10-31-2010

EXCLUSION CLAUSES" OF THE UNHCR STATUTE AND THE CONVENTION RELATING TO THE STATUS OF REFUGEES

Enny Soeprapto

Indonesian Human Rights National Commission of Indonesia.

Follow this and additional works at: <https://scholarhub.ui.ac.id/ijil>

Recommended Citation

Soeprapto, Enny (2010) "EXCLUSION CLAUSES" OF THE UNHCR STATUTE AND THE CONVENTION RELATING TO THE STATUS OF REFUGEES," *Indonesian Journal of International Law*: Vol. 7 : No. 4 , Article 1.

DOI: 10.17304/ijil.vol7.4.240

Available at: <https://scholarhub.ui.ac.id/ijil/vol7/iss4/1>

This Article is brought to you for free and open access by the Faculty of Law at UI Scholars Hub. It has been accepted for inclusion in Indonesian Journal of International Law by an authorized editor of UI Scholars Hub.

Exclusion Clauses” of the UNHCR Statute and the Convention Relating to the Status of Refugees

Enny Soeprapto¹

The Statute of the Office of the United Nations High Commissioner for Refugees (UNHCR Statute) not only defines the persone materiae of the competence of the United Nations High Commissioner for Refugees (High Commissioner) but also stipulates circumstances under which the competence of the High Commissioner shall cease or shall not apply to such persons. The Convention relating to the Status of Refugees (CSR) contains similar provisions. The provisions on the non-extension of the High Commissioner's competence under the UNHCR Statute and the non-applicability of the CSR to certain categories of persons are commonly referred to as "exclusion clauses". This article tries to make some modest observations on such "exclusion clauses" and their legal implications.

Keywords: UNHCR Statute, Convention relating to the Status of Refugees, Exclusion Clauses

I. Introduction

The International Refugee Organization (IRO), which was established by the United Nations in 1946 (General Assembly resolutions 62 (I) of 15 December 1946) was mandated to provide, in essence, legal and political protection and assistance to refugees and displaced persons as defined by Annex I of its Constitution (Part I, Sections A-C). They consisted, basically, of those persons who had been recognized as refugees under various arrangements concluded before the Second World War (1939-1945) and those people who were the victims of persecution of the Nazi or fascist regimes or of regimes which took part on their side during the Second World War. While Part I, Section D of Annex I defines the circumstances in

¹ The writer is a former Protection Officer of UNHCR in Geneva, a former Senior Officer of UNIDO in Vienna, and a former Member of the Indonesian Human Rights National Commission (Komnas HAM) whose area of special interest is international refugee law

which the refugees and displaced persons falling under the mandate of IRO would cease to be of concern to the Organization (commonly called “cessation clause (s)”), Part II refers to six categories of persons, including war criminals, quislings and traitors (paragraph 1) and ordinary criminals extraditable by treaty (paragraph 3) **who would not be of concern to the Organization. Such provisions are commonly called “exclusion clauses.”**

The Universal Declaration of Human Rights (UDHR), adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948, also contains “exclusion clauses” with respect to the right to asylum. While paragraph 1 of Article 14 recognizes the right of everyone to seek and enjoy in other countries asylum from persecution, paragraph 2 of the article stipulates that such right may not be invoked in the case of prosecutions genuinely arising from “non-political crimes” or from “acts contrary to the purposes and principles of the United Nations”.

To replace IRO, which was “backward-looking”, by General Assembly resolution 319 (IV) of 3 December 1949, the United Nations decided to establish UNHCR, a subsidiary organ of the General Assembly, to be operational as of 1 January 1951. The UNHCR Statute, adopted by General Assembly resolution 428 (V) of 14 December 1950, mandates the High Commissioner, acting under the authority of the General Assembly, to provide international protection, under the authority of the United Nations, to refugees within the scope of the Statute, comprising not only those persons who have been recognized as refugees under the international arrangements concluded before the Second World War and those who qualify for a refugee status as a result of events occurring both prior to, on and after 1 January 1951. As in the case of the IRO Constitution, the UNHCR Statute also comprises both “cessation clauses” (Article 6 A (a)-(f)) and “exclusion clauses” (Article 7). Under Article 7 of the UNHCR Statute, the competence of the High Commissioner shall not extend to four categories of persons, including those persons in respect of whom there are serious reasons for considering that these persons concerned have 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” (UNHCR Statute, Article 7 (d)).

