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COUNCIL OF EUROPE

COMMITTEE OF MINISTERS

Recommendation Rec(2005)6

of the Committee of Ministers to member states

on exclusion from refugee status in the context of Article 1 F

of the Convention relating to the Status of Refugees of 28 July 1951

(Adopted by the Committee of Ministers on 23 March 2005
at the 920th meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Stressing the need for humane treatment of asylum-seekers by member states of the Council of Europe, in conformity with relevant international instruments dealing with human rights;

Recalling the liberal and humanitarian attitude of the member states of the Council of Europe with regard to asylum-seekers, and bearing in mind the importance of preserving the integrity of the asylum system established by the Geneva Convention of 28 July 1951 and its 1967 Protocol relating to the Status of Refugees (hereinafter "the 1951 Convention");

Anxious to provide refugees with adequate international protection and to exclude from such protection those persons who have perpetrated acts of such gravity that they do not deserve this protection;

Believing that a scrupulous and appropriate application of the exclusion clauses contained in Article 1.F of the 1951 Convention would lead to such a result;

Recalling the absolute nature of the rights protected under Article 3 of the European Convention on Human Rights;

Having in mind that exclusion from refugee status is a different issue than removal of foreigners, in the sense that exclusion does not automatically lead to the removal of a foreigner from the asylum country;

Considering that Article 1.F of the 1951 Convention provides that:

"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",

Recommends that member states take into account the following principles while applying Article 1.F of the 1951 Convention:

1. With regard to the interpretation of Article 1.F:

a. as an exception to the refugee protection regime provided by the 1951 Convention, whose application can have very serious consequences for a person in fear of persecution, the exclusion clauses contained in Article 1.F should be interpreted restrictively;

b. the words "serious reasons for considering" in the heading of Article 1.F refer to the standard of proof required. Exclusion does not require a determination of guilt in the criminal sense. However, clear and credible information is required to satisfy the "serious reasons" standard;

c. in interpreting "crimes against peace, war crimes and crimes against humanity" in Article 1.F.a, due consideration should be given to the developments in international law that have taken place since the drafting of the 1951 Convention;

d. with respect to Article 1.F.b, a crime should be considered "non-political" if it was committed for personal reasons or gain rather than for political reasons, if there is no clear link between the crime and the political goal pursued or if the act was disproportionate to the political objective. Egregious acts of violence, including for example acts that involve random killing and other physical assaults carried out indiscriminately on the population, should also be considered to be non-political. For a crime to be regarded as political in nature, the political objectives should be consistent with human rights principles. International anti-terrorism instruments adopted within the framework of the United Nations and the Council of Europe which specify certain crimes as non-political should provide guidance for determining the political element of a crime;

e. while examining the "seriousness" of a non-political crime in the context of Article 1.F.b the nature of the crime and the harm inflicted are relevant factors. Other relevant factors could be whether most jurisdictions of the member states of the Council of Europe would consider the act in question as a serious crime, the form of procedure used to prosecute the crime, and the severity of punishment in case of a conviction;

f. Article 1.F.c relates to the purposes and principles of the United Nations as contained in Articles 1 and 2 of the United Nations Charter. It is primarily aimed at persons who have been in a position of power;

g. exclusion from refugee status can only be decided on the basis of individual responsibility. The degree of involvement of a person who is linked by virtue of his or her position, action or inaction, to particular parties and entities who commit crimes or advocate violence must be subject to careful analysis. Consideration must be given to grounds for the exemption from individual responsibility, such as psychological or factual circumstances under which the acts were committed;

2. With regard to procedural aspects in relation with Article 1.F:

a. traditional procedural safeguards especially those concerning asylum procedures apply for the application of exclusion clauses;

b. the applicability of the exclusion clauses should be dealt with individually within the regular refugee status determination procedure;

3. With regard to particular issues in connection with the exclusion clauses:

a. where a family member is excluded from refugee status, dependants' and other family members' possible qualification for refugee status would need to be considered on an individual basis. Where family members have been granted refugee status, the excluded applicant cannot be recognised as a refugee by application of the principle of family unity;

b. in cases involving the possible exclusion of minors from refugee status, primary consideration needs to be given to the best interests of the child. Exclusion clauses should normally only apply to minors who, at the time of committing a crime, have reached the age of criminal responsibility within the

country of asylum and who possess the mental capacity and maturity to be held responsible for the act committed. Other possible extenuating circumstances need to be carefully assessed.

