civilian crimes under article 1 F b because "Hezb-e Islami were not legal combatants according to international humanitarian law as they refused to recognize the interim government following the fall of Najibullah in 1992. Hezb-e Islami is therefore considered as civilians taking direct part in the

¹⁹³ 36

¹⁹⁴ 38, similar formulations may be found in 39

¹⁹⁵ 21

conflict. They may be prosecuted in a normal manner in accordance with national legislation".¹⁹⁶

In May 2011, exclusion was decided in a case originating from Palestine where the applicant stated that he had participated in launching attacks against settlements and other objectives in Israel.¹⁹⁷ The basis of the decision was article 1 F a, as the act was considered to be a war crime. The conflict was defined as a non-international armed conflict, and reference was made to common article 3 and AP II. Reference was also, without further explanation, made to AP I article 48 which is applicable in international armed conflicts. On a concrete basis, thorough reasoning as well as factual sources were provided in order to establish that the rockets fired into Israel were indiscriminate in nature and could thus be considered as war crimes. Reference was also made to statements by the Norwegian MFA regarding the categorization of such acts. UDI did not consider whether the acts should be considered under article 1 F b.¹⁹⁸

Later that year (November 2009) the case of a Palestinian applicant was considered differently. On the basis of participating in attacks on Israeli tanks as well as rockets fired into Israel, the applicant was considered to have committed civilian crimes under article 1 F b on the basis of.¹⁹⁹ UDI considered that "the group in question is not considered as legal combatants according to international law. Therefore they have no right to attack anyone with the intention of killing, with impunity, whether they may be military objectives or not".

In one decision rendered in July 2010, the applicant was excluded on the basis of article 1 F a for having committed both war crimes and crimes against humanity by participating in the armed forces in Zimbabwe and rendering prisoners of war to the Military Police where they were tortured.²⁰⁰ In the decision, ICC article 8 no. 1 is misapplied in so far as it is stated that "in order to consider an act as a war crime, it is required that the act was committed as part of a plan or policy, or as part of a large-scale commission of such crimes".²⁰¹ What follows from article 8 no. 1 is however merely that the jurisdiction of the ICC "in particular" covers such crimes.

A 2010 decision concluded on exclusion on the basis of war crimes for an Eritrean applicant who had been responsible for POW camps on the Eritrean side during the 1998-2000 war against Ethiopia.²⁰²

Finally, a March 2011 decision dealt with an applicant having worked in the General Command in Khartoum in Sudan.²⁰³ Reference was made to the ICC arrest warrant against the Sudanese president of March 4th 2009, where the office of the prosecutor considered that from April 2003 until July 2008, war crimes as defined in the ICC statutes art 8 2 e i and 8 2 e v were committed by Sudanese government forces, including the armed forces and their allied Janjaweed militia, the Sudanese police forces and other units.

¹⁹⁶ 2

¹⁹⁷ 45

¹⁹⁸ 24

¹⁹⁹ 24

²⁰⁰ 5

²⁰¹ "For at en handling skal kunne anses som en krigsforbrytelse, gjelder et krav om at det må være begått som ledd i myndighetenes plan eller politikk, eller som del av et omfattende angrep, se for eksempel ICC artikkel 8 nr. 1».

²⁰² 15

²⁰³ 65

2.4.2.1 Formal competency to apply force

A question which has gained little focus within exclusion law theory is whether humanitarian law principles regarding competency to use violent force should decide whether a given factual scenario should be considered under article 1 F a or 1 F b.

Exclusion from refugee status is linked to international humanitarian law through the wording “war crime (...) as defined in the international instruments drawn up to make provision in respect of such crimes” in article 1 F a. Within the scope of international armed conflicts (IACs), the distinction between status as “combatant” and status as “civilian” is fundamental in that it determines both who has the legal competency to participate directly in hostilities as well as other consequences such as immunity from prosecution for lawful acts of war, immunity from targeting etc. The term “combatant” in IACs define who may take direct part in hostilities, i.e. individuals who cannot be prosecuted for carrying out otherwise lawful acts of war (article 3 Hague Regulations, Article 43, para 2, AP I). Participating in hostilities is not a right of the individual, but rather a competency bestowed on him on the basis of representing the state which is a subject of international law. Application of these two categories is fundamental for the implementation of the principle of distinction in armed conflicts, and both combatants and civilians face consequences for breaching the rules pertaining to the category in which they belong.

As stated by Fleck, “[A]s an international legal term, “combatant” means a person who is authorized by international law to fight in accordance with international law applicable in armed conflicts. This authorization is not an individual right afforded to the combatant by international law, but results from the affiliation of the combatant to an organ (i.e. the armed forces) of a party to the conflict, which is itself a subject of international law”.²⁰⁴

The principle is formulated clearly in rule 302 of the Fleck’s Handbook: “Whereas combatants may not be punished for the mere fact of fighting, persons who take a direct part in the hostilities without being entitled to do so (unprivileged belligerents or unlawful combatants) face penal consequences”. In the commentary to the rule it is elaborated that “Such irregular fighters, i.e. fighters not belonging to a subject of international law involved in the conflict, if taken by the adversary, are prosecuted as criminals and sentenced for their direct participation in hostilities, in compliance with article 45 AP I.”²⁰⁵

Within the system of non-international armed conflicts (NIACs) there is no clear definition of combatants. An important distinction from the point of view of exclusion from refugee status is that in NIACs, as main rule only those fighting as lawful representatives a state-party may invoke a customary immunity from prosecution for lawful acts of war. An individual fighting as member of a non-state party to a conflict may be prosecuted for committing violent acts which would be considered lawful acts of war had they been committed by a combatant within IAC or a lawful representative of the state in NIAC.

The question is, however, whether this question of competency under IHL should be directly reflected within refugee law through interpretation of article 1 F of the refugee convention.

²⁰⁴ Fleck, Handbook of international humanitarian law, 2nd edition, p. 81 (section by Knut Ipsen)

²⁰⁵ Ibid, rule 302

According to UDI practice, individuals not holding immunity from having committed otherwise lawful acts of war, who participate in concrete violent incidents during armed conflict, are considered for exclusion under article 1 F b. Examples of groups whom the UDI considers under this category are:

- Eritrean separatists fighting in the Eritrean liberation war against Ethiopia (1961-1991)
- Taliban and other non-state actors targeting the ISAF forces in Afghanistan
- Members of the JEM having taken part in the 2008 attack on the city of Omdurman (Sudan)

The reasoning provided in a 2012 decision regarding a citizen of Eritrea is illustrative of the UDI practice:

“The applicant has explained that he over a significant time span fought with arms against Ethiopian government forces and that he participated in concrete attacks in 1984, 1988 and 1990. UDI considers that Ethiopia was recognized as a state in the relevant time span, and that the Derg regime was its legitimate representative. Furthermore UDI considers that the conflict was one of internal nature within Ethiopia at the time when the applicant participated, between government forces and several rebel groups including ELF, EPLF and TPLF. Internal armed conflicts, including direct attacks on the military forces of a state, are considered crimes in most jurisdictions. The acts of war which the applicant has participated in must be considered as particularly serious. Reference is made to the fact that the applicant tried to kill or injure Ethiopian government forces by several times conducting attacks with the use of weapons. UDI considers the acts committed by the applicant are serious crimes. No information in the case indicates that the applicant was a lawful combatant as stipulated by the Geneva Conventions or international customary law, and he is therefore not immune from criminal prosecution for having attacked enemy combatants. (...). Reference is furthermore made to article 4 of Additional Protocol II which could not provide the applicant with immunity from prosecution, as the rebellion against the Derg regime cannot be considered as affected by this provision.” In considering the stated objective of the applicant for having participated in the conflict, i.e. that the attacks were exclusively aimed at government soldiers and that the motive was to secure a free Eritrea, UDI considered that “murder or attempted murder may never be considered legitimate acts, regardless of the political motive” (my translation).²⁰⁶

The decision is interesting not only as an example of the general approach, but also because the Derg regime is listed by Canada as an oppressive regime who’s leading members should be excluded from refugee status (see chapter 4.1). Furthermore, the political objective of the fighters was eventually gained when Eritrea was recognized by the international community as a state in 1991.

The question of delimitation between article 1 F a and 1 F b in these cases has several practical implications. One is that considering an act under article 1 F b instead of 1 F a introduces the Norwegian domestic criminal law statutes of limitations. In most cases the statute of limitation would be 25 years, but a shorter limit of 10 years could also in fact be applicable.

²⁰⁶ 13

Another consequence is that article 1 F b designates the application of a lower age of criminal responsibility (15 years as according to Norwegian penal law), compared to that stipulated by the Statutes of the ICC for war crimes (18 years). Although the ICC age limit does not reflect international custom, UDI practice is clear on its application in cases considered under article 1 F a. Thus minors between the age of 15 and 18 who have not committed war crimes but what would otherwise have to be considered as lawful acts of war may be subject to exclusion if they acted on the side of a non-state actor, but not if they acted on the side of a state party. This is problematic.

While the current UDI practice is based on a legally correct application of IHL / LOAC, several arguments may be raised against the approach. First, article 1 F b was clearly designed to apply to ordinary, serious crimes not committed with a nexus to an armed conflict.²⁰⁷ Nothing in the drafting history of article 1 F, UNHCR Guidelines or Background notes or in the writings of recognized international law scholars indicate that the convention is to be interpreted otherwise. Provisions prior to article 1 F b made explicit reference to "ordinary criminals",²⁰⁸ which by its wording cannot be confused with fighters taking part in armed conflict without committing war crimes. The lack of relevant examples indicates that the UDI practice may not have been the intended interpretation of the convention. Second, the UDI practice does not further the cause of ensuring respect the law of armed conflict among non-state actors, as they in any case risk prosecution or exclusion from refugee status for otherwise lawful acts of armed conflict. Although the disciplining effect of practice within refugee law must not be over estimated in this context, encouraging respect of the laws of war is considered one of the major challenges within LOAC today.

From a practical point of view, implementing a practice which does not exclude non-state actors having taken part in violent action against repressive regimes, or who from a moral point of view would be considered as "good rebels", is challenging. Where should the line be drawn, and which factual elements should be relevant in the assessment?

One approach could be whether additional protocol II to the Geneva Conventions article 1 no. 1 would qualify the group. The provision refers to "organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol". This approach would to a certain extent create harmony between the IHL regime and application of the exclusion clauses. However, one could also consider whether simply fulfilling the requirement of "organization" and responsible command which enables implementation of IHL should be sufficient. According to the ICRC, the existence of a responsible command "implies some degree of organization of the insurgent armed group or dissident armed forces, but this does not necessarily mean that there is a hierarchical system of military organization similar to that of regular armed forces. It means an organization capable, on the one hand, of planning and carrying out sustained and concerted military operations, and on the other, of imposing discipline in the name of a de facto authority."²⁰⁹ This approach would provide an exception from exclusion for sufficiently organized groups who are not able to carry out sustained and concerted military operations, but who are capable of implementing IHL within their ranks.

²⁰⁷ See e.g. overview provided by Goodwin-Gill and McAdam p. 172

²⁰⁸ IRO Constitution, as referred to in Goodwin-Gill and McAdam p. 172

²⁰⁹ ICRC Commentary on the 1977 Additional Protocols to the Geneva Conventions of 1949, p. 1352

Another approach could relate to the objective of the group, e.g. requiring that the applicant acted as member of an armed group acting on the basis of a serious political objective such as liberation from repressive regimes and/or implementation of democracy. Relevant examples could be sovereignty for an ethnic or religious minority who is subject to serious human rights violations (e.g. the cases of South Sudan or Eritrea), or acting with the objective of serious political change within repressive regimes (e.g. the case of Libya). However, in practice, this approach may involve challenging assessments due to the often limited access to credible information from active conflict zones, as well as varying and sometimes hidden political objectives on the part of insurgents. Still, at one point the facts may become sufficiently clear to facilitate such an approach. Such an approach could potentially also assist at avoiding situations where individuals having acted on behalf of publicly recognized armed opposition groups are excluded (e.g. the example of Libya or the internationally recognized segment of the opposition in Syria).

A main approach should be that individuals who would clearly not be subject to criminal prosecution for the act in question should not be excluded. It should however also be stressed that not excluding non-state actors having taken part in recognized acts aimed at liberation from repression would be an exception from the main rule of exclusion. Exception from the main rule of exclusion requires substantial and good reasons.

A detailed account of an alternative approach to exclusion of individuals having acted within the parameters of IHL but without competency to apply force requires thorough examination and consideration. One of the recommendations of this report is to aim at establishing guidelines for such an assessment within both UDI and UNE, in dialogue with other national stakeholders such as the police, ministry of foreign affairs and other expertise within refugee law, IHL and ICL.

2.4.3 Genocide

It is known through media coverage of criminal and extradition cases that individuals suspected of having participated in genocide have been and are present in Norway. The question of exclusion from refugee status has however never arisen in such cases. It is likely that this is due to the fact that such individuals have either not applied for refugee status, or because they have not been deemed as fulfilling the requirements of article 1 A of the convention.

2.4.4 Serious non-political crimes

Exclusion on the basis of article 1 F b) was decided in 37 of 59 cases included in the survey. This provision is clearly the dominant basis for exclusion according to UDI practice. Interviews with case workers indicate that article 1 F b was sometimes considered as the formal basis for exclusion also in cases which could have been considered against article 1 F a as war crimes or crimes against humanity, because the legal test of article 1 F b was considered less complex and more straight forward to apply. Some case workers formulated this as a principle of “jumping across where the fence is lowest”, *i.e.* applying the lowest threshold necessary in cases which could also be considered against article 1 F a. On the other hand, interviews also showed that the F 1 unit has a clear policy of requiring that the individual held competency to use force within the context of the armed conflict before a case is considered under the higher threshold of article 1 F a as a potential war crime. The two views are not immediately compatible, as the first gives recourse to a pragmatic consideration whereas the latter is based on a strict and principal legal approach.

A majority of 25 article 1 F b decisions were domestic crimes including terror committed outside the context of an armed conflict. However, 12 cases were based on acts committed in the context of a non-international armed conflict and with a clear nexus to the conflict.

The 12 cases with a clear or potential nexus to NIAC included the following scenarios

- Chechen guerilla participating in attacks against Russian forces (11)
- Eritrean soldier having participated in attacks against Ethiopian government forces during the Derg regime, 1984-1990, situation explicitly considered by the UDI as a NIAC (13)
- Planning and participation in the attack on Omdurman, 2008, Sudan (16, 17 and 66)
- Torture of combatants and civilians, participation in attacks against Janjaweed and government forces, Sudan (18)
- Participation in armed conflict as member of a clan militia (Somalia) (19)
- Participation in attacks against Israeli tanks, rocket firing into Israel, Palestine (24)
- Decoding of communication for a Palestinian organization (44)
- Hiding weapons, acquiring food, transmitting money for a guerilla group in Ingushetia (47)
- Participation in guerilla attacks in Ingushetia (74)
- Coordinator and radio operator during PKK attacks in northern Turkey in the 1990s (63)

The remaining 25 decisions which were not based on acts committed in the context of a NIAC included more traditional civilian crimes:

- Employee in an Iraqi prison, who held the role as a guard during torture of prisoners (7)
- Rape (12)
- Torture of fellow soldiers as a means of internal discipline in Eritrean army (14, 15, 56, 57, 76)
- Premeditated murder (20, 49, 64, 69)
- Killing and otherwise targeting opponents of the state during peacetime, Uzbekistan Ethiopia and Eritrea (22 and 34, 54)
- Street robbery and threats by use of knife (33)
- Murder, deprivation of liberty and torture as part of private security staff, Iraq (37)
- Intelligence work that lead to arrests of members of opposing parties, Palestine (46, 58)
- Registering and videotaping demonstrators that lead to arrests, disappearances, torture, Ethiopia (53)
- Deprivation of liberty and violence as means of private revenge, Palestine (60)
- Conviction for violence (62)
- Torture of prisoners by a police officer, Eritrea, (71)
- Murder / terror bombing in 2006, as a member of the LTTE (no nexus to armed conflict at the time) (27 and 28)
- Transportation of ammunition and medical equipment as a member of the LTTE (no nexus to armed conflict at the time) (30)

4.4.4.1 Application of the threshold «serious»

In all decisions, reference was made to the convention text that indicates a threshold test requiring that the crime must have been of a “serious” nature. In most decisions, explicit reference was also made to the UNHCR Background Note section 38, which states that the provision does not include minor crimes, and that the gravity of the crime should be judged against international standards and not against the standards in the host state or the state of origin.

In most decisions where the applicant committed an act of complicity, the qualifier «serious» was considered against the act of a main perpetrator which was not the applicant himself. However, in a few cases the threshold is considered against the act of complicity committed by the asylum applicant. Based on an individual and concrete assessment of each exclusion case, the correct approach is clearly to consider the individual act of the applicant, not the act of others with whom he may have acted in consort or aided or abetted. This does not necessarily indicate that individuals who have been excluded should have been granted refugee status, as an act of complicity in most cases constitutes a “serious” crime in the sense of article 1 F *sui generis*. However, this should be clarified in future practice.

4.4.4.2 «non-political» / the predominance test

No examples were provided in interviews indicating that exclusion under article 1 F b had not been decided based on consideration of the act as “non-political”.

One example is the assessment of armed attacks committed by Chechen guerillas against Russian forces: "UDI has taken note of the political objectives of the group. However, there is no proportionality between the acts committed by the applicant and the political motive. The act has the character of a non-political crime».²¹⁰

In most decisions where article 1 F b exclusion is considered on the basis of acts of complicity, the predominance test is considered against the act of the main perpetrators. As for the assessment of the “seriousness”-requirement, this consideration should be made with relation to the act for which the asylum applicant may be held accountable, i.e. only his own degree of complicity.

4.4.5 Crimes contrary to the purposes and principles of the UN

The exclusion category “crimes contrary to the purposes and principles of the UN” has neither been applied by the UDI nor the UNE. According to interviews, acts such as acts of terrorism are rather considered under article 1 F b) as serious non-political crimes.

4.4.6 Individual criminal responsibility

2.4.6.1 Direct commission

In 14 of 59 cases, individual responsibility was based on the applicant having directly committed the crime.²¹¹ Most examples include attempted murder or murder, both in and outside the context of armed conflict.

²¹⁰ 11

²¹¹ 11, 12, 19, 20, 28, 33, 34, 45, 49, 60, 62, 64, 69, 74

2.4.6.2 Complicity / aiding and abetting

38 of 59 cases were explicitly considered as based on acts of complicity or aiding and abetting.²¹² Among these, reference to legal sources were provided in 32 cases, including a clear majority of providing reference to the ICC statutes article 25 and the UNHCR Background note 2003 paragraph 18. Legal reference lacked in 8 cases, where only the term “act of complicity” (“medvirkning / medvirket”) was used as an indicator. Some decisions provided reference to article 25 only or the Background note paragraph 18 only.

In 15 of the cases where complicity was established, the act in question was described as constituting a “substantial” (“vesentlig”) form of assistance. All formulations including “substantial contribution”, “contribution in a not unsubstantial manner” and “the act had a substantial impact on...” are included in this number.²¹³ No other specific terms were used to describe the degree of impact or involvement in the primary act.

Based on these findings, practice may be indicated as based on ICC article 25 and the UNHCR Background note paragraph 18, and as requiring “substantial contribution” to the main crime.

2.4.6.3 Presumption of responsibility

When analyzing the UDI practice, the question of making use of a presumption of individual responsibility may be categorized as a question of both level of proof and mode of liability. Presumption of responsibility is clearly not a mode of criminal responsibility, but rather a tool developed in some jurisdictions in order to establish sufficient evidence for complicity, joint criminal enterprise or indirect participation in crimes in cases where the individual has not provided concrete information about crimes. Still, for the sake of clarity, presumption of responsibility will be presented as a category of individual liability in this overview.

Among the 59 cases, six were based on a presumption of individual responsibility.²¹⁴ In these cases, no concrete information had been present indicating concrete acts of complicity or aiding and abetting. Exclusion was based on the voluntary and high ranking position of the individual within a repressive regime or a particularly violent organization. In these cases, the burden of proof is reversed, i.e. a rebuttable presumption is made.