The “exclusion clauses” of the CSR are set forth in Article 1, paragraph D, E and F. Under these provisions, the CSR shall not apply to three cat-

egories of persons, including those who have 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) (Article 1F (a)), "a serious non-political crime" (outside the country of refuge prior to their admission to that country as a refugee) (Article 1 F (b)), or have been guilty of "acts contrary to the purposes and principles of the United Nations" (Article 1F (c)).

The Declaration on Territorial Asylum, adopted by General Assembly resolution 2312 (XXII) of 14 December 1967, confirms and elaborates the provisions of Article 14 of the UDHR referred to in paragraph 2 above. While Article 1, paragraph 1 recommends States to respect the granting of asylum by a State, in the exercise of its sovereignty, to persons to invoke Article 14 of the UDHR, including persons struggling against colonialism, paragraph 2 sets forth an "exclusion clause" which stipulates that the right to seek and enjoy asylum may not be invoked by any person with respect to whom there are serious reasons for considering that 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).

The United Nations, deeply disturbed by the world-wide persistence of acts of international terrorism and to ensure that any person who has been engaged in terrorist activities shall be denied asylum by all States and that the refugee status shall not be used to engage in terrorist activities, the General Assembly, by resolution 49/60 of 9 December 1994, adopted the Declaration on Measures to Eliminate International Terrorism, which includes a provision calling for States to take "appropriate measures before granting asylum, for the purpose of ensuring that the asylum seeker has not engaged in terrorist activities and, after granting asylum, for the purpose of ensuring that the refugee status is not used in a manner contrary to the provisions set out in paragraph (a) above" (which urge States to refrain from organizing, instigating, facilitating, financing, encouraging or tolerating terrorist activities and to take appropriate practical measures to ensure that their respective territories are used for terrorist installations or training camps, or for the preparation or organization of terrorist acts intended to be committed against other States or their citizens) (operative paragraph 5 (f) of the Declaration). The Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, adopted by General Assembly resolution 51/

210 of 17 December 1996, also contains a provision which relates to the question of asylum and which states that "The States Members of the United Nations emphasizes the asylum seekers who are awaiting the processing of their asylum applications may not thereby avoid prosecution for terrorist acts" (operative paragraph 4).

Considering that international terrorism not only endangers human life but threatens international peace and security as well, the Security Council, since 2001, adopted a number of resolutions on the subject. Of these, Resolution 1373 (2001), adopted on 28 September 2001, includes a provision intended to ensure that a refugee status should not be granted to any person who has been involved in terrorist activities. Operative paragraph 3(f) of the resolution calls upon States to "Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts".

Some of the "exclusion clauses" of the CSR are adopted by one regional instrument relating to the problem of refugees, *i.e.* the OAU Convention governing the Specific Aspects of Refugee Problems in Africa, adopted in Addis Ababa on 10 September 1969 (OAU Convention). This regional instrument adopts, *mutatis mutandis*, the "exclusion clauses" of the CSR, specifically those set out in Article 1, paragraph F, as quoted in paragraph 4 above.