Explanatory memorandum

Introduction

In the aftermath of the terrorist attacks of 11 September 2001, security considerations in different policy areas, including in the field of refugee protection, have received heightened attention at the international level¹. At the same time, concerns were expressed that unduly restrictive measures in response to security threats would undermine the right to seek asylum.²

In this context the CAHAR decided at its 53rd plenary meeting to entrust a working party with the task of preparing a draft recommendation that would address these security considerations in the context of the existing framework foreseen by Article 1 F of the 1951 Convention to exclude from refugee status those responsible for serious crimes.

Subsequently, the CAHAR, whose task is, according to its terms of reference, *inter alia* "to make proposals for the solution of practical and legal problems facing states in the field of territorial asylum, refugees and stateless persons, particularly by drawing up appropriate legal instruments (conventions and recommendations) in the liberal and humanitarian spirit of the member states of the Council of Europe ..." decided at its 55th meeting to forward this draft recommendation for adoption by the Committee of Ministers. The Committee of Ministers adopted it on 23 March 2005 at the 920th meeting of the Ministers' Deputies.

General considerations

The aim of this recommendation is to provide member states of the Council of Europe with a common approach to the exclusion clauses contained in Article 1 F of the 1951 Convention that would aim at ensuring that those who have committed serious crimes be prevented from enjoying the benefits of refugee status while, at the same time, establishing certain guarantees for persons whose asylum request is examined by the authorities of the member states with regard to a possible exclusion ground.

In preparing the current recommendation, the CAHAR referred to the UNHCR Guidelines on "Application of the Exclusion Clauses: Article 1 F of the 1951 Convention relating to the Status of Refugees" (HCR/GIP/03/05) as a source of inspiration.

Comments on the principles set out in the Recommendation

Preamble:

The preamble reflects the idea that certain acts are so grave that their perpetrators do not deserve international refugee protection. It also conveys the fact that the existing international refugee law regime, through a proper application of Article 1 F, permits member states to exclude such persons from refugee status. Article 1 F also serves the purpose of preventing persons who have committed a serious crime from escaping justice. Moreover, Article 1 F may also be useful for member states as a means to protect themselves from the risk deriving from the presence of persons responsible for serious crimes on their territory.

The "scrupulous and appropriate application of the exclusion clauses contained in Article 1 F" referred to in the Preamble is without prejudice to the rights contained in other international instruments in the field of human rights, and in particular to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

In this context, a particular reference is made in the Preamble to Article 3 of the ECHR. This reference is meant to recall that individuals who have been excluded from the protection of the 1951 Convention are still entitled to be treated in a manner compatible with this Article. Article 3 of the ECHR states that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment". In accordance

with the absolute nature of the rights protected by Article 3, these rights cannot be subjected to any exception, limitation on the ground of public interest nor to any derogation, even in time of war or of other public emergency. Consequently, an individual who has been excluded from the protection of the 1951 Convention will nonetheless always remain protected against removal to a country where he is at risk of ill-treatment within the terms of Article 3.

1. Interpretation of Article 1 F of the 1951 Convention

Paragraph a.:

A first and direct consequence of the application of an exclusion clause to an individual is that such individual will not be recognised as a refugee. He/she may also face an increasing risk of removal.

Paragraph b.:

The "serious reasons for considering" standard is lower than "beyond reasonable doubt", but higher than a balance of probabilities.