Three decisions made reference to the ICC Statutes article 25 as well as the UNHCR Background note paragraph 60 and 61.²¹⁵ Three decisions made reference to the ICC Statutes article 25 as well as the UNHCR “Eligibility guidelines for assessing the internajonal protection needs of iraqi asylum-seekers” from the relevant time, which indicates exclusion on the basis of presumption of responsibility for certain high ranking officers within the former Baath regime of Iraq.²¹⁶ Among these three, two also referred to the UNHCR Background note paragraph 57-58.²¹⁷

²¹²

2,3,5,7,8,9,14,15,16,17,18,22,27,29,30,35,37,38,39,40,42,43,44,46,47,53,54,57,58,60,61,65,66,68,71,73,74,76

²¹³ 2,3,16,17,27,35,44,47,53,54,61,65,66,68,71

²¹⁴ 21,36,41,70,72

²¹⁵ 21,63,72

²¹⁶ 36, 41, 70

²¹⁷ 36, 70

An exclusion decision regarding an Eritrean applicant shows the reasoning and threshold for applying a presumption of individual responsibility:

“The UNHCR Background note paragraph 58 establishes a basis for presumption of individual responsibility for individuals who held leading positions within a government which is obviously engaged in activities who fall within article 1 F. This may be the case, for instance, where the state in question has been condemned by the international society for grave or systematic human rights violations. Where the individual has held a leading position in the government of such a state despite such critique, exclusion may be justified. This involves a reversal of the burden of proof. It is presumed that the person held knowledge of and was personally involved in such atrocities unless the person can provide proof against such knowledge and personal involvement in atrocities”.²¹⁸ In the case in question, the UDI presumed responsibility for an officer in the Eritrean army who had also held a position as administrative leader in a particular area in the country during a specified time span.²¹⁹

The UNHCR eligibility guidelines on Iraq from April 2009 was considered a source in some decisions, and contained the following assessment: " In the context of Iraq, a presumption of individual responsibility for excludable crimes may arise as a result of the persons continued an voluntary functioning in very senior positions of the former government, the Baath party or the security or military apparatus since these institutions were clearly engaged in activities that fall within the scope of article 1 F in this context it is also important to note that the former Iraqi government has faced international condemnation including from the special rapporteur of the commission on human rights on the situation of human rights in Iraq, the commission on human rights and the general assembly, for gross and systematic human rights abuses, Where the individual has remained in very senior positions of the aforementioned institutions, exclusion may be justified, unless he or she can rebut the presumption of knowledge of and personal involvement in such abuses".

On this basis, exclusion was established for an applicant who held high rank in the Baath party in Iraq, having worked for several years despite holding knowledge of the massive human rights violations taking place.²²⁰ In another decision, exclusion was established due to the long military career of the applicant, including several years in a specialized security branch and receiving distinctions only rewarded to persons who had done a particularly good deed for the Iraqi nation. The applicant held the rank of a senior officer.²²¹ A third Iraq decision excluded a former member of the party and police officer who was a member of a cell in charge of arresting military deserters and other people who violated the law in a specific section of Bagdad. The applicant had been well educated and had been promoted several times within the police.²²² The presumption decisions regarding applicants from Iraq are detailed and provide specific country of origin information references.

One case provided over three pages worth of country of information relevant to the assessment of individual responsibility for a high ranking member of the Afghan group / party “Hezb-e Islami” during the civil war from 1992-1996. The applicant had been a member of the organization for 35 years, and held a position of trust within the organization. The UDI presumed responsibility based on his long and voluntary membership

²¹⁸ My translation

²¹⁹ 70

²²⁰ 36

²²¹ 41

²²² 72

in the organization. It was, among other factors, emphasized that the organization did not apply a distinction between a political branch and a military branch.²²³

2.4.7 Mens rea

The ICC Statutes article 30 requiring “intent and knowledge” is mentioned as the legal source in all decisions in the study, including both ICL-crimes and crimes falling under domestic law.

Based on a review of both decisions and their corresponding interviews, “intent and knowledge” as defined in article 30 was present in all decisions. However, not all decisions provided explicit statement as to the fulfillment of both requirements, e.g. by only stating that the applicant acted with knowledge (but not intent).²²⁴

ICC article 30 (2) letter b) defines “intent” in relation to a consequence as “that person means to cause that consequence or is aware that it will occur in the ordinary course of events”. With relation to consequences, the UDI applies the Norwegian term “påregnelig”, which is in line with the minimum requirement established in the ICC provision.

Regarding the *mens rea* requirement related to crimes against humanity and the chapeau of “widespread and systematic”, several decisions contain a standard sentence stating that the «intent must include the fact that the act is a part of a widespread or systematic attack on the civilian population». ²²⁵ However, this formulation is seldom followed by a concrete assessment as to whether the requirement is met in the case.

2.4.8 Balancing test

No decisions indicate that the UDI or UNE applies a balancing test where the risk and nature of persecution should be considered against the seriousness of the act that leads to exclusion.

2.4.9 Defences

2.4.9.1 Duress

Duress was a fairly common argument presented in the comments to pre-notifications provided by asylum lawyers. ICC article 31 was mentioned in 42 decisions as basis for the consideration, whereas a reference to the UNHCR Guidelines 2003 section 22 was added in 9 of the cases. An additional reference to the UNHCR Background note section 69 and 70 was made in 10 of these cases. Another 8 cases simply stated that the legal argument of duress could not be accepted, without providing the legal basis.

In several cases, UDI made reference to a material norm requiring “clear, imminent and unavoidable threat against the applicant’s life”.²²⁶ In one case, the applicant had been

²²³ 21

²²⁴ 77

²²⁵ "Forsettet må også omfatte det forhold at handlingen er en del av et utbredt eller systematisk angrep på sivilbefolkningen.»

²²⁶ E.g. 53, 72

recruited to a violent militia at the age of 14, and had participated in armed attacks and acts of violence at the age of 16 and 17. However, the applicant had stated in the interview that he had left and re-joined the group several times, also after having turned 18, as participation in the group was the only way to make a living in the area. UDI considered that the defence of duress required “extreme” pressure, and that this was not the case for the applicant. The case is relevant from a principal point of view as the UDI stated that young age at the time of the excludable act may have the effect of lowering the threshold for accepting the defence of duress.²²⁷

Duress was argued in a number of decisions relating to applicants from Eritrea, where complicity to torture was established for former conscripts to the Eritrean army.²²⁸ Duress as an argument is of particular interest in these decisions, due to the UDI practice granting asylum to most deserters from the Eritrean army.

In all but one decision, duress was not accepted. In one decision, the applicant had been ordered to enforce punishment such as “otto”, “helicopter” and “Jesus Christ” against fellow soldiers in a training camp. Duress was not accepted, although the following was stated as basis for considering ECHR article 3 applicable: “According to sources available to the directorate, deserters from the Eritrean military are at a high risk of being subjected to torture or inhuman treatment if returned to the home country”.²²⁹ The applicant had been subject to such punishment himself at one point, an element which was considered to establish knowledge on the part of the applicant as to the pain inflicted by the method. The applicant had argued that if he had refused to enforce the punishment, he would have been punished himself, and the consequence would have been even more severe both for the victim and for himself. The UDI referred to the UNHCR Guidelines section 22, the ICC Statutes article 31 first paragraph letter d, the UNHCR Background note 69 and 70, and stated that the generally strict conditions in the Eritrean army were well known, however the applicant had committed repeated acts of torture over a long period. Furthermore, he did not risk a more strict punishment himself than the punishment he enforced against others himself. It was also emphasized that the applicant did not consider escaping before he had been suspected of helping others with escape and feared imprisonment.

In another Eritrea case where the applicant had to enforce what he himself described as “inhuman punishments” in a military police prison, UDI referred to the same legal sources and stated that “duress is only applicable where there has been a clear, imminent and unavoidable threat against the applicant’s life”.²³⁰

In one recent case, the defense was accepted.²³¹ This may indicate a shift in practice, as the facts do not differ to any large degree from former Eritrea cases. The interview showed that the applicant, as a conscripted MP, had guarded inmates in a prison and had enforced punishments such as “helicopter”, “otto” and running in extreme heat. He was normally

²²⁷ 19

²²⁸ 14,56,57,71,76

²²⁹ 56

²³⁰ 57

²³¹ 76

supervised by his superiors while enforcing the punishment, and risked reactions had he not followed orders. The applicant had escaped from the army when he at one point was suspected of assisting others with escape. The case constitutes the only instance where the UDI accepted the defense of duress and granted refugee status.

2.4.9.2 Superior orders

In 10 cases, the applicant argued that he had acted under orders from a superior and thus should not be excluded.²³² This was not accepted in any of the cases. The legal basis of the assessment was consistent in the cases where this was an issue: reference was always made to the ICC statutes article 33. In some cases, the reference was specified to article 33 first section letter d, and in some cases reference was also made to the UNHCR Guidelines 2003 section 22.

2.4.10 Age of criminal responsibility

According to three decisions rendered by the UDI, the minimum age of criminal responsibility in cases considered under article 1 F a) is 18 years as stipulated by the ICC statutes article 26, while the minimum age in cases considered under article 1 F b) is 15 years as stipulated by the Norwegian Penal Code § 46. This follows clearly from two cases where the applicant was excluded for having aided and abetted war crimes and serious non-political crimes during the non-international armed conflict in Afghanistan in 1992-1996, during a period which covered both age before and after turning 18.²³³ The UDI considered that these applicants could not be held responsible for war crimes committed before the age of 18, chf. ICC article 26 and UN Convention on the right of the child article 40 (2) a),²³⁴ but that they could be held responsible for serious non-political crimes committed between the age of 15 and 18 chf. Penal Code § 46. The cases also clearly illustrate how article 1 F a) and b) should not be applied simultaneously.

Decisions regarding article 1 F b) contain an inconsistency in so far as that the UDI anchors all matters of general criminal law such as individual criminal responsibility, *mens rea* and duress in the ICC statute, while at the same time referring to domestic criminal law in order to apply a lower age of criminal responsibility.²³⁵ Clarification should be sought on this matter.

2.5 Burden and level of proof

2.5.1 Burden of proof

As a main rule, the burden of proof rests with the UDI. This is not specifically stated in decisions. Only in cases where exclusion is decided on the basis of a presumption of responsibility is the burden of proof reversed.

²³² 5,7,15,22,34,46,56,57,65,72

²³³ 2, 3

²³⁴ The application of UN CRC article 40 (2) a) was clearly irrelevant in this case, but is not highlighted in this report as it is not representative of a practice at the UDI.

²³⁵ 20

2.5.2 Level of proof

The following overview shows the application and reasoning regarding level of evidence in the 59 decisions included in the survey:

A clear majority of decisions included reference to the convention text “serious reasons for considering”, as well as reference to the UNHCR Guidelines 2003 section 35 requiring “clear and credible evidence” and the UNHCR Background Note section 107-111 indicating that where the applicant provided the information which lead to exclusion, this would in any case be considered as sufficient (36 of 59 decisions).²³⁶

A second group includes decisions where reference was made to the convention text “serious reasons for considering” and the UNHCR Guidelines 2003 section 35 requiring “clear and credible evidence” but not to the Background Note section 107-111 (7 of 59 decisions). However, the facts of the case were in fact established on the basis of the statement of the applicant in all of these cases.²³⁷

A third group include decisions where reference was made only to the convention text “serious reasons for considering” (5 of 59 cases).²³⁸ In four of these, the facts were established on the basis of the statement of the applicant, whereas in one case the facts were established on the basis of a judgment from another European country.²³⁹

A fourth group included decisions where no reference was made to a rule pertaining to level of proof.²⁴⁰ Apart from three decisions where the facts of the case were mainly established on the basis of a criminal conviction for the excludable acts,²⁴¹ also in these cases the facts were established on the basis of the statement provided by the applicant.

Based on the material assessment of evidence in the decisions, it is clear from the above that the factual assessment of evidence in almost all cases is made on the basis of the statement of the applicant.

Furthermore, in more than half of the decisions a consistent and identical reference is made to the convention text, Guidelines section 35 and Background note section 107-111. An additional seven decisions include reference to the Guidelines section 35. From this it can be inferred that “clear and credible evidence” must be required according to the UDI practice.

As the level of proof required for exclusion according to the refugee convention is autonomous and may not be directly transferred to a similar standard within Norwegian domestic law, the question arises as to whether internal Norwegian standards of proof are in fact applied. The main rule on evidence in Norwegian administrative law is the requirement of proof beyond a balance of probabilities (“50 %”). However, in cases where a morally condemnable or infamous act constitutes the basis of the decision, a “clear”, “strong” or “qualified” balance of probabilities is required, indicating something more than a

²³⁶ 2,3,8,9,11,13,17,18,19,22,24,29,30,34,36,38,39,40,41,44,45,46,47,53,56,57,58,65,66,68,69,70,71,73,75,76

²³⁷ 28,37,43,60,63,72, 21

²³⁸ 7, 14,33,35,61

²³⁹ 33

²⁴⁰ 5, 12, 15, 16, 20, 27, 42, 49, 54, 62, 64, 74

²⁴¹ 49, 62, 64

balance of probabilities but less than proof beyond any reasonable doubt.²⁴² Facts falling under article 1 F of the refugee convention may arguably be considered to fall under this category, as exclusion from refugee status for all practical purposes marks the asylum applicant as a criminal. Both moral consequences and concrete consequences relating to practical rights incur.

An analysis of the cases shows that reference was made to a domestic law standard of proof in only 6 of 59 cases.²⁴³ In four of the six decisions, it was stated explicitly that exclusion requires proof beyond a clear or qualified balance of probability,²⁴⁴ whereas in two decisions it was stated that exclusion requires evidence on a mere balance of probability.²⁴⁵

In the 6 decisions where individual responsibility was established on the basis of a presumption, the level of proof was described as requiring both a mere balance of probability²⁴⁶ and a clear balance of probability²⁴⁷. I.e. there is no link between the applied standard of proof and the applied mode of individual responsibility.

UDI practice should be clarified on this matter.

2.6 The applicant has served a sentence for the crime

In two exclusion decisions, the applicant had been convicted and served his sentence for the act which constituted the basis for exclusion.²⁴⁸ In both cases, UDI stated that the crimes in question were of such a serious nature that although the applicant had served his sentence, this could not exclude the use of article 1 F. The first case concerned murder while the other case concerned violence against a person by use of knife. It follows from these two cases that the fact that an applicant has served a sentence for the crime in question may be relevant, but that exclusion will be decided in most serious cases. A relevant question is whether all cases who fulfill the threshold "serious crimes" are of such a nature that having served time is not emphasized by the UDI. Based on the few case examples, it is too early to answer this question.

2.7 Temporary residence permits

Temporary residence permits were granted on the basis of Section 74 in all cases where exclusion was decided. The permits had a validity of six months, after which renewal had to be sought. The permits did provide permit to work in Norway, but could not serve as the basis for family reunification, permanent residency, new entry into Norway (i.e. the holder may not leave Norway and expect to return), or visit to other Schengen countries.

²⁴² Schei *et al*, *Tvisteloven Kommentarutgave* bind II, p 989.

²⁴³ 21, 22, 43, 60, 61, 63

²⁴⁴ 43, 60, 61, 63

²⁴⁵ 21,22

²⁴⁶ 21

²⁴⁷ 63

²⁴⁸ 49,62

3 The Immigration Appeals Board (UNE)

The Immigration Appeals Board (UNE) considers appeals over negative decisions made by the UDI in all immigration cases including asylum, as well as a small number of positive cases rendered by the UDI which have been referred to the UNE by the Ministry of Justice (MJ).²⁴⁹ UNE is formally organized under the MJ. However, as a main rule it may not be instructed in issues relating to interpretation of law or the outcome in concrete cases.²⁵⁰ Such instruction may only take place in cases relating to state security and foreign affairs.²⁵¹ UNE is considered to be a “quasi-judicial” nature due to its independent position *vis à vis* the MJ and due to the independence of the Board and Board Leaders *vis à vis* the Director of UNE.²⁵²

UNE employs approximately 350 persons, including 30 Board Leaders who fulfill qualifications similar to that of judges. In addition, the MJ appoints approximately 300 lay members of the board.²⁵³

The hierarchical levels at which a case may be considered within UNE are

- i) the Secretariat
- ii) a Board Leader alone
- iii) a Board consisting of a Board Leader and two Board Members
- iv) a Grand Board consisting of three Board Leaders and four Board Members.²⁵⁴

Cases which do not give rise to questions of substantial doubt may be decided by a Board Leader alone.²⁵⁵ Competency to render decisions in these cases may also be delegated to the secretariat.²⁵⁶ By negation, cases which do give rise to questions of substantial doubt shall be decided by the Board. The term “substantial doubt” indicates “doubt regarding questions which may have a decisive impact on the outcome of the case”.²⁵⁷ Examples are provide in the internal guidelines, *e.g.* issues which have not been tried before, cases where it is unclear whether the applicant fulfills the requirement for being recognized as a refugee or cases which provide a good basis for clarifying particular areas of the administrative practice.²⁵⁸

In all Board cases one Board Member should be chosen from a list suggested by the MJ, the Ministry of Foreign Affairs and The Norwegian Association of Lawyers (Juristforbundet), and

²⁴⁹ § 76 first and fourth paragraph

²⁵⁰ § 76 second section

²⁵¹ § 76 third section

²⁵² § 77 first section, Kommentarutg. s. 461 and 471, Immigration regulations § 16-2 second paragraph.

²⁵³ www.une.no

²⁵⁴ Intern retningslinje om valg av avgjørelsesform

²⁵⁵ § 78 third section first sentence

²⁵⁶ § 78 third section second sentence and IR-10-11-05

²⁵⁷ Immigration regulations § 16-9

²⁵⁸ Intern retningslinje section 2.2.

one Board Member from a list suggested by Humanitarian organizations.²⁵⁹ In Grand Board cases, three Board Leaders and four Board Members preside.²⁶⁰

According to the Immigration regulations § 16-4 second paragraph, cases of a principal nature, cases with potential large impact on society or financial issues and cases within areas where there is a tendency towards fragmentation of practices can be decided by the Grand Board. It also follows from this provision that where UNE practice is in conflict with country specific protection recommendations from the UNHCR, or when new practice in conflict with such recommendations is considered for implementation, a minimum of one representative case should be decided by the Grand Board unless the practice is in line with existing instructions from the MJ to the UDI.

Normally, all cases are prepared by the secretariat.²⁶¹ The Secretariat employs both jurists and social scientists. As a main rule, the applicant should be given a right to provide an oral statement to the Board or to the Grand Board.²⁶² The Board Leaders at UNE have a varied background, some having worked as jurists in various public offices, others having their background from private law firms. Some are recruited internally within UNE.²⁶³

3.1 Methodology

UNE practice is described on the basis of access to 15 UNE decisions provided by the UDI. The decisions were rendered in the period august 2007 – august 2012. Based on interviews with case workers, the total number of UNE exclusion decisions is somewhat higher, and the study may not purport to provide an exhaustive and definite overview of UNE practice.

In order to supplement the case material, written sources such as the UNE “practice note” and the internal template for decisions describing administrative routines and practice within the field of article 1 F have been consulted.

Qualitative interviews have been conducted with three UNE officers, chosen on the basis of their direct knowledge and experience with article 1 F cases on both a case by case and overall level.

3.2 Internal routines

3.2.1 Screening

Potential article 1 F cases at UNE may largely be divided into two categories:

- i) Appeals over cases where the UDI has applied article 1 F
- ii) Appeals over cases where the UDI did not consider the immigration act § 28 (inclusion) to be applicable, and thus did not consider exclusion

²⁵⁹ § 78 first paragraph

²⁶⁰ §78 second paragraph

²⁶¹ Intern retningslinje om valg av avgjørelsesform

²⁶² § 78 fifth paragraph, chf. Immigration regulations § 16-12 second paragraph and IR-10-12-02 (internal regulations)

²⁶³ The examples are based on the published overview of nine board members who were appointed in 2008: <http://www.une.no/Aktuelt/Redegjorelser/9-nye-nemndledere/>

- iii) Appeals over cases where article 1 F issues present were not identified (few would fall in this category without also falling in category ii)).

The first category comprises cases where the exclusion issue is easily identified by UNE, as it is visible in the UDI decision. This may not be the case in the second category comprising both cases where potential excludable acts may have been mentioned in the interview, and cases containing scarce information connecting an applicant to such acts. Based on the case review, a large percentage of cases fall within this category where the UDI decision does not indicate that exclusion may be an issue. This is also supported by the subjective assessment of officers at UNE, as reported in interviews.

All categories of cases call for particular attention from UNE as information available in the appeal may not have been available at the UDI level.

According to qualitative interviews at UNE, screening for article 1 F cases takes place within the general structure for case processing. Appeals over UDI decisions are first directed to the relevant geographical units at UNE, where the Head of Section designates cases to officers within the Secretariat for initial analysis and preparation for the Board Leader or Board Meeting. Most exclusion cases are identified at this level. Officers who are trained as generalists within refugee law conduct the identification. All officers at UNE must follow an introductory course within refugee law when they start, which includes a short section on article 1 F (approximately 30 minutes). In addition to this, the geographical units and other internal stakeholders may arrange seminars and meetings (with external experts) on an *ad hoc* basis. The caseworkers also discuss exclusion cases within their units. Thus, the officers at the level of the Secretariat have basic knowledge about article 1 F.

