

# **NON-APPLICATION OF THE CONVENTION**

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# **CESSATION – EXCLUSION – PROTECTION ELSEWHERE**

**Presentation**

**by**

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# Non-application of the Convention

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graph TD; A[Non-application of the Convention] --> B[Cessation clauses]; A --> C[Exclusion clauses]; A --> D[Protection by others];
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Cessation clauses

Exclusion clauses

Protection by others

# Cessation clauses

Voluntary  
act of the  
refugee

Changed/ceased  
circumstances

Re-availment  
of  
protection  
1 § C (1)

Re-  
establishment  
in country of  
origin  
1 § C (4)

Re-  
acquisition  
of (old)  
nationality  
1 § C (2)

Acquisition of  
new nationality  
1 § C (3)

# CESSATION CLAUSES

- Re-availment of protection 1 § C (1)
- Voluntary and intentional
  - Passport
  - Registering with authorities of the country left (acquiring documents through diplomatic missions)
- Re-establishment in country of origin 1 § C (4)
- Voluntary and intentional
  - Length of stay (short visit : not)
  - Information on circumstances
- Voluntary re-acquisition of (old) nationality 1 § C (2)
  - What if state (re)-extends, but refugee does not want?
- Acquisition of new nationality 1 § C (3)
  - Where? – state of asylum or resettlement – clear
    - successor state of persecuting state extending -???

## CESSATION - CHANGED CIRCUMSTANCES - CLAUSE

### GC 1 § C (5)

- He can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality
- Provided that this paragraph shall not apply to a refugee falling under section A (1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality

## CHANGED CIRCUMSTANCE CLAUSE ASSESSMENT OF THE CHANGE

Executive Committee Conclusion No. 69 (XLIII)  
(1992),

- [I]n taking any decision ... States must carefully assess the fundamental character of the changes ... including the **general human rights situation**, as well as the **particular cause of fear** of persecution...an essential element in such assessment by States is the **fundamental, stable and durable character of the changes**,

## CHANGED CIRCUMSTANCE CLAUSE ASSESSMENT OF THE CHANGE

- **Fundamental**
  - „complete political change”, genuine end of hostilities = elimination of root causes
- **Enduring**
  - longer observation before return (*Vilvarajah!*); 12-18 months
  - real peace, reconciliation starting
- **Protection restored**
  - more than mere physical security or safety. Existence of a functioning government and basic administrative structures.

# CESSATION CLAUSES – PROCEDURE, EXCEPTION

- **Individual procedure** should apply – except in mass influx and temporary protection
- **Burden of proof** on the government
- **„Compelling reasons”** exception:
  - In case of atrocious forms of persecution:  
ex-camp or prison detainees, survivors or witnesses of violence against family members, including sexual violence, as well as severely traumatised persons frequently suffering from local population.
  - „Application of the ‘compelling reasons’ exception is interpreted to extend beyond the actual words of the provision to apply to Article 1A(2) refugees. This reflects a general humanitarian principle that is now well-grounded in State practice.” UNHCR Guidelines, 2003, point 21

# Exclusion clauses

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graph TD; A[Exclusion clauses] --> B[Crime Against Peace  
War Crime  
Crime Against Humanity]; A --> C[Serious non-political crime prior to admission]; A --> D[Acts contrary to the purposes and principles of the UN];
```

Crime Against Peace  
War Crime  
Crime Against  
Humanity

Serious non-  
political crime  
prior to  
admission

Acts contrary to  
the purposes and  
principles  
of the UN

## EXCLUSION CLAUSES – FUNDAMENTALS

- Non-deserving cases should not get protection (avoid abuse of the system)
- War criminals and other serious criminals should not remain unpunished

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Threshold: „serious reasons for considering”

- less than balance of probabilities!? (G. Goodwin-Gill, p, 97) – still debated

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Inclusion before exclusion? – debate

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**Exclusion ≠ removal**

Protection against torture, etc („broad non-refoulement”) remains!

# CRIME AGAINST PEACE, WAR CRIME, CRIME AGAINST HUMANITY

There is no accepted definition (Geoff Gilbert, p. 434)

- **Crime Against Peace** (Nürnberg, IMT Charter) = planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties...
- ICC: no definition of aggression
- **War Crime** (IMT, Geneva Conventions and 1977 protocols, ICC, Tribunals /ICTY, ICTR/)
  - violations of the laws or customs of war
    - murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or 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 – IMT
  - Now: much wider, grave breaches of the Geneva Conventions ICC: 50 crimes (see separate sheet)
- **Crimes against Humanity (as in ICC):**
- murder, severe deprivation of physical liberty, torture, rape, and other inhumane acts of similar character. .. if „... committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack,“ defined to mean „a course of conduct involving the multiple commission of acts referred to... against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.“

The notes to this empty slide (view in „notes page” mode!) contain the definition of war crimes in the ICC Statute

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## SERIOUS NON-POLITICAL CRIME PRIOR TO ADMISSION

- Outside the country of refuge prior to [the individual's] admission to that country as a refugee

- Terrorism?

UNGA Res.53/108 on Measures to Eliminate International Terrorism

“criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of political, philosophical, ideological, racial, ethnic, religious or other nature that might invoked to justify them”.

# TERRORISM –EU DEFINITION

## COUNCIL FRAMEWORK DECISION OF 13 JUNE 2002 ON COMBATING TERRORISM (2002/475/JHA)

### Art. 1 Terrorist offences and fundamental rights and principles

1. ... acts referred to below in points (a) to (i), ..., which, given their nature or context, may seriously damage a country or an international organisation where committed with the aim of:

- seriously intimidating a population, or
- unduly compelling a Government or international organisation to perform or abstain from performing any act, or
- seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation,

shall be deemed to be terrorist offences:

- (a) attacks upon a person's life which may cause death;
- (b) attacks upon the physical integrity of a person;
- (c) kidnapping or hostage taking;
- (d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss;
- (e) seizure of aircraft, ships or other means of public or goods transport;
- (f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons;
- (g) release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life;
- (h) interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life;
- (i) threatening to commit any of the acts listed in (a) to (h).

## SERIOUS NON-POLITICAL CRIME PRIOR TO ADMISSION

- No need for proof sufficient for a criminal trial, but there should be serious reasons for considering.
- It includes inchoate offences such as attempts, conspiracies and incitement.
- Difficulty: Is mere membership of a group adequate to exclude? Are all members complicit?
- Is constructive knowledge adequate to impose individual criminal responsibility?
- What if already served a punishment or long time passed?

# ACTS CONTRARY TO THE PURPOSES AND PRINCIPLES OF THE UN

- Only state leaders – or private persons (non- state actors)
- Terrorism: what definition?  
any national legal definition? UN definition?
- „Crimes capable of affecting international peace, security and peaceful relations between States, as well as serious and sustained violations of human rights, would fall under this category.” UNHCR  
Guidelines, 2003

## PROTECTION BY OTHERS

### GC 1 § C (5) D.

This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.

UNRWA = United Nations Relief and Work Agency  
(established in December 1949, by a GA resolution, operational since 1 May 1950)

“Today, UNRWA is the main provider of basic services - education, health, relief and social services - to over 4.3 million registered Palestine refugees in the Middle East”

<http://www.un.org/unrwa/overview/index.html> -visited 3 November 2006

# THANKS!

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