One of the most appropriate ways for national authorities to obtain "clear and credible information" that someone falls under the exclusion clauses is a proper recourse to reliable and relevant country of origin information. Indications that a person has committed an act that falls under Article 1 F (a) to 1 F (c) can be deduced from the information in the country of asylum or by an international tribunal, from credible confession by the asylum seekers or from former legitimate conviction or penal prosecution. On the contrary, no such indications could be deduced from information based on hearsay or mere suspicion.

Paragraph c.:

Developments referred to in this paragraph include but are not limited to the adoption of the following instruments:

1973 International Convention on the Suppression and Punishment of the Crime of Apartheid;

1973 Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity;

1977 Additional Protocol to the Geneva Convention of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts;

1984 Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment;

1985 Inter-American Convention to Prevent and Punish Torture;

1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment;

Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991;

The Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994;

1998 Rome Statute of the International Criminal Court.

It also refers to developments of customary international law and international criminal law.

There are also relevant non-binding sources which should be used for interpretation of Article 1 F (a), such as the 1950 Report of the International Law Commission to the UN General Assembly and the Draft Code of Crimes against the Peace and Security of Mankind, provisionally adopted by the International Law Commission in 1991.

Paragraph d.:

It should be recalled that there is no internationally accepted definition of what constitutes a non-political crime.

However, domestic courts in member states have identified elements that can be of assistance in qualifying what constitute a non-political crime.

In general for a crime to be regarded as political it is necessary that political reasons – and not other motives, such as personal reasons or gain – predominate. Also, the political character of the violent acts must be demonstrated in a way that shows that they were directly linked to the political aim and that they meet the requirement of proportionality between the political aim and the prejudice caused in that struggle.

International treaties, such as the 1977 European Convention on the Suppression of Terrorism, as modified by its Protocol approved by the Committee of Ministers on 13 February 2003, lists certain offences that should not be considered political crimes for the purpose of extradition. These offences should however not be classified automatically as non-political under Article 1 F (b).

Paragraph e.:

A "serious crime refers to a very grave punishable act, including but not limited to homicide, rape, hijacking and armed robbery. Crimes such as petty theft should not be reasons for exclusion under Article 1 F (b).

The notion of "form of procedure to prosecute the crime" that appears in this paragraph refers to the type of penal proceedings used in the context of prosecuting serious crimes, such as trial by jury.

Paragraph f.:

Article 1 F c is only triggered in extreme circumstances by activities which are capable of affecting peace, security and peaceful relations between states, as well as serious and sustained violations of human rights.

This exclusion clause aims avoiding that the following categories of asylum seekers be granted with the benefits of the 1951 Convention:

- policy-makers and those holding positions of political responsibility, in situations where, for example, violations of human rights or other activities contrary to the purposes and principles of the United Nations have occurred, and where they may be considered to have covered such activities with their authority;
- the agents of implementation of such policies, including, for example, officials in government departments or agencies who knew or ought to have known that principles of the United Nations had been violated.

The fact that the Charter of the United Nations addresses itself to States suggests that references to "acts contrary to purposes and principles of the United Nations" imply a state-like or quasi-state

capacity. This clause was not primarily aimed at the “man in the street”.

Paragraph g.:

The requirement of individual responsibility signifies that no group can, as such, be excluded from refugee status. It requires a clear nexus between the applicant and the excludable crime.

Regarding the “degree of involvement” of a person in committing certain acts, one should recall that, as a general rule under international criminal law on individual responsibility, such responsibility arises when an individual committed, or made a substantial contribution to a criminal act, in the knowledge that his act or her act or omission would facilitate the criminal conduct. The rules of international criminal law on individual responsibility should also be used as guidelines with respect to criminal “participation”. In this regard, criminal acts may also include ordering, instigating, commissioning, aiding or abetting a crime.

In principle, membership of a group that advocates or practices violence is not necessarily sufficient to exclude a person from refugee status. It needs to be considered whether this person had close or direct responsibility for, or was actively associated with, the crimes in question. However, a presumption of responsibility may arise in certain cases of voluntary membership in a group that uses methods which are of particularly violent nature or of voluntary membership in a government clearly engaged in activities that fall within the scope of Article 1 F. In such cases, the burden of proof which normally lies with the State that wishes to exclude under Article 1 F, may shift to the asylum seeker. The presumption of excludability that would arise accordingly is a rebuttable presumption.