Exclusion cases may also be identified during the Board Meeting, in cases where the applicant gives statement providing information which was not formally present in the case. When suspicion arises that article 1 F may be a relevant question, the secretariat will mention article 1 F in an internal note which is prepared in each case, in order to highlight this issue for the Board Leader or the Board. The threshold for mentioning article 1 F was described as low, although in most cases this did not involve an in depth analysis of the exclusion question.

No formalized / specialized routines or systems for identifying exclusion cases exist at UNE, although IR-10-11-18 states that exclusion shall be considered when concrete elements indicate that the appellant has committed or aided or abetted a serious crime.²⁶⁴

3.2.2 Ensuring a unified practice

In order to strengthen the focus on Human Rights within UNE, four officers work as designated Human Rights Officers in charge of providing advice and guidance to the geographical units and individual officers within this area. The responsibility to provide advice within the area of exclusion also falls upon these officers. However, in practice only one of the four Human Rights Officers provides advice related to exclusion, based on an informal division of areas of responsibilities.

²⁶⁴ IR-10-11-18 section 2. The IR does not mention routines for screening.

Across the nine geographical units at UNE, three Practice Officers hold positions with a particular focus on ensuring a unified practice within their designated geographical areas. This includes ensuring a unified practice within the area of exclusion related to each country of origin.

The geographical units focus on exclusion on a case by case basis, but have also arranged *ad hoc* seminars and meetings on legal issues related to exclusion as well as COI-related questions.

Another element providing a more unified approach to article 1 F is the template for decisions, which is used by all the geographical units. According to the template, exclusion must be considered in all cases where the applicant is considered a refugee in accordance with Section 28 first paragraph. The template also indicates that a written assessment of article 1 F should only be included in the decision when exclusion is a central issue in the case.

Copies of all decisions where article 1 F has been applied or considered should be provided to the Human Rights and Practice officers after they have been rendered, in order to enable an internal overview over these cases.

As a tool for ensuring a unified practice within other areas of immigration and asylum law, UNE has established written common guidelines (“praksisnotat”) that consider common legal issues which arise in many cases. Such guidelines exist within areas such as the application of internal flight alternative, application the principle “best interest of the child” and the convention ground “membership in a particular social group”, but not within the area of exclusion.²⁶⁵

During interviews at UNE it became clear that ensuring a unified practice across the nine geographical units is identified as a potential challenge which may call for concrete measures such as the establishment of more detailed common guidelines within exclusion, internal seminars across the geographical units etc. In order to ensure that a common practice across all geographical units is in fact implemented by the independent Boards in the concrete cases, Board Leaders should be involved in this process. UNE should also consider referral of article 1 F cases to the Grand Board in order to clarify legal issues.

Exclusion cases contain complex problem statements both in a legal context and regarding country of origin information. One officer described that exclusion cases would require twice the amount of resources as a regular asylum case. Allocating resources to UNE’s handling of exclusion cases would therefore both have the consequence of strengthening competencies and ensuring an effective assessment of cases which would not be to the detriment of the case processing time within other areas of asylum cases.

3.2.3 The principle of two administrative levels

Asylum applications in Norway are considered at two administrative levels, UDI and UNE. According to the Administrative Act section 34, the Appeal Body has the competency to consider all sides of a case, including new information provided after the first instance

²⁶⁵ <http://www.une.no/Praksis2/Notater/>

decision. The question arises as to how cases should be treated where the UDI did not find Section 28 (inclusion) applicable and thus did not consider article 31 (exclusion).

According to the UNE internal regulations on exclusion, the question of exclusion is considered to be the “same case”, in the administrative law sense of the word, as the application for asylum. Thus, as a main rule it is not necessary to return the case to the UDI for renewed consideration when the exclusion issue arises during the appeal. However, according to the internal regulations, an exception can be made in cases where the factual information regarding exclusion has been provided after the case was sent to UNE and when the new information necessitates further investigations. In these cases the case is returned to UDI for further examination and assessment.²⁶⁶

3.2.4 Ensuring contradiction

The principle of contradiction is fundamental to Norwegian Administrative law.²⁶⁷ According to IR 10-11-18 section 3.2, pre notification to the appellant regarding potential application of article 1 F shall be done in cases where the relevant information is provided by other sources than the appellant himself. In other cases where exclusion for various reasons was not considered by UDI, it is stated in the IR that pre notification as a main rule should be given in cases where the applicant has not been provide with the opportunity to comment on the question of exclusion. Following pre notification, a three week deadline for providing a statement regarding the 1 F issue should be established in cases where the information does not originate from the appellant, and two weeks where the information originates from the appellant. However, the IR establishes that where information which may lead to exclusion only arises during the oral hearing in the Board Meeting, it is sufficient to provide the appellant with information regarding the potential application of the exclusion provision and give him an opportunity to comment on the matter during the oral hearing.

3.3 Overview of cases

Among the 15 decisions, 6 decisions were rendered in 2012, 2 in 2011, 6 in 2010, one in 2009 and one in 2007. Two of these decisions were reconsiderations rendered in 2012 of cases that had been considered also in 2010. For the sake of this study I consider the 2012 decisions as separate and include them in the total number.

Based on country of origin, the cases were divided as follows:

- Afghanistan 4
- Iraq 3
- Russia 5 (3 separate cases of which two were considered both in 2010 and 2012 with different outcome)
- Sudan 1
- Eritrea 1
- Zimbabwe 1

The outcome in UNE compared to that of the UDI was different in 10 out of 13 decisions:

²⁶⁶ IR-10-11-18, Internal regulations on exclusion

²⁶⁷ Administrative Act § 17

- In 7 cases the UDI did not consider the applicant as protected under Section 28 first paragraph a or b, and thus did not consider exclusion at all, whereas UNE considered 28 first paragraph to be applicable and considered exclusion.²⁶⁸
- In 3 cases the UDI excluded the applicant, whereas UNE did not.²⁶⁹
- Only in 3 cases did the UDI and UNE conclude in the same manner.²⁷⁰

In total, UNE concluded on application of article 1 F in 8 cases. Among these, 4 were based on crimes against humanity and 4 on serious non-political crimes. No cases were based on war crimes or crimes against the peace. However, UNE did consider war crimes in one case, which will be analyzed below.

3.4 Practice on the application of article 1 F

3.4.1 Crimes against humanity

The internal templates for decisions refer to ICC article 7 as the applicable definition of crimes against humanity, and clarify that such crimes may take place in the context of both armed conflict and peace time.

Among the 8 exclusion decisions, 4 were based on crimes against humanity.²⁷¹

Two of these related to former members of the Afghan secret services KhAD/WAD.²⁷² One of the appellants was a high ranking officer in the organization, who participated in arrests and attacks as well as gathered information about persons who would later be arrested. Because he gained promotions several times, he was considered to loyal towards the system. UNE considered that the appellant clearly must have known which methods KhAD applied, and described the practices of the organization. This appellant had previously applied for asylum in another Schengen country, where article 1 F was also applied. The UDI concluded that he was not a refugee (he did not fulfill the requirements of section 17 first paragraph first sentence of the Immigration act 1988) and consequently did not consider exclusion.²⁷³

The other appellant had worked as a prosecutor under KhAD for four years.²⁷⁴ According to UNE, this in and of itself provides serious reasons for considering that the applicant had committed crimes against humanity, because “KhAD systematically used torture (and murder), i.e. in order to provoke confessions and evidence”.²⁷⁵ It was further stated that “it is obvious that the appellant as others in the office of the prosecution were well familiar with the methods of KhAD and under which circumstances confessions and other evidence could be produced”.²⁷⁶ For this reason, UNE did not find it necessary to establish whether

²⁶⁸ 1, 4, 6, 10, 48, 55, 74

²⁶⁹ 15, 16, 75

²⁷⁰ 5, 37, 43

²⁷¹ 1, 5, 43, 55

²⁷² 1, 55.

²⁷³ 1

²⁷⁴ 55

²⁷⁵ «Khad brukte systematisk tortur (og drap), bla for å tvinge frem tilståelser og bevis.»

²⁷⁶ «Det er åpenbart at klageren som andre i anklagemyndigheten var velkjent med KhADs metoder og under hvilke omstendigheter tilståelser og bevis kunne vært frembrakt under».

the appellant individually had committed or aided and abetted torture, as long as it could be established that he in line with the practices of the KhAD system gave orders to interrogate or based his decisions on evidence collected under torture. It was also emphasized that the applicant had a career within KhAD which indicated that he was loyal to the system.

This is the only decision where UNE, albeit without explicitly stating it, may be considered to having applied a rule of presumption of individual responsibility for crimes. The decision provides a thorough array of country of origin information regarding KhAD, and provides concrete reasons based on the position, time span and advancement of the appellant.

In addition, UNE overturned one decision rendered by UDI, where the UDI had excluded on the basis of crimes against humanity.²⁷⁷ This case concerned an Iraqi member of the Baath party who had reported two individuals to the party due to their activities against the regime. It followed from the interview that the applicant held one of the highest ranks available for youth members of the party. He participated in weekly meetings in order to recruit students to the party, and he participated in protection of geographical areas where his group was responsible for armed training. He stated that his home was “like a local Baath office”. Regarding one of the two individuals that the applicant had reported to the party, he stated “I expected that he would be arrested, because he was doing something against the government. We are not so stupid that we let a person fool us. In my opinion I did the right thing.” He also stated that he had heard about detainees risking torture, but that the regime had its reasons for doing this. Based on the statements provided by the applicant, UDI concluded that the applicant had aided and abetted crimes against humanity in Iraq. The UDI established objective and subjective elements regarding the individual act of complicity, the underlying act of torture during interrogations and the chapeau requirement of “widespread and systematic” attack.

UNE considered these facts differently by stating: “UNE does not consider the acts of the appellant, as he has described them in the interview, amount to the definition [of crimes against humanity]. It is required that the acts were committed in a systematic manner or with a large impact. The appellant has reported two persons to the authorities while he was still a student. UNE considers that he knew that this could lead to arrests and probable torture of these individuals. Emphasis is put on the fact that the applicant did not hold a position within the police, security forces, army or any other leading position which enabled him to aid and abet the atrocities with a large impact” (my translation).

First it must be remarked that UNE erred in its application of the chapeau requirement, which should be considered against the general situation in Iraq under Saddam Hussein (“widespread and systematic”) and whether the appellant fulfilled *mens rea* with relation to this, not whether his isolated acts were committed in a “systematic manner or with a large impact”. Secondly, UNE did not consider whether the applicant, falling short of having committed crimes against humanity, should be excluded on the basis of having aided and abetted torture (article 1 F b). Not only is this erring in the application of article 1 F, it is also a fundamentally different approach than in another Baath-case where both crimes against humanity and article 1 F b) in the form of aiding and abetting torture was considered.²⁷⁸

3.4.2 War Crimes

²⁷⁷ 75

²⁷⁸ 43

In the internal template for decisions, war crimes are defined as “serious violations of the law of armed conflict, mainly atrocities against civilians and other non-combatants (sick, wounded, POWs etc.), attacks against protected objectives and use of illegal means of warfare”. It is further stated that war crimes require the existence of and nexus to an armed conflict of international or internal nature. Armed conflict is defined as “states applying weapons against each other or protracted armed conflict against the authorities of a state and organized armed groups”. Concrete reference is made to the ICC statutes article 8 (2) a-f defining war crimes.

As described above, UDI interprets the intersection between article 1 F a and 1 F b strictly in line with fundamental principles of competency to use force in the context of an armed conflict. By consequence, an individual who participates in armed conflict who does not hold a customary competency to apply force and to enjoy immunity from such acts, must be considered against article 1 F b) for having committed a civilian crime. This could in principle apply to any members of non-state actors participating in non-international armed conflicts.

UNE has considered this issue in one case relating to a Sudanese member of the Justice and Equality Movement (JEM), where UNE concluded differently than would the UDI on the basis of their approach.²⁷⁹ The case concerned a member of JEM, a Darfur ethnic minority rebel group, who had participated in the organization and commission of the May 2008 attack on the government city of Omdurman. While the UDI concluded that participation in the attack amounted to complicity to serious non-political crimes, UNE concluded that due to the fact that an internal armed conflict existed in Sudan at the time,²⁸⁰ the case should be considered against article 1 F a) as a potential war crime. There was no information in the case indicating that the applicant had committed or aided or abetted war crimes during the attack, and he was accordingly not excluded. The UNE decision did not consider whether the applicant held competency to aid and abet in the attacks, which did include killing and attempts at killing government soldiers although the death toll among the insurgents were much higher. Neither did it consider whether he could be immune from prosecution for such acts on a customary basis.

However, another UNE decision concerning alleged aiding and abetting a Chechen guerilla group, was concluded in the opposite.²⁸¹ The applicant was excluded on the basis of article 1 F b. As to the understanding of “serious non-political crime”, UNE considered that “the acts of the guerilla group, including the attack at X village in year Y, clearly falls within the definition, as the criminal character of the act must be considered to outweigh the political agenda of the guerilla”. Although UNE did not explicitly consider whether IHL would be applicable in the concrete situation, it was clear that at least the threshold of Common Article 3 was met in the concrete situation. Based on the evidence available, it could not be induced that other than legitimate targets had been attacked by the group.

The fact that the case was assessed on the basis of article 1 F b indicates an approach in line with the UDI practice, as opposed to the UNE approach in the Sudan case described above.

However, based on qualitative interviews with UNE officers, the norm contained in article 1 F a is as a main rule applied in *all* cases that are based on acts having been committed in the

²⁷⁹ 16

²⁸⁰ UNE referred to the UN Commission on Inquiry on Darfur, UN Security Council reports, the ICC arrest warrant on president Al Bashir for crimes against humanity (ICC article 8 2 e)) and the HRW report “Crackdown in Khartoum”, 16.6.2008.

²⁸¹ 10, june 2012 decision

context of an armed conflict, regardless of the formal competency of the applicant to use force.

The internal template for decisions does not indicate whether formal competency to use force within the context of an armed conflict is a requirement for consideration under article 1 F.

UNE should therefore review its approach in order to ensure internal consistency in application of these norms, across the various geographical units. Due to the serious consequences of exclusion for the individual, the problem statement is of such importance that it should be subject to assessment by the Grand Board (Stornemnd) in order to clarify the area of application *ratione personae* of article 1 F a and 1 F b.

3.4.3 Genocide

As for the UDI, genocide cases have not been subject to exclusion on the basis of article 1 F in UNE. This may be explained by reference to the “inclusion before exclusion” process.

3.4.4 Serious non-political crimes

As opposed to article 1 F a, the internal template for decisions does not elaborate on the interpretation of article 1 F b.

Five decisions on exclusion are based on article 1 F b, among which one case was primarily based on article 1 F a and only on a subsidiary basis on article 1 F b. The latter case pertained to an instance of exclusion on the basis of participation in crimes against humanity in Iraq under Saddam Hussein, where the applicant had made a good career within the Baath party and had participated in armed arrests and reporting of dissidents and opponents to the security forces.

Two of the five decisions relating to serious non-political crimes dealt with clear cut issues of premeditated murder and deprivation of liberty / aiding abetting torture respectively.²⁸² The requirements of “serious”, “non-political” crimes were clearly met in both cases.

The other two cases dealt with rendition of prisoners to the governmental security forces in Ingushetia,²⁸³ and “complicity to armed rebellion against a state / terrorism” committed by an applicant from Chechnya.²⁸⁴

The first case constituted a clear example of complicity to torture or murder by governmental forces, as it was proven that the applicant knew that this would most likely be the consequence upon referring the captives to the security forces.

The other case was based on an applicant from Chechnya having provided guerillas with food, medical equipment, rucksacks as well as having organized the journey of recruits from a village to the guerillas in the mountains. He had also served as a guard in a guerilla camp during an attack which took place elsewhere. The applicant had been arrested, convicted and had served a sentence in Russia for his affiliation with the guerilla group. The UNE decision stated that the applicant had been complicit to “armed uprising against the state

²⁸² 37 and 74

²⁸³ 6

²⁸⁴ 10

authorities / terror activities” and that by his acts he had made possible and aided and abetted illegal operations. It was emphasized that he had done this voluntarily and knowingly. Furthermore, UNE stated that due to the serious nature of the act, the fact that he had already served a sentence for this act could not be considered as relevant. The decision did not elaborate on how individual responsibility was established, nor did it provide explicit reason why article 1 F a was applied instead of article 1 F b. Explanation was not provided as to which act was considered as “terror activity”. As to the *mens rea* requirement, the decision did not consider whether the applicant had knowledge of the act of the main perpetrator(s). In a 2012 decision, this case was revised and given a different outcome. Based on the same facts as in the first assessment, UNE considered that the acts of the guerilla group clearly were to be considered as “serious non-political crimes”, and although the applicants support was not a *sine qua non* for the functioning of the group he had done this voluntarily and knowingly. However, UNE did not find that the acts of the applicant amounted to “substantial contribution” to the crimes of the group, and under all circumstances the fact that he had served a sentence for his contribution had to be emphasized. Accordingly the exclusion decision was reversed and he was afforded refugee status.

3.4.5 Acts contrary to the purposes and principles of the UN

As opposed to article 1 F a, the internal template for decisions does not elaborate on the interpretation of article 1 F c.

In UNE practice, no decisions have been rendered on the basis of article 1 F c.

3.4.6 Individual responsibility

The UNE internal template for decisions state that “article 1 F applies both to main perpetrators and those who aid and abet the crime. Both physical and mental aiding and abetting is included”.²⁸⁵

Among the 8 cases where UNE decided to exclude the applicant, 7 were based on “complicity” (“medvirkning”). The eight case considered an instance of premeditated murder, where the applicant had stated that he had been the main perpetrator.

In all cases where UNE explicitly base the legal basis for their legal consideration of individual responsibility on acts of complicity (“medvirkning”), reference was made to the UNHCR 2003 Guidelines paragraph 18 which establishes that “substantial contribution” must have been made.²⁸⁶ The cases include the following incidents:

- Afghan former officer in KhAD/WAD, having “gathered and forwarded information that was used during arrests and interrogations”, “participation in arrests and interrogation”²⁸⁷
- Russian civilian of Chechen origin who had transported food, medicine and clothes to Chechen guerillas in the mountains (not excluded, as this was *not* considered to be a “substantial contribution”, see description above Chapter 4.4.4).²⁸⁸ Thus, based

²⁸⁵ My translation

²⁸⁶ 1

²⁸⁷ 1

²⁸⁸ 10, decision of June 2012

on the current practice of UNE, providing food and medicine to a guerrilla group as well as guarding a camp during a presumed illegitimate armed attack does not amount to aiding and abetting the crime.

- Iraqi citizen having worked for a private militia, who participated in abduction of four individuals. The act of abduction is both considered a “serious non-political crime” *sui generis*, and as “substantial contribution” to torture. Legal basis for complicity was referred to as UNHCR Guidelines 2003 paragraph 18, EU directive on refugee status article 12 no. 3, ICTY Statutes article 7, ICTR statutes article 6, ICC statutes article 25 no 3 and UNHCR Background notes paragraph 51 – 56.²⁸⁹

Application of the UNHCR norm “substantial contribution” was also confirmed by UNE during the qualitative interviews with officers.

Exclusion on the basis of complicity was also decided in the following cases, where the legal basis for individual responsibility was not explicitly mentioned. However, the facts of the case clearly show that the requirement of “substantial contribution” was met.

- Zimbabwean former army officer whose soldiers committed torture while under his command, and who explicitly had given orders to burn down a civilian house.²⁹⁰
- Russian former serviceman who had participated in arresting civilians in Ingushetia and handing them over to the Russian security forces, and who “acted with a high degree of complicity” (“medvirket i høy grad”).²⁹¹
- Iraqi member of the Baath party who participated in a group which arrested individuals and handed them over to the party for interrogation.²⁹²

In one 2007 case, an Afghan member of KHAD/WAD who worked as a prosecutor was excluded. The decision is based on his work position in the organization, and UNE bases the assessment of complicity on general knowledge about the organization and its judicial system. The decision neither states that complicity requires “substantial contribution” nor that individual responsibility is presumed. However, the reasoning indicates that a notion of presumption was applied. The decision stated that the applicant would be complicit «if he gave orders that interrogations which would include torture were to be initiated or if he based his accusations on evidence and confessions provided under torture. In any case, the applicant has played an important and necessary role in the system and must be considered to having aided and abetted the crimes as well as accepted that they were committed”.²⁹³

3.4.7 Mens rea

The internal template for decisions refer to the ICC Statutes article 30 as defining the *mens rea* requirement. “Intent” is defined as including situations where the individual was aware that the result would be the consequence of the act in the normal course of events.