It is worth noting that, of the ten interregional, regional, or subregional legally binding instruments to combat terrorism, two instruments contain provisions to ensure that refugee status or asylum should not be granted to any person who has been involved in terrorist activities. Such provisions may be considered as "exclusion clauses", additional to those stipulated in the UNHCR Statute and CSR. The Inter-American Convention against Terrorism, adopted in Bridgetown on 3 June 2002, provides, in essence, that any person in respect of whom there are serious reasons for considering that he or she has committed a terrorist offence should not be granted refugee status (Article 12) or asylum (Article 13). Similarly, the ASEAN Convention on Counter Terrorism, adopted at Cebu, Philippines, on 13 January 2007, provides, in essence, that, before granting refugee status to any person, the States Parties should ensure that he or she has not "planned, facilitated or participated in the commission of terrorist acts" (Article X).

This provision is, practically an adoption of operative paragraph 3(f) the Security Council resolution 1373 (2001) of 28 September 2001 quoted in paragraph 7 above.

As may be noted from the preceding paragraphs, certain categories of persons, for "administrative" or fundamental reasons, are excluded from the application of international and regional instruments on the problem of refugees and on asylum or on human rights which include provisions on refugees or asylum, either of legally binding or non-legally binding nature, concluded since 1946. More recently, since the 1990s, in view of the concern of the international community on the grave danger of international terrorism to human life as well to international peace and security, a number of resolutions adopted by the General Assembly or Security Council of the United Nations or a number of legally binding regional instruments to combat international terrorism, also call for States, in essence, to deny refugee status or asylum to those persons who have been engaged in terrorist activities. Such provisions, commonly called "exclusion clauses", will be examined in more details below.

II. "Exclusion clauses" of the UNHCR Statute

Paragraph 7 of the UNHCR Statute stipulates that the competence of the High Commissioner shall not extend to "a person: (a) Who is a national of more than one country unless he satisfies the provisions of the preceding paragraph in relation to each of the countries of which he is a national; or (b) Who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country; or (c) Who continues to receive from other organs or agencies of the United Nations protection or assistance; or (d) In respect of whom there are serious reasons for considering that he has committed a crime covered by the provisions of treaties of extradition or a crime mentioned in article VI of the London Charter of the International Military Tribunal or by the provisions of article 14, paragraph 2, of the Universal Declaration of Human Rights".

- A. A person who is a national of more than one country unless he satisfies the provisions of the preceding paragraph in relation to each of the countries of which he is a national

The regime of international protection of refugees and the designation

of UNHCR by the United Nations as an international body to provide such protection have emerged and have been recognized and accepted by the international community with the purpose of ensuring that a refugee, who is without protection from his country of citizenship or former habitual residence, would continue to be protected. A person who has more than one citizenship may in situation where he cannot avail himself of the protection of one of the countries of his nationality is still able or can avail himself of the protection the other country of his citizenship. In such a situation the person concerned continues to be under national protection and, therefore, an international protection is not required. Consequently, such a person should be excluded from the mandate of the High Commissioner, unless he is unable or unwilling to avail himself of the protection of both countries of his citizenship for reasons of his race, religion, nationality or political opinion.

- B. A person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country
A non-citizen residing in a given country who is granted the same rights and has the same obligations as citizens of that country, is, in reality, under the national protection of the country of residence concerned. He does not, therefore, need international protection and, consequently, should be excluded from the *ratione personae* of the High Commissioner.

- C. A person who continues to receive from other organs or agencies of the United Nations protection or assistance

This category of persons to whom the mandate of the High Commissioner does not apply refers to Palestinian refugees who fall within and receive protection and assistance from the United Nations Relief and Work Agency for Palestine Refugee in the Near East (UNRWA), a subsidiary organ of the General Assembly established in 1949 (General Assembly resolution 302 (IV) of 8 December 1949). UNRWA has been providing education, health, relief and social service in the region since 1950. As in the case with UNHCR, UNRWA, has been, originally, intended to be an agency of a temporary nature to be dissolved upon the solution of the problems of refugees. However, as

in the case with the problems of refugees in general, the problem of Palestinian refugees, in view of the protracted conflicts in the region, durable solutions for the problems of Palestinian refugees have not been found. As in the case of UNHCR, the mandate of UNRWA has been periodically extended. Putting the Palestinian refugees under the mandate of the UNHCR would constitute a duplication. They are, therefore excluded from the mandate of the High Commissioner.