Defences referred to in this paragraph may include those of self-defence or duress. Factors which may serve to mitigate individual responsibility, such as the grant of pardon or amnesty, lapse of time, or having served a criminal sentence, should be considered.

2. Procedural aspects

Paragraph a.:

Reference in this paragraph to « traditional procedural safeguards » covers safeguards such as:

- access to legal counsel and to an interpreter in accordance with relevant national legislation;
- respect of the principle of benefit of the doubt;
- reasons for exclusion to be given in writing;
- opportunity given to the applicant to rebut or refute any accusation brought against him in the context of Article 1 F (as an exception to this rule, where national security is concerned and sensitive evidence cannot be disclosed to the applicant, mechanisms to ensure procedural fairness and due process should be introduced);
- right to appeal an exclusion decision to an independent and impartial body.

Paragraph b.:

Institutions responsible for refugee status determination should not consider exclusion cases on an expedited basis. Given the grave consequences that the application of the exclusion clauses might have on the situation of an individual and the complexity of factual and legal issues attached to cases of exclusion, determination of excludability should take place within a regular refugee status determination procedure.

States may consider establishing specialized units for dealing with exclusion cases within the institution responsible for refugee status determination. In any event, the staff in charge of refugee status determination should have specific knowledge of relevant principles and standards of international law in order to implement Article 1 F of the 1951 Convention.

3. Particular issues

Paragraph a.:

Paragraph 3 a. is concerned with the principle of “family unity” from the perspective of the family members of an excluded person and from the perspective of the excluded person himself. Family members of an excluded person have the right to establish their own case even in situations where their claims are based on fear of persecution because of their family links with the excluded person. An excluded applicant can not benefit from the protection - or the assistance - as a refugee on the basis of the principle of family unity.

Paragraph b.:

The first sentence of this paragraph is inspired by Article 3 of the 1989 UN Convention on the Rights of the Child according to which: “in all actions concerning children, whether undertaken by public or private welfare institutions, courts of law, administrative authorities or legislative bodies the best interest of the child shall be a primary consideration.”

In countries of asylum where a minimum age has been established below which children shall be presumed not to have the capacity to infringe penal law, a child below this age cannot be considered by the state concerned as having committed an excludable crime. If the age of criminal responsibility is higher in the country of origin, this should also be taken into account in the child’s favour.

When a child is above the age of criminal responsibility, it is necessary to evaluate the child’s maturity in order to establish whether he/she possessed the mental capacity to commit the crime in question. In cases where mental capacity is established, a careful examination of all relevant factors surrounding the reasons why and the circumstances in which the child committed or became involved in the criminal act, including an assessment of possible defences (duress, superior orders, self-defence) and their application to children, is required.

As with all asylum procedures involving children, specially qualified and trained staff should as far as possible handle cases where questions of possible exclusion arise with respect to minors. Appropriate knowledge of the psychological, emotional and physical development and behaviour of children is essential in view of the complexities involved.

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Note¹ See, for instance, Security Council resolutions SCR 1373 of 28 September 2001 and SCR 1377 of 12 November 2001. See also the Declaration of 12 September 2001 of the Council of Europe’s Committee of Ministers and its Decision of 21 September 2001 on the Fight against International Terrorism; Guideline XII of the Guidelines on human rights and the fight against terrorism, adopted by the Committee of Ministers on 11 July 2002 at the 804th meeting of the Ministers’Deputies.

Note² Council of Europe Parliamentary Assembly Resolution 1258 (2001), “Democracies facing terrorism”, in particular paragraph 13. See also Joint Statement by Mary Robinson, UN High Commissioner for Human Rights, Walter Schwimmer, Secretary General of the Council of Europe, and Ambassador Gerard Stoudmann, Director of the OSCE Office for Democratic Institutions and Human Rights of 29 November 2001 on “Human Rights and Terrorism”.