²⁸⁹ 37

²⁹⁰ 5

²⁹¹ 6

²⁹² 43

²⁹³ 55 «(...) avhør som ville innebære tortur eller om han baserte sine anklager til retten på bevis og tilståelser som kunne være avgitt under tortur. Klageren har i alle fall vært en viktig og nødvendig faktor i systemet og må anses for bevisst å ha medvirket til forbrytelsene, herunder akseptert at de ble begått.»

Regarding “knowledge”, the template states that this often depends on the position of the applicant. Reference is made to the ICTY Appeals Judgment from 2002 in the *Kunarac-case*, stating that the individual must have known about the attack on the civilian population and that his acts were part of this attack “or at least [that he took] the risk that his acts were part of the attack” (paragraph 102-103), including that detailed knowledge of the attack is not required and that the motive of the individual for participating is irrelevant.

Among the 8 cases where UNE concluded on application of article 1 F, one was based on a clear instance of premeditated murder where *mens rea* was easily established on the basis of the statement of the applicant.²⁹⁴ The remaining seven cases all dealt with instances of complicity to either crimes against humanity, war crimes or serious non-political crimes. Among all 8 decisions, only one decision provided a legal reference to ICC article 30 as basis for the *mens rea* consideration. In the remaining cases, no legal reference was made.²⁹⁵

Among the 7 complicity cases, 4 made use of the word “knowledge” when describing the subjective state of the applicant *vis à vis* the criminal act.²⁹⁶ None of the decisions provide explicit reference to whether knowledge was present both with regards to the act of complicity and the act(s) of the main perpetrator (double *mens rea*). Among the 7 complicity cases, two did not explicitly make use of any term providing reference to a standard of *mens rea*. In one of these cases, the facts clearly showed that the requirement of knowledge was present.²⁹⁷ Among the seven, UNE considered in one that the applicant “understood or should have understood” that persons he arrested and handed over to security authorities would be subject to torture and possible murder.²⁹⁸ Here, UNE erred in requiring that it would be sufficient to establish neglect (“should have understood”). However, this may not have affected the outcome of the case, as the facts showed that the requirement of “knowledge” (ICC art 30) could be established.

3.4.8 Defences

The internal template for decisions refers to the ICC statutes article 31-33 as defining the applicable defences under article 1 F. Defences are not applied in any UNE decision included in the survey. Each assessment on this point is in line with ICC article 31-33.

3.4.9 Burden and level of proof

The responsibility of providing sufficient evidence for exclusion clearly rests with UNE.²⁹⁹ This is not explicitly mentioned in the decisions, but follows from clear practice.³⁰⁰

In the practice note, IR-10-11-18, UNE makes reference to the UNHCR 2003 Guidelines

²⁹⁴ 74

²⁹⁵ 37

²⁹⁶ 1, 10, 37, 43

²⁹⁷ 55

²⁹⁸ 6: “Klageren har, etter hva han selv har opplyst overfor norske myndigheter, vært med på å foreta arrestasjoner i av sivilpersoner og overlate disse til andre deler av sikkerhetsapparatet i Ingusjetia til tross for at han forsto eller burde ha forstått at disse personene ville kunne bli utsatt for trakassering, mishandling, tortur og endog drap».

²⁹⁹ IR 10-11-18 section 2

³⁰⁰ One decision stands out as not in line with this practice, but this decision was later overturned and the applicant was granted refugee status (case)

section 35, which states that “clear and credible evidence is required. It is not necessary for an applicant to have been convicted of the criminal offence, nor does the criminal standard of proof need to be met”. Reference is also made to the travaux préparatoires of the Norwegian immigration act, where it is stated that the main rule in civil cases in Norway is that of a balance of probabilities but also that the level of proof required must be assessed in accordance with the evidence in each concrete case.³⁰¹ The same reference is made in the internal template for decisions.

Among the 8 exclusion decisions, two decisions lacked legal or case concrete reference to level of proof. In 3 cases, the convention text “serious reasons to believe” was the only reference. In one case, UNE stated that based on the statement of the applicant, “there was little doubt” that the applicant had committed premeditated murder. In one case, UNE considered that there was a clear and strong probability in the concrete case, and as such the requirement of “serious reasons to believe” was fulfilled. In one case where UNE did not conclude on exclusion as it did not find a nexus between the acts of the applicant and the acts of the main perpetrator, it stated that the level of proof required was “overveiende sannsynlig” (similar to clear balance of probability), by referring to the travaux préparatoires in Ot. Prp. 75 (2006-2007) p. 112 and p 417 as well as NOU 2004:20 at p. 400.

Thus the review of cases shows that UNE does not apply a consistent level of proof (at least this is not made visible in the reasoning provided in the decisions). It must be added that some of the decisions are several years old. During interviews with UNE officers, it became clear that a “clear balance of probability” is required, while this does not follow from IR.10.11.18 or the internal template for decisions. UNE should clarify the level of proof applied in exclusion cases.

Based on the case review as well as interviews with case holders and officers at UNE, it is clear that UNE often is presented with a more complex evidential situation compared to that dealt with by the UDI. A large percentage of applicants change or adapt their formal statement in the process of appealing a UDI exclusion decision.³⁰² UNE is charged with the complex assessment of applying the evidence norm “clear balance of probability” on this situation, where some cases may have been subject to misunderstandings and misinterpretations while others are instances of an applicant attempting at avoiding an otherwise lawful and mandatory application of article 1 F. The current practice of inviting appellants in exclusion cases to oral hearings must therefore be continued, as requirement of “substantial doubt” will be present in most cases.

Where UNE reaches another consideration than the UDI on the basis of information provided in the appeal or oral statement, current UNE decisions often do not provide clarification of this. As a consequence, the UDI are not in a position to assess clearly whether UNE has applied a differing legal assessment or simply had access to other evidence than the UDI. In cases where the evidential assessment in UNE leads to another conclusion than that drawn by the UDI, UNE should always provide an account of the new or changed information as part of the reasoning in the decision in order to clarify the basis of the alternative outcome *vis à vis* the UDI.

³⁰¹ Ot. Prp. 75 (2006-2007) section 5.8.5

³⁰² Among the eight UNE decisions where article 1 F was applied, five were instances where the applicant had changed or adapted his statement during the Board Meeting but where the Board based the decision on the basis of information provided in the asylum interview (1,6,16,37,75). In one decision where UNE overturned an exclusion decision provided by UDI, this was based on new information provided by the applicant during the Board Meeting (15).

3.4.10 Temporary residence permits

According to IR-10-11-18 section 4, temporary permits on the basis of the Immigration Act Section 74 should as a main rule be granted in cases where article 1 F is applied. Ordinary residence permits on the basis of section 38 (“strong humanitarian grounds” or “strong ties to Norwegian society”) should always be considered. Prolonged residency in Norway with or without a residence permit, where section 73 (ECHR article 3) hinders return to the country of origin, is a relevant factor in the assessment of whether ordinary section 38-permits should be afforded.³⁰³ Whether the decision has impact on children of the applicant resident in Norway is also relevant. However, the original reasons for excluding the applicant should be emphasized, in particular whether these reasons are still present.³⁰⁴ According to IR-10-11-18, matters which could have but did not form the basis of exclusion should be taken into consideration when it is decided whether the appellant should be granted a residence permit on the basis of section 38 (strong humanitarian reasons or strong ties to Norway). Based on interviews and the case study, no such permits have been granted thus far.

Interviews with UNE officers also indicate that where the UDI has applied article 1 F and granted a temporary status on the basis of Section 74, but UNE do not consider the applicant to fulfill the primary requirement of article 1 A, the individual retains the temporary Section 74 permit even though UNE in principle has considered that ECHR article 3 does not apply. This is due to the administrative law principle prohibiting withdrawal of positive positions granted to the individual (Administrative act Section 35 and customary law principles). Interviews at UNE have indicated that UDI in some cases renew temporary permits and continue to consider the applicant excluded under article 1 F, despite the UNE decision concluding that neither article 1 A or ECHR article 3 is applicable following which renewal of a temporary permit should be denied. During UDI interviews, this problematique was also described, but rather as a consequence of the administrative law requirement of assessment of cases at two levels. UDI interviews described situations where cases were sent “in orbit” between the two administrative levels as an applicant could consequently appeal the UDI decision granting a temporary permit, arguing that the assessment of exclusion was wrong. However, in such cases, both UDI and UNE consider the question of exclusion as finally settled, and only assess the question of whether there are grounds for renewal of a temporary Section 74 permit.

3.4.11 The relationship between exclusion and expulsion

According to interviews with case workers at the UDI, applicants who are excluded from refugee status are hardly ever expelled from Norway. This is due to the fact that they all have been preliminarily considered as refugees, *i.e.* expulsion would in most cases conflict with both the refugee convention and ECHR article 3. In such cases, exclusion may only be considered – on a very strict basis - in cases relating to state security.

However, the F 1 case workers informed that expulsion as an issue does arise in cases relating to withdrawal of refugee status, a portfolio which was recently transferred to this unit. Such decisions have not been part of this study.

³⁰³ Ot. Prp. Nr. 75 (2006-2007) s 118 and 436

³⁰⁴ IR 10-11-18 section 4, with reference to NOU 2004:20 p. 422

4 Co-operation among stakeholders

The MJ may as a main rule not instruct the UDI in the outcome of concrete cases.³⁰⁵ However, in cases potentially giving rise to questions affecting “national interests” or “foreign policy”, instruction may take place. As a consequence, the UDI must inform the MJ about cases that may be subject to instruction. Based on interviews with UDI case workers, such notification may take place where article 1 F –cases are considered to also affect “national interests” or “foreign policy”. MJ instruction is provided in very few cases among those who are communicated.

The National Criminal Investigation Service (KRIPOS) is routinely informed, in writing, of article 1 F cases by the UDI. Their access to UDI information in each case is assessed on a concrete basis, and only following concrete requests from KRIPOS. Also following the Internal Regulations of UNE, KRIPOS shall be informed in all cases where there is reason to believe that the complainant has committed or been an accomplice to crimes and acts as mentioned in article 1 F.³⁰⁶ NCIS shall be informed also when there is no basis for exclusion in the case. The NCIS may in such cases ask for a review or copy of the documents in the case, with due reference to the legal basis of the request.

³⁰⁵ Immigration Act section 76 second paragraph

³⁰⁶ IR of 11.3.2011 section five

Part 4: Comparative study

4.1 Canada

4.1.1 The structure and proceedings of the immigration authorities

The Immigration and Refugee Board of Canada (IRB) is in charge of immigration and asylum cases in Canada. The IRB is Canada's largest independent administrative tribunal. Within the IRB, applications for asylum are considered by the Refugee Protection Division (RPD). Appeals over the decisions rendered by the RPD may be launched to the Refugee Appeals Division (RAD), which was established on December 15, 2012. The RAD most often bases its decision on the documents provided by the parties involved and the RPD record, i.e. no oral hearing is conducted.

Admissibility hearings for certain categories of applicants considered to be inadmissible to or removable from Canada are conducted by the Immigration Division. The Immigration Division also conducts detention reviews for individuals who are detained on the basis of the Immigration and Refugee Protection Act.³⁰⁷

Judicial review can be made to the Federal Court and further to the Federal Court of Appeal.³⁰⁸

The Canadian “Crimes Against Humanity and War Crimes Program” (hereinafter referred to as the War Crimes Program) has been in effect since 1998, and is now permanent. It involves the following agencies:

1. Canada Border Services Agency (CBSA) which enforces the Immigration and Refugee Protection Act
2. Citizenship and Immigration Canada (CIC) which decides on the admissibility of temporary and permanent residents to Canada as well as conducts the initial screening as part of the visa assessment
3. The Department of Justice which is in charge of citizenship revocation and extradition
4. The Royal Canadian Mounted Police (RCMP) which conducts investigations of crimes under the Crimes Against Humanity and War Crimes Act.³⁰⁹

The War Crimes program is headed by a Steering Committee composed of senior leaders from each agency. Through the War Crimes Program, applicants may be denied visas when applying from overseas. Physical entry may also be denied at any port of entry into Canada. For individuals already present in Canada, the programme encompasses remedies including exclusion from refugee status, admissibility hearings (where the person is already in

³⁰⁷ <http://www.irb-cisr.gc.ca/Eng/tribunal/Pages/index.aspx>

³⁰⁸ Rikhof 2012 p. 164

³⁰⁹ Canada's Program on Crimes Against Humanity and War Crimes, annual report 2008-2011

Canada), removal, citizenship revocation, extradition, surrender to an International Criminal Tribunal as well as Criminal Investigation and Prosecution.³¹⁰

An interesting aspect of the War Crimes Programme is the prescription of certain regimes as such that senior officials are inadmissible to Canada (Section 35 (1) (b) of the Immigration, Refugee and Protection Act). A number of regimes have been designated as such, including

- the Bosnian Serb regime from March 27, 1992 to October 10, 1996.
- the Siad Barré regime in Somalia from 1969 to 1991.
- the former military governments in Haiti from 1971 to 1986 and from 1991 to 1994, except for the period from August to December 1993.
- the former Marxist regimes of Afghanistan from 1978 to 1992.
- the governments of Ahmed Hassan Al-Bakr and Saddam Hussein in power in Iraq from 1968 until May 22, 2003.
- the government of Rwanda under Juvénal Habyarimana from October 1990 to April 1994, as well as the interim government in power from April 1994 to July 1994.
- the governments of the Federal Republic of Yugoslavia and the Republic of Serbia under Slobodan Milosevic from February 28, 1998 to October 7, 2000.
- the Taliban regime in Afghanistan from September 27, 1996 to December 22, 2001.
- the Government of Ethiopia under Mengistu Haile Mariam from September 12, 1974 to May 21, 1991.³¹¹

4.1.1.2 Identification of cases

Officers at CIC and the CBSA are first in line in identifying individuals who may have committed serious crimes and are trying to enter Canada. Training, tools for screening, intelligence and research is made available in order to assist with the identification. CIC and CBSA may request an in depth assessment of an applicant's involvement in war crimes, crimes against humanity or genocide. Computer systems are also installed in order to alert immigration and CBSA officers on individuals who may have been involved in such crimes.

Claims for refugee status that raise suspicion of involvement in war crimes, crimes against humanity or genocide are referred to the CBSA, which conducts an investigation. If the suspicion is substantiated, an application for exclusion of the claimant may be forwarded to the RPD.

4.1.2 Facts and figures

In 2012, The Refugee Protection Division received approximately 20200 claims for refugee status for processing. In the same year, approximately 6100 appeals were lodged to the Refugee Appeals Board. The Refugee Appeals Board finalized approximately 6200 appeals.³¹²

In 2010, the 9 most prominent countries of origin in Canadian asylum proceedings were

1. Hungary
2. China
3. Colombia

³¹⁰ Canada's Program on Crimes Against Humanity and War Crimes, report 2008-2011

³¹¹ *ibid*

³¹² <http://www.irb-cisr.gc.ca/Eng/tribunal/stat/Pages/index.aspx>

4. Mexico
5. Sri Lanka
6. Haiti
7. Nigeria
8. Saint Vincent
9. India
10. Pakistan

In 2011, the 9 most prominent countries were

1. Hungary
2. China
3. Colombia
4. Pakistan
5. Namibia
6. Mexico
7. Nigeria
8. Saint Vincent
9. Sri Lanka
10. India³¹³

The Canadian War Crimes Program has made available statistics regarding article 1 F exclusion which shows the following numbers:³¹⁴

	2008-2009	2009-2010	2010-2011
Refugee claims investigated by the CBSA for the commission of or complicity in war crimes, crimes against humanity, or genocide	549	794	680
Exclusion arguments filed by the CBSA before the RPD to exclude claimants from refugee protection because there were reasonable grounds to believe that the claimant committed or was complicit in war crimes, crimes against humanity, or genocide	112	87	88
Cases excluded from refugee protection by the RPD because there were reasonable grounds to believe that the claimant committed or was complicit in war crimes, crimes against humanity, or genocide	18	25	31
Cases denied refugee protection by the RPD for reasons other than reasonable grounds to believe that the claimant committed or was complicit in war crimes, crimes against humanity, or genocide, where an exclusion argument had been filed	19	24	27
Cases granted refugee protection by the RPD where an exclusion argument had been filed	17	34	18

³¹³ Statistics available through the University of Ottawa, Refugee forum, <http://www.cdp-hrc.uottawa.ca/projects/refugee-forum/projects/Statistics.php>

³¹⁴ Canada's Program on Crimes Against Humanity and War Crimes, annual report 2008-2011, p. 7

Refugee claims withdrawn or abandoned by claimant	20	15	22
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4.1.3 Applicable law

The core provision within Canadian exclusion law is Section 98 of the Immigration and Refugee Protection Act (IRPA), which sets out that asylum seekers who are covered by article 1 F of the Refugee Convention are not to be considered refugees.

The outline of article 1 F as interpreted in Canadian law is described in the case law, which is summarized in Chapter 11 of the policy document “Interpretation of the Convention Refugee Definition in the Case Law” (hereinafter referred to as the Interpretation Guideline).³¹⁵

4.1.4 Practice on article 1 F

4.1.4.1 Article 1 F a

In Canada, article 1 F is interpreted by reference to international instruments such as the Charter of the International Military Tribunal, Statutes of the ICTR and ICTY as well as the Rome Statute of the International Criminal Court.³¹⁶

According to Rikhof, war crimes have been addressed only sporadically in the Canadian practice. According to the available practice, war crimes in internal armed conflicts as basis of exclusion were not established before 1990.³¹⁷

A careful study of available case law and literature on Canadian practice shows no examples of cases where individuals having participated in armed conflict as representatives of a non-state actor, without committing war crimes, are excluded on the basis of article 1 F b.³¹⁸ This must not be confused with practice regarding membership in organizations with a brutal purpose, where e.g. membership in organizations committing terror offences is considered under article 1 F b.

As for crimes against humanity, the interpretation guideline provides reference to the Supreme Court Case of Mugesera in establishing the requirements for a criminal act to “rise to the level of a crime against humanity”:

- “i. An enumerated proscribed act was committed (this involves showing that the accused committed the criminal act and had the requisite guilty state of mind for the underlying act);
- ii. The act was committed as part of a widespread or systematic attack;
- iii. The attack was directed against any civilian population or any identifiable group of persons; and
- iv. The person committing the proscribed act knew of the attack and knew or took the risk

³¹⁵ Interpretation of the Convention Refugee Definition in the Case Law, Legal Services, Immigration and Refugee Board of Canada, December 2012

³¹⁶ Interpretation of the Convention Refugee Definition in the Case Law, Chapter 11

³¹⁷ Ibid p 166

³¹⁸ The study is based on cases available through Refworld, Refugeelawreader and the Office of the Commissioner for Federal Judicial Affairs of Canada

that his or her act comprised a part of that attack.”

Regarding the *mens rea* requirement for a crime against humanity, the Supreme Court stated that

“...the person committing the act need only be cognizant of the link between his or her act and the attack. The person need not intend that the act be directed against the targeted population, and motive is irrelevant once knowledge of the attack has been established together with knowledge that the act forms a part of the attack or with recklessness in this regard...Even if the person's motive is purely personal, the act may be a crime against humanity if the relevant knowledge is made out.”³¹⁹

Canadian practice has also clarified that the individual committing a crime against humanity may be an individual acting both independently of a State and in conjunction with the authorities of the state.³²⁰

The interpretation guideline provides several examples of acts that constitute crimes against humanity including:

- Crimes committed as part of Mobutu’s regime in Zaire / DRC, which was considered to having committed widespread and systematic attacks.
- Participation in China’s one child policy of forced sterilization and forced abortion
- Participation in international trafficking in drugs was not considered a crime against humanity.³²¹

No cases regarding “crimes against the peace” have been tried in Canada.³²²

4.1.4.2 Article 1 F b

According to Rikhof, a crime has to be capital or a “very grave punishable act” in order to be considered serious in the context of article 1 F b in Canada, and there is a presumption that it must be equivalent to a crime which carries a maximum penalty of 10 years in Canadian criminal law.³²³

Examples from Canadian jurisprudence of sufficiently serious crimes include murder, bombing, sexual assault, drug trafficking, kidnapping, sabotage, armed robbery, terrorist acts and child abduction as well as serious economic crimes such as tax evasion and fraud.³²⁴

The test as to whether a crime is non-political has been considered in several cases, indicating a requirement of a rational connection between the targets of the crime and the alleged political objective. One example was provided in *Gil v. Canada*, where attacking business premises of supporters of the Khomeini regime in Iran could not hold any objective rational connection to changing the politics of the regime.³²⁵ Another example was provided

³¹⁹ Interpretation Guideline chapter 11 provides reference to *Mugesera*, at paragraph 174.

³²⁰ Ibid chapter 11, reference to *Sivakumar*, at 444.