- D. A person 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 (IMT) or by the provisions of Article 14, paragraph 2, of the UDHR

1. Crimes covered by treaties of extradition

The subject matters of extradition treaties are, practically in all cases, common crimes or non-political crimes or crimes which should be considered as non-political crime whatever their motives, such as international terrorism, and which are of serious nature. Persons who committed or were involved in such common crimes and, therefore, are common criminals, should be treated as such and (are) consequently, are or should be outside the mandate of the High Commissioner, whose *ratione personae* are those who are or have well-founded fear of being persecuted for reasons of their race, religion, nationality, or political opinion, very basic human rights recognized by the UDHR in 1948, adopted before the establishment of UNHCR in 1950 and the commencement of its operation in 1951, and which, subsequently, have been reaffirmed and elaborated in more details by various human rights international instruments of legally binding or non-legally binding nature.

2. Crimes mentioned in Article VI of the London Charter of the IMT

As the culmination of the declarations and statements issued by the Allied Governments during the Second World War (1939-1945) expressing their determination that war criminals should be punished, the Allied Governments met in London from 26 June to 8 August 1945 and concluded an Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis. For this purpose, Article 1 of the Agreement stipulates that an IMT

shall be established with its jurisdiction and other relevant aspects spelled out in the Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945. Article 6 of the IMT Charter lists three categories of crimes as the *ratione materiae* of the IMT, namely: crimes against peace, war crimes and crimes against humanity.

It is important to note that, the IMT Charter provides that, in order to make alleged perpetrators fall under the jurisdiction of the IMT, they should have been acting “in the interests of the European Axis countries, whether as individuals or as members of organizations” (Article 6, *chapeau*, first paragraph, last sentence). This provision may be considered as implying the exclusion of “isolated cases” or “personally motivated” acts. Additionally, it is of the greatest importance to note the provision of the IMT Charter which states that “there shall be individual responsibility” for the crimes under the jurisdiction of the IMT (Article 6, *chapeau*, second paragraph), thus introducing the concept of individual responsibility in international criminal law and making individuals subjects of international law, at least in international criminal law.

a. Crimes against peace

What is meant by the term “crimes against peace” is spelled out in Article 6, paragraph (a) of the IMT Charter, namely “planning, preparation or waging 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.”

While the term “violation of international treaties, agreements or assurances” is self-explanatory, it is not the case with the term “war of aggression”. Article 39 of the Charter of the United Nations (UN Charter) refers the principal organ of the United Nations, namely the Security Council, that is mandated to determine “the existence of any threat to the peace, breach of the peace, or acts of aggression” and make appropriate recommendations relating thereto “to maintain or restore international peace and security” (first and last sentences). Until today there is no international instrument which spells out the legal definition of the term “aggression”. The Assembly of the

States Parties to the Statute of the International Criminal Court (ICC Statute or Rome Statute) of 17 July 1998 has not been able, so far, to agree on the legal definition of the term "the crime of aggression", one of the four crimes under the jurisdiction of the ICC on which the participating States to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, held in Rome, from 16 June to 17 July 1998, failed to adopt a definition on the term until the date of the adoption of the Rome Statute. In 1974, the General Assembly, by its resolution 3314 (XXIX) of 14 December 1974, or over nineteen years since the adoption of the UN Charter, agreed on the definition of the term "aggression" as annexed to this resolution. Both the General Assembly and the Security Council are international bodies of political nature. It should be expected that, their decisions, including the decision of the Security Council to determine the existence of any act of aggression under Article 39 of the UN Charter, would be very much based of political, not of legal considerations. The international community will have to live with such a situation until such time that the Assembly of States Parties to the Rome Statute would, eventually, agree on the legal definition of the term "the crime of aggression". Under these circumstances, in considering whether a person has been involved in a crime of aggression, the High Commissioner would have to rely on the decision of the Security Council on the subject as reference for the coming years to come, in order to enable him, with certainty, **to determine** whether a person has committed a crime of aggression and, in the affirmative, to exclude him from his mandate under the UNHCR Statute.

b. War Crimes

According to Article 6, paragraph (b) of the IMT Charter, the term 'war crimes' means "violations of the laws and customs of war" and which include, but not limited to, "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,

town or villages, or devastation not justified by military necessity.”