³²¹ Ibid chapter 11, 11.2.3

³²² Interpretation of the Convention Refugee Definition in the Case Law, Chapter 11

³²³ Rikhof 2012 p 316

³²⁴ ibid p 317

³²⁵ Ibid p 318

in *Zrig v. Canada*, where the applicant had been a member of the Mouvement de la Tendence Islamique (MIT), later Ennahda, operating in Tunisia.³²⁶ According to the Federal Court, sufficient evidence existed to prove that MIT / Ennahda had been responsible for arson against the localities of the government party in 1991, in which a night watch was killed. The Federal Court first considered, that “the arson at Bab Souika may be described as barbarous and atrocious, so that it is harder to say that this was a political crime”.³²⁷ Following this, it stated that although “the existing regime was repressive in nature”, no “close link between the Bab Souika arson and Ennahda’s political objective of establishing an Islamist state in Tunisia” could be found. The arson could not be regarded as an “acceptable form of political protest”, and should thus constitute grounds for exclusion.³²⁸

Where an applicant has been convicted and has served a sentence for the crime in question, this does not bar exclusion in Canadian practice. However, it is one of many relevant factors which may impact on the decision on whether to apply article 1 F or not.³²⁹

4.1.4.3 Article 1 F c

Older Canadian jurisprudence provides several examples of exclusion of individuals convicted of drug trafficking on the basis of article 1 F c.³³⁰ However, in the 1998 judgment of *Pushpanathan v. Canada*, the Supreme Court changed the approach in requiring that article 1 F c crimes must be based on “consensus in international law that particular acts constitute sufficiently serious and sustained violations of fundamental human rights as to amount to persecution, or are explicitly recognized as contrary to the purposes and principles of the United Nations”. According to the Supreme Court, only two categories of crimes fulfil this requirement: First where an act has been explicitly declared by the UN, ICJ or similar bodies as contrary to the purposes and principles of the UN. Secondly, where an act is determined to amount to “serious, sustained and systemic violation of human rights constituting persecution”.³³¹ Drug trafficking was not considered to fall in either category. Following this judgment, article 1 F c has mostly been applied in conjunction with article 1 F a.³³²

4.1.4.4 Standard and burden of proof

In Canada, the standard of proof is worded in the terms “reasonable grounds to believe”.³³³ The Supreme Court of Canada has stated that it requires “something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities. In essence reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information”.³³⁴

In *Sumaida v. Canada* and *Pushpanathan v Canada*, the Federal court rejected that proof is needed regarding specific instances of victimization of the civilian population when

³²⁶ *Zrig v. Canada (Minister of Citizenship and Immigration)*. [2002] 1 F.C. 559; [2001] F.C.J. No. 1433; 2001 FCT 1043. Canada: Federal Court, 24 September 2001, paragraphs 113 and 114

³²⁷ *ibid* paragraph 113

³²⁸ *ibid* paragraph 114

³²⁹ Rikhof 2012 p. 320

³³⁰ *Ibid* p. 352

³³¹ *Ibid* p 355

³³² *Ibid* p 357

³³³ Rikhof 2012 p 109

³³⁴ *Mugesera v. Canada (Minister for Citizenship and Immigration)*, 2005 SCC 40

considering crimes against humanity. It is sufficient to document what would generally happen to civilians in such instances.³³⁵

According to Rikhof, the standard of proof appears to be implemented as lower than the civil law standard of proof in common law countries (Australia, Canada, New Zealand and the UK), although these jurisdictions still require “objective, compelling and credible evidence” as in Canada or “clear and convincing evidence” as in Australia.³³⁶ Among the civil law countries, the Netherlands, Belgium and France apply a standard which is described as below that applicable in criminal law,³³⁷ whereas at least in the Netherlands it is clear that proof beyond the civil law balance of probabilities is required.

4.1.4.5 Modes of individual responsibility

According to Rikhof, Canadian courts have established four types of accomplice liability which may form the basis of exclusion under article 1 F a): i) being present at the commission of an international crime, combined with authority, ii) membership in a brutal limited purpose organization, iii) aiding and abetting in an international crime and iv) holding a shared criminal purpose with another participant.³³⁸

In a comparative perspective, the notion of membership in brutal, limited purpose organizations attracts most interest. Where it is established that the organization is among those deemed to be brutal in nature, and that the applicant was a member of that organization, a rebuttable presumption of individual responsibility is created.³³⁹ In such cases, it is not considered necessary to establish individual involvement through reference to concrete acts or crimes committed by the applicant. The membership of the individual must coincide in time with the period when the organization could be characterized as brutal.

Organizations considered to be brutal which have also been considered in the Norwegian context are KhAD (Afghanistan), Mukhbarat (Iraq), Savak (Iran), PUK (Iraq), and the LTTE (Sri Lanka).³⁴⁰

In order to be considered a member of a brutal organization, it is required that the individual joined and remained voluntarily in order to actively aid the purpose of the group.³⁴¹

Joint criminal enterprise (JCE) also often constitutes grounds for consideration in membership cases in Canada.³⁴²

According to the interpretation guidelines, the following factors are relevant:

- i. method of recruitment,
- ii. nature of the organization,

³³⁵ Rikhof 2012, p 165,

³³⁶ Rikhof, *The Criminal Refugee: The Treatment of Asylum Seekers with a Criminal Background in International and Domestic Law*, Republic of Letters Publishing 2012, p. 111

³³⁷ *ibid*

³³⁸ Rikhof p. 218

³³⁹ *Ibid* p 221

³⁴⁰ *Ibid* p 221-222

³⁴¹ *Ibi*

³⁴² *Supra* (297) p 248 In this respect it should be borne in mind that JCE, as developed on the international level by the ICTY, can be traced back to the common law tradition. The concept may therefore seem unfamiliar in a continental law context.

- iii. the claimant's rank,
- iv. knowledge of atrocities,
- v. opportunity to leave the organization, and
- vi. period of time spent in the organization.³⁴³

4.1.4.6 Cases involving children or minimum age of criminal responsibility

Canadian practice has excluded individuals on the basis of acts committed between the age of 11 and 13,³⁴⁴ 13-18,³⁴⁵ 15 -18,³⁴⁶ all based on an assessment of the child's knowledge and mental capacity.³⁴⁷ In *Poshteh v. Canada (2005)*, the Federal Court of Appeal stated that "while a finding of membership in a terrorist organization may be possible for a minor of any age, it would be highly unusual for there to be a finding of membership in the case of a young child, say, under the age of twelve." Furthermore it stated that "matters such as knowledge and mental capacity are the types of considerations to be taken into account in deciding whether a determination of membership in a terrorist organization in the case of a minor is to be different than in the case of an adult".³⁴⁸

4.1.4.7 Defenses

The Interpretation Guideline refers to the following examples of duress which may justify participation in certain offences:

- "the perpetrator was in danger of imminent harm"
- "the evil threatened him or her was on balance greater than or equal to the evil which he or she inflicted on the victim"
- "he or she was not responsible for his own predicament".

It is underlined that the law "does not function at the level of heroism and does not require a person to desert or disobey an order at the risk of his life".³⁴⁹

In *Finta*, the Supreme Court stated that a superior order would not constitute a defense if the order was "manifestly unlawful", "patently and obviously wrong" or "offends the conscience of every reasonable right thinking person".³⁵⁰

The interpretative guidelines explicitly state that remorse is not a defense, which may absolve an applicant from exclusion.³⁵¹

4.1.4.8 Balancing test

Neither under article 1 F a, b nor c is a balancing test is applied in Canadian practice.³⁵²

³⁴³ Interpretative Guideline, Chapter 11, section 11.2.6

³⁴⁴ *Saridag v. Canada (Minister of Employment and Immigration)*, IM -5691-93

³⁴⁵ *Penate v. Canada (Minister of Employment and Immigration)* [1994] F.C. 79

³⁴⁶ *Ramirez v. Canada (Minister of Employment and Immigration)* [1992] FC 306

³⁴⁷ *Rikhof* 2012 p 292-293

³⁴⁸ *Poshteh v. Canada (2005)*FCA 85 at paragraph 48, 50, as referred in *Rikhof* 2012 p 294

³⁴⁹ *Asgedom, Yoseph v. M.C.I.* (F.C.T.D., no. IMM-5406-00), Blais, August 30, 2001

³⁵⁰ Interpretative Guideline chapter 11, reference to *Finta*, at 834

³⁵¹ *ibid*, 11.2.5.4, reference to *Ramirez*, at 328

4.1.4.9 Consequences of exclusion

Following exclusion from refugee status or any other conclusion that the individual is inadmissible to Canada, the person may be deported after all legal remedies have been exhausted. If an individual does not report for removal at a designated time, he or she may be arrested and forcibly deported.³⁵³

In 2011, the CBSA established a specific “Wanted by the CBSA” list in order to facilitate the execution of outstanding warrants for removal from Canada of individuals who have been excluded.³⁵⁴

4.1.4.10 Co-operation among stakeholders

Through the War Crimes Program, extensive structures of cooperation among the bodies involved is in place (see above 4.1.1).

³⁵² Interpretative Guideline chapter 11, section 11.2.4 and 11.4.1.

³⁵³ Canada’s Program on Crimes Against Humanity and War Crimes, annual report 2008-2011, p. 11

³⁵⁴ *ibid*

4.2 Great Britain

4.2.1 The structure and proceedings of the immigration authorities

4.2.1.1 The Border Agency and WCU

The United Kingdom Border Agency (the Border Agency) is an executive agency of the Home Office, and one of the largest law enforcement agencies in the UK. It reports to the Home Secretary.³⁵⁵ The Border Agency is organized into three operational groups:

1. International group (responsible for processing visa applications overseas)
2. Immigration group (responsible for immigration applications made in the UK)
3. Intelligence group
4. Enforcement and crime group (responsible for coordinating detention and removal activities).³⁵⁶

In 2011, a crime and enforcement directorate was created which is now responsible for enforcement of decisions, removals and criminal casework.³⁵⁷ Cases involving the possible commission of international crimes are treated as high priority under the UKBA's Harm Agenda.³⁵⁸

Asylum cases are first considered by the Border Agency, after which they may be appealed to the courts (four levels including the First Tiers, Upper Tribunals, the High Courts and the Supreme Court). In exclusion cases, a certificate to the effect that article 1 F has been applied is issued by the Secretary of State.³⁵⁹ The appellate authority must first consider the validity of the certificate. If the certificate is upheld, all parts of the appeal is dismissed except for the consideration under the European Convention on Human Rights.³⁶⁰

In late 2003, the Border Agency established a specialized War Crimes Unit (WCU) which was operational by the end of 2004. Prior to this, article 1 F was rarely applied in UK asylum practice. The WCU was assimilated into the Special Cases Directorate (SCD) in 2009. SCD considers all cases relating to exclusion, other than where 1F has been raised in the case of a foreign criminal facing deportation (these cases are managed by UKBA's Criminal Casework Directorate).³⁶¹

SCD has a research team made up of country specialists who provide support to case workers, by providing screening products to aid referral and also research and analysis reports to support 1F exclusion where it is merited. The team also has expertise in conflict, international relations, the military and international criminal law. The team performs these tasks not only with relation to the convention bases assessment of exclusion of asylum

³⁵⁵ <http://www.ukba.homeoffice.gov.uk/aboutus/>

³⁵⁶ *ibid*

³⁵⁷ Annual Report 2011

<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/annual-reports-accounts/annual-report-11-12.pdf?view=Binary>

³⁵⁸ Presentation by Special Cases Directorate representative (UKBA), in Oslo December 2012

³⁵⁹ section 55 of the IAN ACT of 2006

³⁶⁰ Instruction p 14

³⁶¹ Presentation by Special Cases Directorate official (UKBA), in Oslo December 2012

seekers, but also with relation to the assessment of a similar norm applicable to other residence permits, visas and citizenship.³⁶²

The UKBA has traditionally been divided in to regional entities, but is now moving towards a more centralized system.³⁶³

4.2.1.2 Identification of cases

Approximately 250 potential 1 F cases are referred to SCD each year. A majority of around 80 % of these cases fall under article 1 F a). Since 2005, SCD has rendered an average of 60 exclusion decisions per year. Systematic screening of immigration cases in search for individuals who should be excluded under 1 F a) started in 2005 - 2006. Screening for 1 F b) and c) cases is still in the early stages of development. As a specialized unit focused on exclusion, SCD's research team provides the Border Agency with specialized country profiles which are aimed at assisting all case workers in identifying and interviewing applicants who could fall under article 1 F. The team has developed around 60 country profiles which are updated each six months, and which enables case workers to single out cases based on general knowledge of organizations, state bodies including the military, general history and relevant factors. On this basis, cases may be singled out and forwarded to SCD for thorough assessment and in most cases follow up interviews.³⁶⁴

SCD also screens applicants who have applied for resettlement through the UNHCR, primarily by ensuring that individuals from risk-groups (*e.g.* members of certain organizations) are not resettled through this channel. One important element in screening for 1 F perpetrator is a Watch List which is constantly updated by several bodies working not only with 1 F cases but also state security. Individuals at the list who attempt to enter the UK should be identified by the border agency at visa posts, airports or other checkpoints.³⁶⁵

4.2.1.3 Interviews

Around 50 % of the cases which are referred to SCD are re-interviewed. In these cases, the research team conducts background research relevant for the interview and prepares the Border Agency interviewing officer. In some cases the research officer will be present during the interview in order to provide relevant information.³⁶⁶

Based on the Exclusion Instruction, "the individual circumstances of the case must be fully explored at interview when exclusion is an element to the case" and that the applicant "must be given the opportunity to explain his level of involvement in the crime or act and the motivation or reasoning behind his alleged actions".³⁶⁷ Interviewers are instructed to consult section 3.3. on "issues of complicity and culpability" in the Exclusion Instructions before conducting the interview,³⁶⁸ as well as to ensure whether the applicant had the

³⁶² *ibid*

³⁶³ *ibid*

³⁶⁴ *ibid*

³⁶⁵ *ibid*

³⁶⁶ *ibid*

³⁶⁷ Instruction p 5

³⁶⁸ *ibid* p 6

“requisite understanding and intention at the time that he participated in or committed that act”.³⁶⁹

4.2.2 Facts and figures

4.2.2.1 General statistics

According to Eurostat figures, the total number of asylum applicants in the UK in 2010 was 23 715.³⁷⁰ In 2011 the number was 26 430.³⁷¹ In 2010, the five main citizenships of non-EU asylum applicants in the UK were

- Zimbabwe (2435)
- Iran (2350)
- Pakistan (2185)
- Afghanistan (1975)
- Sri Lanka (1660)³⁷²

In 2011, the five main citizenships of non-EU asylum applicants in the UK were “

- Pakistan (4035)
- Iran (3155)
- Sri Lanka (2170)
- Afghanistan (1660)
- Libya (1200).³⁷³

4.2.2.2 Character of exclusion cases

On an annual basis, 200-300 asylum applications are referred to SCD for consideration under article 1 F. The annual number of exclusion decisions where article 1 F has been applied has been approximately 60 since 2005.

4.2.3 Applicable law

³⁶⁹ Instruction p 10

³⁷⁰ Asylum applicants and first instance decisions on asylum applications in 2010 - Issue number 5/2011, http://epp.eurostat.ec.europa.eu/portal/page/portal/product_details/publication?p_product_code=KS-QA-11-005 Last accessed 4.1.2013

³⁷¹ [http://epp.eurostat.ec.europa.eu/statistics_explained/index.php?title=File:Number_of_\(non-EU-27\)_asylum_applicants_in_the_EU_and_EFTA_Member_States_and_their_age_distribution,_2011.png&filetimestamp=20121012123334](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php?title=File:Number_of_(non-EU-27)_asylum_applicants_in_the_EU_and_EFTA_Member_States_and_their_age_distribution,_2011.png&filetimestamp=20121012123334) Last accessed 4.1.2013

³⁷² Asylum applicants and first instance decisions on asylum applications in 2010 - Issue number 5/2011, http://epp.eurostat.ec.europa.eu/portal/page/portal/product_details/publication?p_product_code=KS-QA-11-005 Last accessed 4.1.2013

³⁷³ http://epp.eurostat.ec.europa.eu/statistics_explained/images/7/75/Five_main_citizenships_of_%28non-EU-27%29_asylum_applicants%2C_2011_%28number%2C_rounded_figures%29.png Last accessed 4.1.2013

The Immigration Act 1971 constitutes the foundation of the UK legal framework. Other relevant acts are the Immigration Act 1988, the Asylum and Immigration Appeals Act 1993, the Asylum and Immigration Act 1996, Immigration and Asylum Act 1999, Nationality, Immigration and Asylum Act 2002, Immigration, Asylum and Nationality Act 2006, Criminal Justice and Immigration Act 2008 (not exhaustive list)³⁷⁴

Article 1 F is implemented in UK law through Regulation 7 of the Refugee or Person in need of International Protection Regulations 2006 (the 2006 Regulations³⁷⁵). This provision establishes that a person who falls within the scope of Article 1 F of the Convention is not a refugee.³⁷⁵ The regulations refer article 1 F in a manner identical with the EU QD, despite the fact that the UK has opted out of the Directive.³⁷⁶ The term “refugee” is defined in Regulation 2 of the 2006 Regulations as a person who falls within article 1 (A) of the Convention and to whom Regulation 7 does not apply.³⁷⁷

Within UK practice, the purpose of article 1 F is formulated as the denial of the “benefits of refugee status to certain persons who could otherwise qualify as refugees but who are underserving of protection”, as well as to “ensure that such persons do not misuse asylum in order to avoid being held to account for their acts”.³⁷⁸

Revocation of refugee status on the basis of article 1 F follows from paragraph 339A (vii) of the Immigration Rules which provides that status should be revoked or not renewed if the individual should have been or is excluded in accordance with Regulation 7.³⁷⁹

According to the Exclusion Instruction, individuals who are excluded from refugee status are likely to also be excluded from Humanitarian Protection (comparable to the EU concept of “subsidiary protection”).³⁸⁰ Furthermore, also applications for family reunification, work permits and other categories of leave to stay in the UK are screened in order to prevent perpetrators of international crimes from entering into the UK. First, the Home Secretary may ban an individual from the UK on a discretionary basis “where the Secretary of State has personally directed that the exclusion of a person from the United Kingdom is conducive to the public good”.³⁸¹ Second, entry clearance or leave to enter the UK should normally be refused when “[t]he immigration officer deems the exclusion of the person from the United Kingdom to be conducive to the public good. For example, because the person's conduct (including convictions which do not fall within paragraph 320(2) or 320 (19)), character, associations, or other reasons, make it undesirable to grant them leave to enter”.³⁸² Third, leave to remain and variation of leave to enter or remain should normally be refused based on “the undesirability of permitting the person concerned to remain in the United Kingdom in the light of his conduct (including convictions which do not fall within paragraph 322(1C), character or associations or the fact that he represents a threat to national security”.³⁸³ All

³⁷⁴ Annual Report 2011

<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/annual-reports-accounts/annual-report-11-12.pdf?view=Binary>

³⁷⁵ Instruction p 4

³⁷⁶ Directive 2011/95/EU of 13 December 2011, preambular paragraph 50

³⁷⁷ Instruction p 4

³⁷⁸ Instruction p 4

³⁷⁹ Ibid p 5

³⁸⁰ Instruction p 5

³⁸¹ Immigration Rules Section 320 (6), available at

<http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part9/>

³⁸² Immigration Rules Section 320 (19)

³⁸³ Immigration Rules Section 322 (5)

the above legal basis may include individuals with whom an article 1 F situation exist, but who apply for other forms of leave to stay in the UK other than refugee status.³⁸⁴

4.2.4 Practice on article 1 F

Article 1 F is considered before article 1 A in UK practice (exclusion before inclusion).

The interpretation of articles 1 F a, b and c are based on the recognized sources of international criminal law as well as the jurisprudence rendered on the basis of these sources, as presented in Part 2 of this report.³⁸⁵ I will not (re-)address the relevant international sources applied under each category. According to the Exclusion Instruction, the decision should normally be based on the most relevant exclusion clause, but it is also possible for more than one clause to apply (e.g. both article 1 F b and c regarding acts of terrorism).³⁸⁶

4.2.4.1 Article 1 F a

A clear majority of approximately 80 % of 1 F cases in the UK have been based on article 1 F a. The starting point of the consideration under article 1 F a) should be the 1998 Rome Statute. Following this, in principle, all “international instruments” are relevant when establishing the sphere of article 1 F a).³⁸⁷

Crimes against humanity, including the categories of underlying offences, are defined in line with the ICC Statute article 7.

In SK Zimbabwe [2010] UKUT 327 (IAC) an applicant was excluded on the basis of crimes against humanity on the basis of violent invasions of land owners and expulsion of workers from their houses and jobs on the farm. The attacks were considered as “part of widespread systematic attacks against the civilian population of farmers and farm workers, carried out not just with the full knowledge of the regime but as a deliberate act of policy, with the intention of advancing its grip on power, suppressing opposition, and helping its supporters”.³⁸⁸ According to Rikhof, the decision is a “good example of applying existing international norms to a new fact pattern”.³⁸⁹ Another situation which has been considered as fulfilling the objective description of the chapeau requirement in UK practice is Iran, where a member of the Basji was excluded on the basis of complicity.³⁹⁰

In UK practice, individuals taking part in armed conflict as representatives of non-state actors are considered under article 1 F a when exclusion becomes an issue in such cases, e.g. due to the commission of war crimes.³⁹¹

³⁸⁴ Presentation by SCD official in Oslo December 2012

³⁸⁵ Instruction p 16 and 18, see also Gurung v. Secretary of State for the Home Department [2002] UKIAT 04870 and JS (Sri Lanka UKSC 15)

³⁸⁶ Instruction p 5

³⁸⁷ JS (Sri Lanka)

³⁸⁸ As referred by Rikhof, *ibid.*

³⁸⁹ *Ibid*

³⁹⁰ AA Iran [2011] UJUT 00339 (IAC)

³⁹¹ Presentation by SCD official in Oslo December 2012

4.2.4.2 Article 1 F b

Article 1 F b cases in the UK comprise serious non-political crimes such as murder, rape, armed robbery and arson, as well as acts of terrorism.

According to the Exclusion Instruction, “crimes which attract custodial sentences of 12 months or more are generally to be considered as serious». ³⁹² This delimitation is based on reference to the definition of “particularly serious” in section 72 Nationality, Immigration and Asylum Act 2002 as one which could attract a custodial sentence of two years or more in the UK. As article 1 F b uses the less qualifying term “serious”, UK practice has landed on a threshold of 12 months or more. However, the Instruction emphasizes that the likely sentence is less important than the nature of the crime. Examples provided in the Instruction are in line with those included in the UNHCR Guideline: murder, rape, arson and armed robbery, as well as those accompanied by the use of deadly weapons or who involve serious injury to persons. The Exclusion Instruction refers to the UNHCR Handbook paragraph 155 which states that a “serious crime” must be a capital crime or a “very grave punishable act”.

A crime is considered “non-political” if it was committed “essentially for personal reasons or gain and no political motives were involved; or where the crime might have been politically motivated but the crime committed was wholly disproportionate to the claimed political objective. ³⁹³ An act should be assessed on the basis of the “motive, context, methods, and proportionality of a crime to its objectives”. ³⁹⁴ The following definition of a political crime has been given by the courts:

“A crime is a political crime for the purposes of Article 1F(b) of the 1951 Convention if and only if:

(1) it is committed for a political purpose, that is to say with the object of overthrowing or subverting or changing the government of a state or inducing it to change its policy; and

(2) there is a sufficiently close and direct link between the crime and the alleged political purpose. In determining whether such a link exists, the court will bear in mind the means used to achieve the political end, and will have particular regard to whether the crime was aimed at a military or governmental target, on the one hand, or a civilian target on the other, and in either event whether it was likely to involve the indiscriminate killing or injuring of members of the public.” ³⁹⁵

According to the Exclusion Instruction, “a link may however be established to a political crime if such methods are used against specific targets that are political in nature (e.g. government representatives etc.) and are committed for political motives”. ³⁹⁶ Examples from practice include in the case of an attack by the LTTE against military personnel and an attempt to poison the wife of president Mobutu in Zaire. ³⁹⁷

³⁹² Ibid p 6

³⁹³ Ibid p 6

³⁹⁴ Ibid p 18

³⁹⁵ T [1996] AC 742, at 786-787

³⁹⁶ Ibid p 18

³⁹⁷ Rikhof 2012 p 336, referring to Kapferer “Exclusion Clauses in Europe” p 204

UK law has transposed the EU Qualification Directive article 12 (2) (b) into Regulation 7(2)(b) of the 2006 Regulations, which sets out that “outside the country of refuge” shall be taken to mean the time “up to and including the day on which a residence permit is issued”. The time limit therefore refers to the time when a residence permit is formally issued in the UK. According to the Exclusion Instruction this includes crimes which were initiated before entering into the UK and continued in the UK before an asylum application has been decided (e.g. drug imports).³⁹⁸

Where the applicant has been convicted and has served a sentence for the crime in question, this does not prevent article 1 F from being applicable.³⁹⁹

4.2.4.3 Article 1 F c

According to the Exclusion Instruction, the “purposes and principles of the UK” is interpreted in line with article 1 and 2 of the UN Charter.⁴⁰⁰ According to UK practice, both state and non-state actors can be guilty of 1 F c) acts.⁴⁰¹ However, exclusion on the basis of article 1 F c) requires that the act had an international dimension, i.e. “crimes capable of affecting international peace, serious and sustained violations of human rights, inducing terror and putting extreme pressure upon government”⁴⁰².

In the UK, article 1 F c has largely been applied to cases relating to terrorism.⁴⁰³ However, in *Al Sirri and DD Afghanistan* [2012] UKSC 54, the Supreme Court stated that an attack on the ISAF-forces by a member of the afghan mujahedeen was “in principle capable of being an act contrary to the purposes and principles of the United Nations”, as such an approach “accords with common sense and is correct in law”. With relation to the terrorism cases, reference can be made to Section 54 of the Immigration, Asylum and Nationality Act 2006 which provides that “acts of committing, preparing or instigating terrorism” and “acts of encouraging or inducing others to commit, prepare or instigate terrorism” are to be considered as contrary to the purposes and principles of the UN.

Terrorism is defined in line with Section 1 of the Terrorism Act 2000:

“(1) In this Act “terrorism” means the use or threat of action where
(a) the action falls within subsection (2),
(b) the use or threat is designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public, and
(c) the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause.

(2) Action falls within this subsection if it
(a) involves serious violence against a person,
(b) involves serious damage to property,
(c) endangers a person’s life, other than that of the person committing the action,
(d) creates a serious risk to the health or safety of the public or a section of the public, or
(e) is designed seriously to interfere with or seriously to disrupt an electronic system.

³⁹⁸ Instruction p 18

³⁹⁹ Rikhof 2012 p. 335

⁴⁰⁰ Instruction p 20, Rikhof 2012 p. 365

⁴⁰¹ Instruction p 21 as well as *Al Sirri and DD Afghanistan* [2012] UKSC 54

⁴⁰² Presentation by SCD official in Oslo December 2012

⁴⁰³ Rikhof 2012 p 364

(3)The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

(4)In this section

(a)“action” includes action outside the United Kingdom,

(b)a reference to any person or to property is a reference to any person, or to property, wherever situated,

(c)a reference to the public includes a reference to the public of a country other than the United Kingdom, and

(d)“the government” means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.

(5)In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.”

The term “guilty of” does not indicate that a criminal conviction or proof beyond a reasonable is necessary, but rather equates to “responsible for”.⁴⁰⁴ Examples include instances of individual involvement which falls well within the sphere of individual responsibility within international criminal law.⁴⁰⁵

4.2.4.4 Standard and burden of proof

The burden of proof for exclusion rests with the Secretary of State, not with the applicant.⁴⁰⁶

The standard of proof follows directly from the interpretation of the convention phrase “serious reasons for considering” and is understood as “evidence that is not tenuous or inherently weak or vague, and which supports a case built around more than mere suspicion or speculation.”⁴⁰⁷ It is a level of proof below that needed for a criminal conviction but above mere suspicion. According to the Supreme Court in JS (Sri Lanka), rendered in march 2010, “considering” must be interpreted as closer to “believing” rather than “suspecting”. The SC also stated that “the reality is that there are unlikely to be sufficient serious reasons for considering the applicant to be guilty unless the decision-maker can be satisfied on the balance of probabilities that he is”.⁴⁰⁸

Application of the clauses does not require conviction or prosecution for the offence in the country of origin. Where the applicant has been convicted of an offence prior to lodging the application, this could provide “serious reasons for considering” but must also be considered as potential evidence of persecution in the form of false charges against the asylum applicant.

In the concrete assessment, the statement of the applicant cannot justify a decision to exclude if that statement is not credible.⁴⁰⁹ This question is rarely relevant in Norway, as applicants providing unreliable statements are seldom provided refugee status, entailing that exclusion is hardly ever considered in such cases.

⁴⁰⁴ Rikhof 2012 p 365

⁴⁰⁵ See examples presented by Rikhof 2012 at p 365

⁴⁰⁶ Instruction p 5

⁴⁰⁷ *ibid*

⁴⁰⁸ R (on the application of JS) (Sri Lanka) v. Secretary of State for the Home Department [2010], UKSC

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⁴⁰⁹ *ibid*

4.2.4.5 Modes of individual responsibility

Individuals may incur individual responsibility for excludable crimes by “personally perpetrating the crimes”, by “planning, inciting, ordering, soliciting or inducing the commission of the crime”, “by significantly aiding or abetting the planning, preparation or execution of the crime or participating in a joint criminal enterprise” (the classical notion of aiding and abetting), or by making a “substantial contribution to the commission of a crime by others, knowing that his/her acts facilitated the criminal conduct (e.g. by controlling the funds of an organization known to be dedicated to achieving its aims through violent means or organizing the physical or logistical support necessary to enable a terrorist group to operate)” (a form of extended liability / JCE).⁴¹⁰

The latter category is based on the Supreme Court decision in *JS (Sri Lanka)*,⁴¹¹ which dealt with a member of the LTTE who took part in various military operations against the Sri Lankan army between 1997 and 2000 and who later became one of the main security guards of an LTTE leader. Here, the court based the assessment of extended liability on the ICC Statute. It stated that the essential test is whether “there are serious reasons for considering him voluntarily to have contributed in a significant way to the organization’s ability to pursue its purpose of committing war crimes, aware that his assistance will in fact further that purpose”.⁴¹²

Organizations proscribed in the UK are listed in Schedule 2 to the Terrorism Act 2000. When an applicant claims to be a member of such an organization, this is not sufficient, but may be evidence that article 1 F should be applied. The question to be answered would be “has the individual voluntarily contributed in a significant way to the organization’s ability to pursue its purpose of committing acts of terrorism / serious crime(s), aware that the assistance will in fact further that purpose”. Officers are instructed to “consider exclusion particularly carefully” in cases where an applicant has been convicted of an offence under Section 11 of the Terrorism Act 2000, i.e. belonging or professing to belong to a proscribed organization.⁴¹³

According to the Supreme Court, exclusion in such cases should be assessed on the basis of the following seven determining factors (not exhaustive and not necessarily relevant in each case⁴¹⁴):

- the nature and (potentially of some importance) the size of the organization and particularly that part of it with which the asylum-seeker was himself most directly concerned,
- whether and, if so, by whom the organization was proscribed,
- how the asylum-seeker came to be recruited,
- the length of time he remained in the organization and what, if any, opportunities he had to leave it,
- his position, rank, standing and influence in the organization,
- his knowledge of the organization’s war crimes activities, and

⁴¹⁰ Instruction page 9

⁴¹¹ *R (on the application of JS) (Sri Lanka) v. Secretary of State for the Home Department* [2010], UKSC 15

⁴¹² *Ibid*, paragraph 38 and 49

⁴¹³ Instruction p 6 and 21

⁴¹⁴ *AA (Article 1 F a) Iran* [2011] UKUT 00339 (IAC)

- his own personal involvement and role in the organization including particularly whatever contribution he made towards the commission of war crimes.

According to Rikhof, UK practice has given the notion of complicity “the most expansive treatment” in his study.⁴¹⁵

4.2.4.6 Cases involving children or minimum age of criminal responsibility

According to Section 55 of the Borders, Citizenship and Immigration Act 2009, the UKBA must carry out all functions in a manner that takes into consideration the best interest of children in the UK. Due regard to this provision must be given also in exclusion cases whose outcome may affect children in the UK dependent on the applicant, and such cases must be dealt with in a timely and sensitive fashion.⁴¹⁶

Application of the exclusion clauses in asylum applications by children is considered rare, and must be exercised with great caution, “in view of the particular circumstances and vulnerabilities of children”. The instruction furthermore states that exclusion cases based on acts having been committed as a minor always implies an assessment of the applicant’s ability to understand his acts and how far he can be held criminally responsible. Finally the instruction emphasizes that minors who for instance were compelled to serve with armed forces or an armed group is more likely to have been a victim of offences than a perpetrator.⁴¹⁷ The article should be applied responsibly based on the humanitarian character of the Convention and the serious consequences of exclusion for the individual.⁴¹⁸

Applications from minor asylum seekers are considered by specially trained staff, including those involving questions of exclusion.⁴¹⁹

Children are not exempt from exclusion in the UK, however careful consideration of the age and maturity of the applicant at the time of the act should be made.⁴²⁰

4.2.4.7 Mens rea

In order to establish *mens rea*, the the individual must have acted with both “intent” and “knowledge”. Intent requires that the individual intended to engage in the conduct or to bring about a particular consequence, whereas “knowledge” requires that he was aware of the circumstances or that certain consequences would follow in the ordinary course of events.⁴²¹ The Supreme Court has relied on article 30 of the ICC statute when establishing the requirement of *mens rea*, saying that the provision makes it “plain, when a person is aware that in the ordinary course of events a particular consequence will follow from his actions, he is taken to have acted with both knowledge and intent”.⁴²²

4.2.4.8 Defenses

⁴¹⁵ Rikhof p 366

⁴¹⁶ Asylum Instruction p 3

⁴¹⁷ *ibid*

⁴¹⁸ *ibid*

⁴¹⁹ Asylum Instruction p 3

⁴²⁰ Home Office, *Processing an Asylum Application from a Child*, 2 November 2009, section 17.3

⁴²¹ Asylum Instruction p 10

⁴²² *R (on the application of JS) (Sri Lanka) v. Secretary of State for the Home Department* [2010], UKSC 15

Three categories of defenses are described in the Exclusion Instruction: self-defense, coercion / duress or self-defense / defense of others. Age and gender is mentioned as relevant factors in the assessment, *e.g.* whether the applicant was a child soldier forced to commit war crimes.⁴²³

According to the Instruction, the defense of superior orders “will only apply if the individual in question was under a legal obligation to obey the order in question, was unaware that the order was unlawful, and the order itself was not manifestly unlawful (the latter being deemed so in all cases of genocide or crimes against humanity).”⁴²⁴

As for the defense of duress, this only applies “if the incriminating act committed by the individual resulted from a threat of imminent death or of serious bodily harm against that individual or someone else, and the individual acted necessarily and reasonably to avoid this threat, provided that the individual did not knowingly intend to cause a greater harm than the one to be thus avoided”. Where the defense of duress is argued in cases where the individual acted on orders from a superior, it should be considered whether the individual could simply have left the organization. The consequences of desertion plus the foreseeability of being put under pressure to commit certain acts are relevant factors.⁴²⁵

If the applicant has been convicted and punished for an excludable crime, this does not exempt the application of article 1 F. However, it should be taken into account in the overall assessment.⁴²⁶

4.2.4.9 Balancing test

Starting as early as 1994, UK courts have rejected the application of a balancing test where the risk and seriousness of the persecution should be weighed against the nature of the act which should lead to exclusion.⁴²⁷ According to Section 34 of the Anti-Terrorism, Crime and Security Act 2001 (ATCS Act) there should be no balancing test assessing the extent of persecution feared against the gravity of the article 1 F crime. The risk of mistreatment in the country of origin is instead considered as part of the assessment of whether removal of the applicant would be in violation of the ECHR.

4.2.4.10 Consequences of exclusion

In exclusion cases, the UKBA renders a so called “one stop decision” where all relevant issues are considered including inclusion, exclusion, application of the ECHR as well as ban from the UK.⁴²⁸

As of September 2nd 2011, a “restricted leave policy” was introduced for asylum seekers who are excluded on the basis of article 1 F and who cannot be removed from the UK on the basis of the ECHR.⁴²⁹ Based on the new policy, discretionary leave to remain should only be

⁴²³ Asylum Instruction p 12

⁴²⁴ *ibid*

⁴²⁵ *ibid*

⁴²⁶ Asylum Instruction section 3.6

⁴²⁷ Rikhof 119

⁴²⁸ Presentation by SCD official in Oslo December 2012

⁴²⁹ Policy statement on Article 1 F: restricted discretionary leave, available at <http://www.ein.org.uk/news/policy-statement-article-1f-refugee-convention-restricted-discretionary-leave>, last accessed 6.1.2012.

granted for a maximum of 6 months at a time. Several restrictions may be decided, including on the individuals employment or occupation in the UK, residential area, requirement to report to an immigration officer or the Secretary of state at regular intervals and prohibitions on taking up studies at educational institutions. The policy applies to both new and old 1 F cases, including those where former temporary permits were granted for a longer period of time than 6 months.

4.2.4.11 Relationship to ECHR article 8 in case of family ties

Asylum applicants of dependents of an individual who has been excluded should be assessed on an individual basis. Dependents may not be excluded on the basis of acts committed by a family member. However, a concrete assessment must be made as to whether the dependent has individual reasons for seeking asylum, potentially as a consequence of acts of the family member but also based on his or her own record.⁴³⁰

According to the Exclusion instructions, consideration of ECHR article 8 must be made when it is proposed to remove a principal asylum seeker who has been excluded, but to allow a dependent to stay, or the other way around. The UN CRC article 3 implies that the best interest of the child should always be a primary consideration in such cases.⁴³¹

4.2.4.12 Co-operation among stakeholders

The SCD team collaborates with Interpol, the ICC and Commonwealth countries including the US, Australia, New Zealand and Canada (members of the FCC). At the domestic level, they cooperate with the Metropolitan Police Services War Crimes Unit, *i.e.* by forwarding cases for possible investigation and prosecution. So far, the UK has not seen any conviction for war crimes on the basis of this co-operation. Two cases have been investigated, where one resulted in the conviction of a former officer in the Afghan Hezb-i-Islami for torture and hostage taking.⁴³² The MPS recently arrested a Nepalese Army officer for torture offences.⁴³³

According to the Exclusion instruction, the Chief Executive must be advised before a person who is "subject of extradition proceedings, convicted of a serious non-political offence or a fugitive from justice" is granted asylum or another form of leave in the UK. Furthermore, even though extradition requests involving asylum seekers or refugees are not likely to arise very frequently, the Judicial Cooperation Unit (JCU) within the Home Department must be consulted before a decision is reached on the asylum application.⁴³⁴

⁴³⁰ Ibid p 13

⁴³¹ Ibid

⁴³² Presentation by Special Cases Directorate official (UKBA), in Oslo December 2012

⁴³³ <http://www.telegraph.co.uk/news/worldnews/asia/nepal/9780719/Nepal-protests-arrest-of-colonel-on-war-crimes-charges-during-East-Sussex-visit.html>, last accessed 12.3.2013

⁴³⁴ Instruction p 10

4.3 DENMARK

4.3.1 The structure and proceedings of the immigration authorities

Denmark has a two-tiered asylum system, where the primary consideration is made by the Danish Immigration Service (IS).⁴³⁵ Decisions rendered by IS may be appealed to the Refugee Appeals Board (RAB).⁴³⁶ As opposed to Norway, Denmark does not have judicial control by the courts in asylum cases.⁴³⁷

4.3.1.1 The Immigration Service

Previously, the Danish Immigration Service (IS) was a body under the former Ministry of Refugees, Immigration and Integration. In 2011 the area of asylum and family reunification was transferred to the Ministry of Justice, and the remaining areas of responsibility to the Ministry of Employment. As of 1.1.2012, the section of the old “Udlændingservice” in charge of asylum, family reunification and overall policy within the area of immigration changed name to “Udlændingestyrelsen”.⁴³⁸

IS is structurally divided into two Asylum Sections, and does not have a specific unit in charge of exclusion cases.⁴³⁹

4.3.1.2 The Refugee Appeals Board

The Refugee Appeals Board is a quasi-judicial and independent body whose members may not take instruction on the outcome of a case. The RAB is considered to be a court within the meaning of article 39 of the EU Council Directive on asylum procedures (2005/85/EC).⁴⁴⁰

Cases are considered by a board consisting of three members, including an appointed judge. The remaining two members are appointed by the Ministry of Justice and the Council of the Danish Bar and Law Society respectively.⁴⁴¹ As a main rule, all Board hearings are oral, and are attended by the applicant, a lawyer, an interpreter and a representative of the IS.⁴⁴²

In the accelerated procedure the cases are decided by the appointed judge only. The asylum seeker is appointed a lawyer when the case is pending before the RAB.⁴⁴³

Where the question of exclusion is identified by RAB although it has not been considered by IS in the first instance, the case is returned to IS in order to ensure assessment of the application in to instances.⁴⁴⁴

⁴³⁵ www.nyidanmark.dk

⁴³⁶ www.flygtningenaevnet.dk

⁴³⁷ The Aliens Act section 56 (8) stipulates that the decision of the RAB is final.