The London Agreement and the IMT Charter were adopted in 1945. Under these circumstances, the list of offences classified as falling under the category of “war crimes” referred to in Article 6, paragraph (b) of the IMT Charter was based on the laws and customs of war as provided for in the relevant international instruments which had already existed before 1945, *inter alia*, the 1899 Hague Convention (II) with respect to the Laws and Customs of War on Land, the 1907 Convention (IX) concerning Bombardment by Naval Forces in Time of War, the 1933 Hague Rules of Aerial Warfare and the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare. Prior to the establishment of UNHCR in 1950 and the start of its operation in 1951, four international humanitarian Law conventions were adopted in Geneva in 1949. Thereafter, in 1977, two Additional Protocols to the four Geneva Conventions of 1949 (Protocol I relates to international armed conflicts while Protocol II deals with non-international armed conflicts), complementing the 1949 instruments, were adopted. In 1998, States adopted the ICC Statute (in force as of 1 July 2002), which sets forth much elaborated provisions on “war crimes” and the corresponding “Elements of Crimes”, which would assist the ICC in interpreting and applying the relevant provisions of the ICC Statute. Earlier, although with a limited *ratione personae*, *ratione loci*, and *ratione temporis*, the United Nations established the International Criminal Tribunal for Former Yugoslavia (ICTY) in 1993 and the International Criminal Tribunal for Rwanda (ICTR) in 1994. Under their respective Statute, the *ratione materiae* of the ICTY includes “Graves breaches of the Geneva Conventions of 1949” (Article 2) and “Violations of laws and customs of war” (Article 3), while that of the ICTR comprises “Violations of Article 3 common to the Geneva Conventions and of Protocol II” (Article 4).

Those international legal instruments concerning the laws and customs of war as well as humanitarian law, including the

proceedings and judgments of the international tribunal or court concerned on specific cases, offer the most useful reference for the High Commissioner in considering and, eventually, determining, whether a person who requests a refugee status has been involved in "war crimes" and, in the affirmative, decides not to extend his competence to such person.

c. Crimes against humanity

According to Article 6, paragraph (c) of the IMT Charter, "crimes against humanity" consists of the following criminal acts: "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecution 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 where perpetrated."

In line with the purpose of the establishment of the IMT, namely to try those persons who committed war crimes during the Second World War (London Agreement of 1945, Article 1), the perpetration of the criminal acts listed in Article 6, paragraph (c) of the IMT Charter, have been stipulated in the context of the Second World War. In view of the gravity of such crimes, and the considerations that they may be committed in time of peace, the international community agreed that, in order to make such crimes punishable, they need not be committed in an armed conflict situation. In the relevant international instruments concluded after 1945, the list of criminal acts to be considered as falling under the category of "crimes of humanity" have been expanded and made more specific. This ICTY Statute of 1993 (Article 5) and the ICTR Statute of 1994 (Article 3) list the following criminal acts as "crimes against humanity": murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution on political, racial and religious grounds, and other inhumane acts. The Rome Statute, adopted in 1998, considers "crimes against humanity", together with "the crime of genocide", "war crimes" and "the crime of aggression" as the most serious crimes of concern to the international community