⁴³⁸ Immigration Service, annual report 2011

⁴³⁹ Organization chart of October 2012, available at http://www.nyidanmark.dk/NR/rdonlyres/11712B63-8958-453B-9868-022272D848E0/0/udlaendingestyrelsen_organisationsdiagram.pdf

⁴⁴⁰ http://www.flygtningenaevnet.dk/da-dk/English/General_information_regarding_fln.htm

⁴⁴¹ *ibid*

⁴⁴² *ibid*

⁴⁴³ http://www.flygtningenaevnet.dk/da-dk/English/General_information_regarding_fln.htm

⁴⁴⁴ *ibid*

4.3.2 Facts and figures

According to Eurostat figures, the total number of asylum applicants in Denmark in 2010 was 5100.⁴⁴⁵ In 2011 the number was 3945.⁴⁴⁶ In 2010, the five main citizenships of non-EU asylum applicants in Denmark were

- Afghanistan (1465)
- Syria (815)
- Iran (655)
- Rusland (400)
- Serbia (265).⁴⁴⁷

In 2011, the five main citizenships of non-EU asylum applicants in Denmark were

- Afghanistan (910)
- Iran (505)
- Syria (470)
- Russia (365)
- Serbia (195).⁴⁴⁸

Available statistics does not include information regarding exclusion decisions.⁴⁴⁹

4.3.3 Applicable law

As part of an “anti-terror” package which was introduced in the aftermath of the terror attacks against USA in 2011, Danish immigration law was amended in 2002 to include stricter provisions regarding foreigner who were suspected of constituting a threat against state security. Another objective of the amendments was to implement Security Council resolution 1373. The amendments came into force in 2002 (Law no. L 32 of December 13th 2001).

Article 1 A of the 1951 Convention is implemented through section 7 stk. 1 of the Danish Aliens Act. Applicants who may not be considered as convention refugees may fall under the parameters of Section 7 stk. 2, providing so called B-status.

Section 10 contains general provisions on exclusion applicable to all forms of residence permits, including refugee status and other permits. Section 10 stk. 1 no. 3 implements article 1 F, in stipulating that an alien “cannot be issued with a registration certificate of a residence card pursuant to the EU rules (...) or a residence permit under sections 7 to 9 f” if

⁴⁴⁵ http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_asyappctza&lang=en, last accessed 1.3.2013

⁴⁴⁶ [http://epp.eurostat.ec.europa.eu/statistics_explained/index.php?title=File:Number_of_\(non-EU-27\)_asylum_applicants_in_the_EU_and_EFTA_Member_States_and_their_age_distribution,_2011.png&filetimestamp=20121012123334](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php?title=File:Number_of_(non-EU-27)_asylum_applicants_in_the_EU_and_EFTA_Member_States_and_their_age_distribution,_2011.png&filetimestamp=20121012123334), last accessed 1.3.2013

⁴⁴⁷

http://epp.eurostat.ec.europa.eu/statistics_explained/images/4/41/Five_main_citizenships_of_%28non-EU-27%29_asylum_applicants%2C_2010_%28number%2C_rounded_figures%29-de.png, last accessed 1.3.2013

⁴⁴⁸ http://epp.eurostat.ec.europa.eu/statistics_explained/images/7/75/Five_main_citizenships_of_%28non-EU-27%29_asylum_applicants%2C_2011_%28number%2C_rounded_figures%29.png, last accessed 1.3.2013

⁴⁴⁹ E.g. «Tal og fakta på udlendingeområdet 2011», Justisministeriet and Udlendingestyrelsen 2011

“the alien is deemed to fall within Article 1 F of the Convention relating to the Status of Refugees (28 July 1951).”⁴⁵⁰

In addition to the provision implementing article 1 F, Section 10 stk. 1 contains provisions excluding from refugee status aliens who are “deemed a danger to national security” or “deemed a serious threat to the public order, safety or health”. The preparatory documents regarding Section 10 stk. 2-4 indicated that a proportionality test should be applied. It was also stated that for applicants who would be considered convention refugees under Section 7 stk 1, the assessment had to be in line with the Refugee Convention.⁴⁵¹

Section 10 stk. 2 stipulates that, in addition, only where “*particular reasons make it appropriate, including regard for family unit*” may an alien be issued with a residence permit according to the EU rules or residence permit under sections 7 to 9 f, if

- “(i) the alien has been convicted abroad of an offence that could lead to expulsion under section 22, 23 or 24 if his case had been heard in Denmark;
- (ii) there are serious reasons for assuming that the alien has committed an offence abroad which could lead to expulsion under section 22, 23 or 24;
- (iii) circumstances otherwise exist that could lead to expulsion under the rules of Part IV;
- (iv) the alien is not a national of a Schengen country or a Member State of the European Union, and an alert has been entered in the Schengen Information System in respect of the alien for the purpose of refusal of entry pursuant to the Schengen Convention; or
- (v) because of communicable diseases or serious mental disorder the alien must be deemed potentially to represent a threat or cause substantial inconvenience to his surroundings.”

An applicant who is excluded under Section 10 stk 1 is not only excluded from refugee status under Section 7 stk 1, but also from protection status under Section 7 stk 2.⁴⁵²

As for Section 10 stk. 2, applicants who are considered convention refugees under Section 7 stk. 1 may only be considered for exclusion under alternative no. 1, as the refugee convention requires that the applicant has been convicted of the crime in question and also requires an assessment of whether the crime is particularly dangerous and whether the alien as a consequence is a danger to Danish society.⁴⁵³

Section 10 stk. 3 and 4 contain strict provisions pertaining to re-entry into Denmark after expulsion. A provision contained in section 10 stk. 5 stipulates that registration certificates or residence cards may not be issued to aliens who are subject to restrictive measures intended to prevent entry and transit as decided by the UN or the EU (the “sanction list”).

Whether Section 10 stk. 1 no. 3 (article 1 F exclusion) is applied or not relies on a concrete assessment, which first and foremost is based on the statement of the applicant, but also the documentation which has been presented. Information provided by the state of origin, other Danish authorities including the National Prosecutor for International Crimes, the

⁴⁵⁰ Section 10 Stk. 1

⁴⁵¹ Lovforslag nr. L 32 af 13. December, reference provided in Flyktningsnævnets Beretning 2011 p 288 2001, side 18, 1. spalte

⁴⁵² Section 10 Stk. 3

⁴⁵³ Beretning 2011 p 288

courts, international war crimes tribunals and statements from witnesses may be relevant.⁴⁵⁴

Where the requirements for exclusion are present in a case, exclusion is mandatory.⁴⁵⁵

Section 19 stk. 2 no. 2 stipulates that a temporary or permanent residence permit may always be revoked when information is provided which indicates that the applicant would have been excluded under section 10 stk. 1. A 2011 report from the RAB refers to a decision rendered in July 2011, where a Kurdish applicant of Turkish nationality had been granted refugee status together with his wife and children in 2002. In 2009, the Danish Ministry of Justice received a judgment rendered by another European state, where the applicant had been convicted to four years imprisonment for complicity to two terror related crimes committed by the PKK. The acts in question had been committed before the applicant came to Denmark as an asylum seeker. One person was killed in one of the terror incidents to which the applicant had been complicit. Both IS and RAB concluded on revocation of the residence permit, with reference to Section 19 stk. 2 no. 2 and Section 10 stk. 1 no. 3, as the act was considered to fall under article 1 F b of the refugee convention. RAB made reference to the UNHCR Handbook Section 141 in this assessment.

As in Norway, an applicant who has been excluded from refugee status may be granted subsidiary protection on the basis of ECHR article 3, which is implemented in the Danish Immigration Act section 31.

RAB applies guidelines, policy documents and background notes in the interpretation of article 1 F, although such documents are not considered to be legally binding.⁴⁵⁶ Council Directive 2004/83/EC (the Qualification Directive) is not binding on Denmark.

Inclusion is normally considered before exclusion in Danish practice, as is the case in Norway.⁴⁵⁷

4.3.4 Practice on article 1 F

4.3.4.1 Article 1 F a

In a June 2011 case, RAB granted refugee status to a Rwandan applicant who had been acquitted from accusations of participation in the 1994 genocide. The applicant had held a high ranking function in the party MDR in his municipality, arranging meetings and recruiting members. After the genocide, he had been arrested in total three times, and had spent a total of 11 years in pre-trial detention. After having fled Rwanda, he was summoned to meet for trial in a Gacaca tribunal, where he was charged with murder in 1994. He was sentenced to life imprisonment in absentia in *primo* 2009. RAB considered that as he had previously been acquitted of a Category 2 offence, and because no new evidence indicated that this conclusion was wrong, article 1 F a could not be applied in his case. He was granted residence permit on the basis of Section 7 stk. 1.⁴⁵⁸

⁴⁵⁴ Flyktningnævnet, Beretning 2011, p. 270

⁴⁵⁵ Rapport fra regeringens arbejdsgruppe om udlændinges ophold i Danmark, 2007, p. 53

⁴⁵⁶ Einarsen, Vevstad, Skar p. 22

⁴⁵⁷ Chf. all cases available at www.flyktingenaevnet.dk, see also *ibid* p 33

⁴⁵⁸ Flyktningnævnet, Beretning 2011, p 271

Both IS and RAB has considered that participation in forced abortions as part of the one child policy in China falls under both article 1 F a and 1 F b. In a 2007 decision, a Chinese doctor who had participated in forced abortions on women in the 7th and 9th months. Where the foetus did not die from medical treatment, the live born child was killed by injecting air into the veins or lungs. RAB considered that the participation and complicity of the applicant amounted to both a serious non-political crime and to crimes committed as part of "systematic violations against the civilian population" as stipulated in article 1 F a. The applicant had been investigated by the SAIS who had closed the case due to lacking fulfilment of the requirement of double criminality. Regarding this issue, RAB considered that the statement on this fact did not change the assessment under article 1 F of the Refugee Convention. Reference was made to a decision rendered by the Canadian Immigration and Refugee Board, Refugee Protection Division, where a person who had participated in forced abortions in China was excluded.

4.3.4.2 Article 1 F b

Interpretation of article 1 F b in Danish law is based on the UNHCR Background Note of 2003.⁴⁵⁹ As to the definition of "serious", reference is made to the Background Note section 38-40, stating that the objective of the provision is not to exclude an applicant on the basis of a minor offence. The assessment of whether a crime is to be considered as "serious" should be made on the basis of international standards, in which context the following factors are relevant:

- The nature of the crime
- The damage or injury caused
- The criminal procedure within which the act will be considered
- The punishment which may be decided
- Whether the act would be considered as serious in most legal systems.⁴⁶⁰

Reference is also made to the UNHCR Guidelines 2003 Section 14, and to a recommendation from the Council of Europe Committee of Ministers Rec(2005)6 of 23. March 2005 section 1 to member states on exclusion from refugee status, where the same factors are highlighted. Examples such as murder, rape, arson and armed robbery is mentioned, including crimes where dangerous weapons have been used, where victims have been seriously injured or where there is evidence of a serious criminal background. Minor theft or possession of drugs for personal use is not considered sufficiently serious.⁴⁶¹

In its 2011 report, RAB also refers to the UNHCR Handbook section 156, 2003 Guidelines section 24 and the Background note section 76-78, all sources which stipulate that a balancing test must be made between the nature of the crime and the degree of persecution feared. Examples from practice provided in the 2011 report shows that the balancing test is applied in Danish practice.⁴⁶² An illustrative example is an October 2011 case, where an Afghan family had fled the country after an incident where the husband had, illegally, sold Russian spirits at a New Year party. Upon confrontation by a police officer, the applicant had been apprehended by a police officer. The applicant had thought he was being

⁴⁵⁹ *ibid*

⁴⁶⁰ *Ibid* p 272

⁴⁶¹ *ibid* p 237, reference is made to UNHCR, Statement on Article 1 F of the 1951 Convention issued in the context of the preliminary ruling references to the Court of Justice of the European Communities from the German Federal Administrative Court regarding the interpretation of Articles 12(2)(b) and (c) of the Qualification Directive

⁴⁶² Flyktningsnævnet, Beretning 2011, p 273 - 274

taken to a place for execution, and had hit the officer. Following this he had fled to a hiding place with his family. RAB considered that the act of violence was not sufficiently serious to lead to exclusion under article 1 F b. RAB also considered that, regardless of whether the act of violence committed by the applicant could be covered by Section 10 Stk. 2 (exclusion from residence permits on the basis of "serious reasons for assuming" that the applicant has committed a crime which may lead to expulsion), a proportionality assessment led to the conclusion that a residence permit could be afforded to the male applicant under Section 7 stk. 2. His wife and children were afforded residence permits on the same basis.⁴⁶³

Another example of practice under article 1 F b include Afghan applicants having committed murder as revenge or retaliation for offences or murder committed against a family member. In a 2011 decision, the applicant was considered excluded from refugee status on the basis of having killed a nephew as revenge for rape committed against his sister. However, the applicant could not be forcibly returned to Afghanistan, based on Section 32 a and 31 (non-refoulement), as he would risk persecution as defined in Section 7 stk. 2.⁴⁶⁴

In a 2011 decision, RAB considered a case where the applicant had fired several shots with a Kalashnikov against Taliban fighters in the immediate aftermath of an incident where his brother and a Taliban fighter had killed each other. The applicant suffered a gunshot himself from having been fired at by Taliban fighters. The applicant had killed several Taliban with his Kalashnikov during this incident. RAB considered that the applicant fulfilled the requirements of protection under Section 7 stk. 2, and furthermore that the acts of the applicant did not amount to exclusion under article 1 F b (the facts of the case did not involve a nexus to an armed conflict, despite the involvement of a Taliban fighter in the incident).⁴⁶⁵

In a 2010 decision regarding a Libyan applicant who had worked for a government security agency, participation in the arrest of an opponent of the regime in 2002 and subsequently providing reports regarding two or three other opponents as well as five students who were later apprehended, led to exclusion under article 1 F b.

4.3.4.3 Article 1 F c

Article 1 F c is seldom applied in Danish practice.⁴⁶⁶ Cases based on this provision have not been described in the annual reports of 2006-2011.⁴⁶⁷

4.3.4.4 Standard and burden of proof

According to section 40 of the Danish immigration act, the applicant has the obligation to provide information relevant for the determination of the case. The standard of proof in exclusion cases is that which follows directly from article 1 F, to which Section 10 stk.1 no. 3 provides reference ("serious reasons to believe"). As in Norwegian practice, both the IS and the RAB are free in their assessment of the evidence.⁴⁶⁸

As is often the case in Norwegian practice, in several cases RAB affords a larger amount of weight to the original statement of the applicant regarding the acts which lead to exclusion

⁴⁶³ *ibid*, p 274

⁴⁶⁴ *ibid* p 277, reference is made to three similar cases including Afg/2011/107, Afg/2011/55 and Libyen/2011/1

⁴⁶⁵ *ibid* p. 276, Afg/2011/108

⁴⁶⁶ Einarsen, Vevstad, Skaar p. 27

⁴⁶⁷ Flyktningenævnet, Beretninger 2006-2011

⁴⁶⁸ Flyktningenævnet, Beretning 2011 p 106-107

compared to a subsequent statement provided after the applicant gained knowledge of the exclusion case.⁴⁶⁹

In a 2009 decision regarding an applicant from Iran who according to his own statement to both IS and SAIS had participated in killing 17-18 members of the revolutionary guard in 1981, SAIS considered that the statement of the applicant was not sufficient for criminal prosecution. RAB considered that the fact that SAIS did not initiate criminal prosecution against the applicant due to insufficient evidence in a criminal law context did not imply that the applicant was not still covered by article 1 F.

4.3.4.5 Modes of individual responsibility

As in Norway, most cases in Denmark are based on accomplice liability.⁴⁷⁰

In decisions rendered in 2003, both IS and RAB relied on the report from the Dutch Ministry of Foreign Affairs of 29. February 2000 in assessing that an Afghan applicant who had worked within the KhAD organization should be excluded under article 1 F a.⁴⁷¹ Subsequent investigation by the police did not conclude in an indictment, and following a request from the applicant the exclusion case was considered anew in 2008. Based on a June 2005 report by the UNHCR, RAB concluded that it was not possible to conclude that any officer within KhAD had been involved in or held knowledge of the serious human rights violations that undoubtedly took place within the organization. Thus, Dutch practice based on the 2000 report by the Dutch Ministry of foreign affairs was not followed. However, because the applicant had stated in the interview that he knew that some individuals who were sent to the interrogation unit would be tortured he was excluded under article 1 F a.⁴⁷²

4.3.4.6 Cases involving children or minimum age of criminal responsibility

In describing applicable law relating to exclusion on the basis of acts committed by children, RAB refers to the UNHCR Guidelines on Child Asylum Claims of 2009.⁴⁷³ The Guideline states that exclusion should be applied with great care in cases relating to children, and in some cases exclusion shall not be considered at all. RAB explicitly refers to the elements listed in Section 64 of the Guideline:

- *mens rea*
- duress, force
- balancing test

The criminal age of minority in Denmark is 15 years. This threshold is applied both in cases considered under Section 10 stk. 1 and Section 10 stk. 2.

Examples provided in the 2011 report include a 2011 decision regarding an Afghan minor

⁴⁶⁹ Flyktingenævnet, Beretning 2011 p 340, Libya 2011/ 1

⁴⁷⁰ This follows from cases described in the 2006-2011 Beretning of RAB, and was also a finding in the 2006 report of Einarsen, Vevstad and Skaar p. 36

⁴⁷¹ Beretning 2010 p 238

⁴⁷² Ibid p 239

⁴⁷³ UNHCR's Guidelines on International Protection: Child Asylum Claims under Articles 1 (A) 2 and 1 (F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees af 22. december 2009

asylum seeker who was considered protected by Section 7 stk. 2 (B-status). At the age of 13 he had killed his uncle as a means of stopping the latter from raping his mother. RAB referred to the Danish age of criminal minority (15 years) as well as the UNHCR Guidelines on Child Asylum Claims, and concluded that Section 10 stk 2 no. 2 did not apply to the applicant. He was afforded B-status and a residence permit.

4.3.4.7 Co-operation with stakeholders

The Danish Special International Crimes Office (SICO) was established in June 2002, and is responsible for “investigating and – if possible – prosecuting serious crimes committed abroad by persons now residing in Denmark. Serious crimes include war crimes, genocide, crimes against humanity, terrorism and torture”.⁴⁷⁴

The Danish Aliens Act Section 45 c stipulates that the immigration authorities may, without the consent of the applicant, present information to Danish prosecutors in order to assess whether charges should be presented for crimes committed in or outside Danish territory.

Where an applicant has been reported to SICO, the facts of the case may lead to exclusion under Section 10 stk. 1 no. 3. In such instances, the prohibition on refoulement (ECHR article 3) implemented in the Aliens Act Section 31 will often be at hinder for forcible return, and the applicant is referred to so called “accepted residency” (“tålt ophold”).⁴⁷⁵

Following investigation by SICO, the authority which reported the case receives information as to the outcome of the investigation. Being the Body which last considered the case, RAB considers whether the outcome of the investigation gives rise to a reconsideration of the asylum or immigration claim.⁴⁷⁶

⁴⁷⁴ <http://www.sico.ankl.dk/page22.aspx>

⁴⁷⁵ Flyktningnævnet, Beretning 2011, p 287

⁴⁷⁶ *ibid*

4.4 The Netherlands

In 1997, the Dutch State Secretary for Justice introduced the currently applicable policy on exclusion, indicating a restrictive but optimal application of article 1 F including the classification of excluded individuals as “unwanted” and increased focus on criminal prosecution.⁴⁷⁷

The policy of the Dutch immigration authorities is to ensure that the Netherlands does not become a “safe haven” for perpetrators of crimes included in article 1 F, and a European context, Dutch immigration authorities have applied article 1 F consistently over a relatively long period. According to a 2008 survey, the Netherlands was at the time considered to have a more pro-active approach to exclusion than other EU states.⁴⁷⁸ The same survey indicated that the Netherlands was among those most active at prosecution of article 1 F crimes (war crimes, crimes against humanity and genocide in particular).⁴⁷⁹

4.4.1 Structure and proceedings of the immigration authorities

The administrative body which considers exclusion cases in the Netherlands is the Immigration and Naturalisation Service (IND)⁴⁸⁰. There is no administrative appeals body, but applicants can appeal rejections to District Courts⁴⁸¹ and further to the Administrative Jurisdiction Division of the Council of State.⁴⁸²

Exclusion is considered before inclusion in the Netherlands. This approach has been approved numerous times by the Dutch Department of Administrative law of the Council of State.⁴⁸³

Exclusion procedures are embedded in the early stages of the process, through consideration by a designated and specialized exclusion unit.⁴⁸⁴

4.4.2 General Statistics

According to Eurostat figures, the total number of asylum applicants in the Netherlands in 2010 was 15 100.⁴⁸⁵ In 2011 the number was 14 600.⁴⁸⁶ In 2010, the five main citizenships of non-EU asylum applicants in the Netherlands were

- i. Somalia (3670)

⁴⁷⁷ Dutch reference provided by Deciana Speckmann, Balancing Exclusion, Prosecution and Non-Refoulement: The application of Article 1 F of the Refugee Convention in the Netherlands as a Model of Contemporary Practice, ANU Centre for European Studies Briefing Paper Series Vol. 2, No 1 (January 2011), p 6

⁴⁷⁸ Adviescommissie vor Vreemdelingenzaken (ACVZ), Artichel 1 F Vluchtelingenverdrag in het Nederlandse vreemdelingenbeleid (2008), 19, english summary available at <http://www.acvz.org>

⁴⁷⁹ Ibid, p 19

⁴⁸⁰ «Immigratie en Naturalisatiedienst»

⁴⁸¹ «Rechtbank»

⁴⁸² «Afdeling Bestuursrechtspraak, Raad van State»

⁴⁸³ Speckmann p 9

⁴⁸⁴ Speckmann p 9

⁴⁸⁵ Asylum applicants and first instance decisions on asylum applications in 2010 - Issue number 5/2011,

http://epp.eurostat.ec.europa.eu/portal/page/portal/product_details/publication?p_product_cod e=KS-QA-11-005 Last accessed 4.1.2013

⁴⁸⁶ [http://epp.eurostat.ec.europa.eu/statistics_explained/index.php?title=File:Number_of_\(non-EU-27\)_asylum_applicants_in_the_EU_and_EFTA_Member_States_and_their_age_distribution,_2011.png&filetimestamp=20121012123334](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php?title=File:Number_of_(non-EU-27)_asylum_applicants_in_the_EU_and_EFTA_Member_States_and_their_age_distribution,_2011.png&filetimestamp=20121012123334) Last accessed 4.1.2013

- ii. Iraq (1905)
- iii. Afghanistan (1585)
- iv. Iran (865)
- v. Armenia (650)⁴⁸⁷

In 2011, the five main citizenships of non-EU asylum applicants in the Netherlands were

- i. Afghanistan (2395)
- ii. Iraq (2005)
- iii. Somalia (1985)
- iv. Iran (1180)
- v. Unknown (735)⁴⁸⁸

Between 1998 and 2008, approximately 700 persons were excluded in the Netherlands. About 350 of these were still in the Netherlands, including 250 residing illegally. Among those residing illegally, approximately 40 were excluded individuals who were protected against refoulement according to ECHR article 3. Among the 350 individuals who were assumed to have left the Netherlands, 120 left under supervision while 230 had no registered address in the country.⁴⁸⁹

With regards to the nationalities of excluded persons present in the Netherlands, approximately 170 of 250 were reported to be of Afghan nationality. Other common nationalities were Iraq, Angola, Iran, Bosnia and Azerbaijan.⁴⁹⁰

4.4.3 Applicable law and practice

Within Dutch law, the Vreemdelingenwet (Vw), Vreemdelingenbesluit (Vb) and Vreemdelingencirculaire (Vc) implement the Refugee convention and outline the refugee policies. The basis of exclusion from refugee status is found in Vw articles 16 (1)(d) and 32(2)(k) stipulating that no residence permit is granted to an asylum seeker who is classified as a danger to the public order. Following Vb article 3.77(1(a)) refugee status may be denied on the basis of this provision in cases where article 1 F of the 1951 Convention applies.⁴⁹¹ Applicants who are excluded are not entitled to other forms of residence permits in the Netherlands (Vb article 3.107 and 3.77), and an “unwanted declaration” is automatically applied (Vw article 67.1). The excluded person must leave the Netherlands, and illegal presence is considered a crime under the Dutch criminal law.⁴⁹² Exclusion is considered before inclusion.⁴⁹³

⁴⁸⁷ Asylum applicants and first instance decisions on asylum applications in 2010 - Issue number 5/2011, http://epp.eurostat.ec.europa.eu/portal/page/portal/product_details/publication?p_product_code=KS-QA-11-005 Last accessed 4.1.2013

⁴⁸⁸ http://epp.eurostat.ec.europa.eu/statistics_explained/images/7/75/Five_main_citizenships_of_%28non-EU-27%29_asylum_applicants%2C_2011_%28number%2C_rounded_figures%29.png Last accessed 4.1.2013

⁴⁸⁹ See Appendix 1 in Speckmann

⁴⁹⁰ ibid

⁴⁹¹ Speckmann p. 6

⁴⁹² Wetboek van Strafrecht, art 197

⁴⁹³ Deciana Speckmann, Balancing Exclusion, Prosecution and Non-Refoulement: The application of Article 1 F of the Refugee Convention in the Netherlands as a Model of Contemporary Practice, ANU Centre for European Studies Briefing Paper Series Vol. 2, No 1 (January 2011), p 1

In Dutch practice, exclusion is decided also in cases where the individual has served a sentence for the crime in question.⁴⁹⁴

No balancing test is applied in Dutch practice.⁴⁹⁵

4.4.3.1 Article 1 F a

Acts of non-state actors committed in internal armed conflicts are considered under article 1 F a. One example was a case regarding violent acts committed by the PKK, which was considered by the Council of State, where acts of terror falling within article 13 (2) of AP II were considered as war crimes.⁴⁹⁶ Another example is a case in which a member of a Maoist group was excluded on the basis of participation in ill treatment of a civilian village leader. The context was considered to be an internal armed conflict, and the act was a war crime given that the victim was a civilian.⁴⁹⁷ Based on a 2005 decision, exclusion on the basis of war crimes can be decided for crimes committed before the entry into force of the ICC Statute.⁴⁹⁸

The consideration of crimes against humanity, both regarding the chapeau requirement and the nature of underlying crimes, is based on and in line with recognized international criminal law, including ICTR and ICTY decisions of Akayesu and Tadic.⁴⁹⁹

4.4.3.2 Article 1 F b

According to the Aliens Manual, article 1 F b applies to “persons who are not worthy of protection because of the seriousness of the crime committed and the impact of the consequences of such acts”.⁵⁰⁰

The political exception only applies where

- “- there is a direct connection between the crime and the political purpose;
- the crime is an effective means to accomplish the political purpose;
- there was no peaceful means available;
- there is reasonable connection between the crime and the political purpose”⁵⁰¹

The manual also states that certain crimes by definition are non-political, including murder, terrorist activities, article 1 F a crimes, rape, torture including female genital mutilation, slavery and trafficking.⁵⁰²

Based on these parameters, exclusion under article 1 F b was not accepted for a member of the Al Da’wa political party in Iraq under the Baath regime, who gathered information about members of Mukhbarat and the Baath party that resulted in the attacks on two men who

⁴⁹⁴ Speckmann p. 9

⁴⁹⁵ Speckmann p 9

⁴⁹⁶ AbRS 23 July 2004, nr, 200401181/1 and 200402651/1 as referred by Rijkhof 2012 p 170

⁴⁹⁷ Rb, The Hague, Awb 02/93493, 28 October 2004, as referred by Rijkhof 2012 p 170

⁴⁹⁸ ABVRS nr 200408765/1, JV, 18 April 2005

⁴⁹⁹ Rijkhof 2012 p 171, Presentation by Peter ten Hove December 2012

⁵⁰⁰ Rijkhof 2012, p 329

⁵⁰¹ Rijkhof 2012 p 329

⁵⁰² ibid

were killed.⁵⁰³ A direct connection between the crime and the political purpose was considered present, and the means was considered effective for accomplishing the political objective (providing information about the members). Alternative options were not considered to have been available for the applicant. In other cases regarding the activities of members of a Maoist group in Nepal and the Dev Sol organization, exclusion was decided because there were other peaceful means available for the applicant.⁵⁰⁴ In Dutch practice, article 1 F may be invoked where the applicant has served a sentence for the crime in question.⁵⁰⁵

4.4.3.3 Article 1 F c

This provision is seldom in use in the Netherlands.⁵⁰⁶ According to the Aliens Manual, acts contrary to the purposes and principles are those designated as such by the UNSC, UNGA or the International Court of Justice, as well as crimes under international law which are subject to universal jurisdiction (war crimes etc.).⁵⁰⁷ Article 1 F c is only applicable to state or non-state actors at a high level who were responsible for the 1 F c activities and who based on their background were aware of the purposes and principles of the UN.

4.4.3.4 Standard and burden of proof

The standard of proof for exclusion cases in the Netherlands falls below the criminal law standard of proof but above that of mere suspicion. Dutch practice has translated “serious reasons” into a requirement of “plausible evidence”.⁵⁰⁸

4.4.3.5 Modes of individual responsibility

According to the Vc, indirect individual responsibility requires knowledge and personal participation in the crime, i.e. the concept of “knowing participation” which stems from Canadian practice.⁵⁰⁹ Rikhof provides an English translation of both “knowing participation” and “personal participation” as it is defined in the manual:

Knowing participation:

- “a) the alien was employed in an organ or organization which according to influential reporting has committed in a systematic or widespread manner crimes set out in article 1 F during the time period of his employment unless the alien can show that there was a significant exception in his individual case;
- b) the alien was employed in an organization of which the Minister has determined that certain categories of persons belonging to that organization will be considered

⁵⁰³ Rb, The Hague, Awb 02/60920, 19 July 2004, as referred in Rikhof 2012 p 330

⁵⁰⁴ *ibid*

⁵⁰⁵ Dutch reference provided by Deciana Speckmann, *Balancing Exclusion, Prosecution and Non-Refoulement: The application of Article 1 F of the Refugee Convention in the Netherlands as a Model of Contemporary Practice*, ANU Centre for European Studies Briefing Paper Series Vol. 2, No 1 (January 2011) p 9

⁵⁰⁶ Rikhof 2012 p. 362

⁵⁰⁷ Rikhof 2012 p 362

⁵⁰⁸ ABVRS, 5 April 2007, nr 200609054/1

⁵⁰⁹ Rikhof 2012 p 233

to fall within article 1 F unless the alien can show that there was a significant exception in his individual case;
c) an alien has participated in activities, which he knew or should have known, were activities set out in article 1 F , without being associates with an organ or organization set out above.”

Personal participation:

“a) It is apparent that the alien has personally committed a crime as set out in article 1 F;
b) A crime as set out in article 1 F has been committed under the order or responsibility of the alien;
c) The alien has facilitated crimes as set out in article 1 F in the sense that his commission or omission has contributed substantially to the crime [substantially is later defined as “indicating that the contribution had a factual effect on the commission of the crime and which would likely not have taken place if nobody had fulfilled the role of the person concerned or if the person concerned had taken the opportunity to prevent the crime”];
d) The alien has belonged to a category of persons within an organization, of which the Minister has determined that certain categories of persons belonging to that organization will be considered to fall within article 1 F unless the alien can show that there was a significant exception in his individual case”.⁵¹⁰

The ministry of justice has designated several organizations as such that membership at a certain level leads to a rebuttable presumption of knowing and personal participation in the crime(s). Examples include members of the RUF (Sierra Leone 1998-2001), senior and general officers in Sarandoy (Afghanistan 1978-1992), Heads of intelligence services in Iraq (during the regime of Saddam Hussein), officers in KhAD/WAD (Afghanistan 1992-1996), certain categories belonging to Hezb-e Whadat (Afghanistan), senior officials in the Baath party (Iraq under Saddam Hussein).⁵¹¹

The presumption can be rebutted in instances where the applicant shows that there was a “significant exception to the policy applicable to the individual’s particular situation”.⁵¹²

According to Rikhof, the approach as seen in the Netherlands is unique in a comparative perspective as the legislator has set out in some detail the sphere of personal and knowing participation, along with the designation of certain members of certain organizations as excludable on a rebuttable presumption.⁵¹³

Examples of indirect individual responsibility in cases other than those based on a rebuttable presumption are:

- Handing persons over to organizations where torture takes place, knowing that torture would take place in that instance (including handing over to KhAD, Hezb-e Whadat security section, military commander in MP in Eritrea, Iraqi intelligence

⁵¹⁰ Rikhof 2012 p 233-234

⁵¹¹ Rikhof p. 235

⁵¹² Rikhof p 237

⁵¹³ Rikhof p 242

service under Baath, Mukhabarat in Iraq, Revolutionary Guard in Iran, KDPI in the Kurdish areas, handing over to a violent section within Fatha in Palestine).⁵¹⁴

- Providing information to organizations who are known to use torture and killings as well as couriers, with the result that those who were subject to the information came to harm
- Carrying out support functions such as interpretation / translation, providing target co-ordinates which resulted in war crimes, employment in the industrial complex of a regime such as that of Baath under Saddam Hussein.⁵¹⁵

The largest group of indirect responsibility involve those in which the applicant was not close enough to the crime in order to establish aiding and abetting, but where he or she held very senior positions in organizations who implemented policies of human rights violations in a country.⁵¹⁶

For individuals who held a position at a certain level in specific organizations, “Knowing and personal participation” can normally be presumed. According to the Aliens Circular 2000, “knowing and personal participation” can be presumed where the applicant has belonged to a category whom the Ministry of Justice, on the basis of a report by the Ministry of Foreign Affairs, has assigned. The applicant may rebut the presumption by proving a significant exception from this principle, e.g. that he acted under duress. However, attempts at rebutting a presumption of responsibility have seldom been successful.⁵¹⁷ Reference is at this point made to the 2003 Guidelines section 19. As for KhAD/WAD the policy is based on factual information provided in a report from the Ministry of Foreign Affairs dated 29th February 2000 which stated that it would be impossible to work as an officer within the organization without holding knowledge of the systematic human rights violations which took place”. The Administrative Law Division of the Council of State has rendered several judgments where it is held that the State may rely on the accuracy of the MFA country report.

The following cumulative conditions may lead to a conclusion on the presence of a “significant exception” from the presumption of responsibility:

1. The applicant quit as an officer in KhAD/WAD
2. The applicant did not rotate within the organization
3. The applicant did not advance within the organization⁵¹⁸

In a letter dated 14. November 2007, the UNHCR criticized the Dutch approach regarding former officers of KhAD/WAD. Furthermore, in May 2008 the UNHCR issued a note on the structure and operations of the KhAD/WAD in Afghanistan from 1987 until 1992, where it criticized the report from the Dutch MFA as not being based on clear and documented sources.

4.4.3.6 Cases involving children

⁵¹⁴ Ibid p 238

⁵¹⁵ Rikhof 2012

⁵¹⁶ Ibid p 240

⁵¹⁷ Speckmann

⁵¹⁸ Ibid (2)

The Aliens Manual establishes that exclusion should not be considered for children under the age of 15.⁵¹⁹ For older children (15-18 years), several circumstances must be taken into consideration, including

- Age at the moment of entering into the organization (joining before 15 is considered in a more positive manner than joining later)
- Whether he/she entered the organization voluntarily or forcibly
- The consequences of refusing to join
- Elements which may affected the free will of the child
- The duration of the engagement as a child soldier
- The possibilities of leaving the organization
- Use of drugs or medication
- Promotions for “good work”.

4.4.3.7 Defenses

The defenses of superior orders, duress and self-defense are to a certain extent described in the Aliens Manual. In case law, the defense of superior orders is considered usually not to be available, and in particular not in cases where the applicant made career in the organization in question. The defense of duress was not accepted where the individual could have left the organization safely at an earlier point, or where he occupied a senior position where he was unlikely to be threatened. On the other hand, the defense of duress was accepted for a member of the Garde Civil in the Democratic Republic of the Congo who was not considered to be in a position to refuse enter into the organization, as members of his family had been mistreated at an earlier instance of trying to leave.⁵²⁰

4.4.3.8 Consequences of exclusion

In the post exclusion phase, the Dutch procedures intend at prosecuting or extraditing individuals (in line with the principle *aut dedere aut judicare*), although prosecution is challenging due to lacking access to evidence and extradition often barred by ECHR article 3.⁵²¹

Following a policy introduced in 1997 with the objective of increasing the pressure on individuals having committed article 1 F crimes,⁵²² applicants who are excluded from refugee status are barred from obtaining other forms of residence permits,⁵²³ and living subsidies are suspended. A so-called “unwanted” declaration is automatically applied when exclusion has been decided, in order to serve as an additional incentive for the alien to leave the country (Vw article 67.1). The applicant may incur criminal responsibility for continuing to reside in the Netherlands without holding a residence permit.⁵²⁴ In cases where the prohibition on refolement contained in ECHR article 3 applies, the obligation to voluntarily leave the Netherlands persists although the applicant may not be forcibly removed.

⁵¹⁹ Ibid p 291

⁵²⁰ Rijkhof 2012 p 282

⁵²¹ ibid

⁵²² Brief staatssecretaris met beleidsnotitie inzake toepassing van artikel 1 F van het

Vluchtelingenverdrag 1951, Doc 19637, nr 295, 17 December 1997, reference provided by Speckmann

⁵²³ Ibid (2)

⁵²⁴ Ibid (2)

Unwanted declarations are issued also where ECHR article 3 applies. Application of article 3 thus only implies a prohibition on forcible removal.⁵²⁵

Practice has shown that a number of applicants to whom article 1 F is applied are difficult to remove from the Netherlands due to ECHR article 3.⁵²⁶ This leads to prolonged illegal stays in the country, also for the family members of those excluded, in cases where refugee status is not granted to them on an individual basis. The 2008 note states that although the alien may not be expected to return to his country of origin in cases where ECHR article 3 applies, he can be expected to leave for another country where he is admitted in order to fulfill the obligation to leave the country.⁵²⁷

In recent years, public debate in the Netherlands have questioned whether the IND apply article 1 F too often, resulting in foreign citizens not being able to work or settle into Dutch society because they have been excluded. This debate arose in particular due to the exclusion of members of the foreign afghan security services KhAD/WAD, where members at a certain level of the organization and higher were excluded.⁵²⁸

Country reports from the Ministry of Foreign Affairs may give rise to reassessment as to whether the alien is still protected by ECHR article 3.

4.4.3.9 Co-operation among stakeholders

In 2008, a total of five article 1 F cases had been processed through the criminal law system to the degree that the cases had been forwarded to Dutch courts with requests for pre-trial detention, summons or judicial investigations.⁵²⁹ The cases included a Congolese army colonel who was convicted to 2,5 years in prison for committing torture as a war crime (2004), a former general of the KhAD/WAD who was convicted to 12 years in prison for committing torture as a war crime (2005) and a former head of department of interrogation of KhAD/WAD convicted to 9 years in prison for committing torture as a war crime (2005).⁵³⁰ Exclusion cases did also lead to extraditions to the ICTR and other countries.⁵³¹

The Dutch International Crimes Act applies to crimes committed after its entry into force on 1 October 2003. However, for offences committed before this, ... The process of gathering evidence in international criminal cases is described as challenging and time consuming. The IND and the police have a common protocol on information exchange. Following conclusion on application of article 1 F, the file is automatically sent to the National Police Agency within the police.⁵³²

⁵²⁵ Ibid (2)

⁵²⁶ Ibid (2)

⁵²⁷ Ibid (2)

⁵²⁸ Speckmann

⁵²⁹ ibid

⁵³⁰ Speckmann p 20

⁵³¹ Ibid

⁵³² Ibid (2)

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ANNEX 1

Statutes of the international criminal court (ICC), articles 6-8

Article 6 Genocide

For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Article 7 Crimes against humanity

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

(a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

(b) "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

Article 8 War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, "war crimes" means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- (i) Wilful killing;
 - (ii) Torture or inhuman treatment, including biological experiments;
 - (iii) Wilfully causing great suffering, or serious injury to body or health;
 - (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
 - (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
 - (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
 - (vii) Unlawful deportation or transfer or unlawful confinement;
 - (viii) Taking of hostages.
- (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
 - (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
 - (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
 - (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
 - (vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
 - (vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
 - (viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
 - (ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

- (x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
- (xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;
- (xii) Declaring that no quarter will be given;
- (xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
- (xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
- (xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
- (xvi) Pillaging a town or place, even when taken by assault;
- (xvii) Employing poison or poisoned weapons;
- (xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- (xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
- (xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;
- (xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- (xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
- (xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
- (xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
- (xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(iii) Taking of hostages;

(iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

(d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(v) Pillaging a town or place, even when taken by assault;

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(ix) Killing or wounding treacherously a combatant adversary;

(x) Declaring that no quarter will be given;

(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.[^]

3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.