as a whole and includes them as the *ratione materiae* of the ICC. Article 7, paragraph 1 of the ICC Statute list eleven criminal offences that would be considered as “crimes against humanity”, subject to the conditions that such criminal acts are committed “as part of a widespread or systematic attack directed against any civilian population, with the knowledge of the attack” [on the part of the perpetrator]. These criminal offences are as follows: murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; persecution against any identifiable group or collectivity on political, racial, national, ethnic, religious, gender as defined in paragraph 3 (*i.e.* “refers to two sexes, male and female, within the context of society” and “does not indicate any meaning different from the above”), 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; enforced disappearance of persons; the crime of apartheid; and other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health. The Elements of Crimes, annexed to the ICC Statute, will assist the ICC in interpreting and applying the provisions of the ICC Statute with respect to crimes under the jurisdiction of the ICC Statute.

3. Provisions of Article 14, paragraph 2 of the UDHR

Article 14, paragraph 2 of the UDHR states that the right to seek and enjoy in other countries asylum from persecution, as referred to in Article 14, paragraph 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”.

a. Prosecutions genuinely arising from non-political crimes

The term “non-political crimes” referred in Article 14, paragraph 2 refers, essentially, to those crimes generally covered by extradition treaties which has been discussed (see paragraphs 15

and 16 above). It is unjustifiable to provide protection by granting refugee status to a person who has committed and/or is escaping from the prosecution of an "ordinary crime".

Under this category it may be included acts of terrorism, whatever their motivation, which are "ordinary crimes". These ordinary crimes" are, indeed, multifaceted. They are of very serious nature that should be the concern of the entire international community and, definitely, are acts against the purposes and principles of the United Nations (this aspect will be further discussed below).

Refugee status should not be misused by perpetrators of "ordinary crimes" to escape from prosecution and punishment. It is, therefore, appropriate that the competence of the High Commissioner does not extend to such persons.

b. Acts contrary to the purposes and principles of the United Nations

The purposes of the United Nations are reflected in the first to fourth paragraphs of the Preamble and set out in Article 1, while its principles are reflected in the fifth to eighth paragraphs of the Preamble and spelled out in Article 2 of the UN Charts.

The purposes of the United Nations consist, in essence, of the following: maintenance of international peace and security; suppression of aggression or other breaches of peace; adjustment or settlement of international disputes or situations which might lead to a breach of the peace by peaceful means; developing friendly relations among nations; achieving international cooperation in solving international problems of an economic, social, cultural, or humanitarian character; promoting and encouraging respect for human rights and fundamental freedoms; and being a centre for harmonizing the actions of nations in attaining these ends.

The principles of the United Nations, on the other hand, consist of: sovereign equality of its Members; fulfillment in good faith, by all of its Members, the obligations under the Charter; settlement of international disputes by peaceful means; refrain from the threat or use of force against territorial integrity or political independence of any State or in any other manner inconsistent with the Purposes of the UN; giving assistance to the UN in any action taken in accordance by its Charter; refrain

from giving assistance to any State against which the UN is taking action; ensuring that non-member States shall act in accordance with the UN Principles for the maintenance of international peace and security; and prohibition of intervention in matters which are essentially within the domestic jurisdiction of any State or requiring Members to submit such matters to settlement under the UN Charter, without prejudice, however, to the application of enforcement measures under Chapter VII of the UN Charter (action with respect to threats of peace, breaches of the peace, and acts of aggression).

The Purposes and Principles of the UN are interdependent and inseparable. Consequently, to determine whether an act is contrary to the purposes and principles of the UN, it has to be tested against these two “philosophical pillars” of the UN, inseparably. From the ways the texts of Articles 1 and 2 are drafted, certain acts can be “easily” considered as acts contrary to the purposes and principles of the UN Charter, such as commission of aggression, use of force to settle international disputes between UN Member States, violation of human rights and fundamental freedoms, and employing threat or use of force against territorial integrity or political independence of a State. The provisions of Articles 1 and 2 are of a general nature to be applied to specific cases. Acts which without any doubt, can be considered as violating or are against or contrary to Articles 1 and 2 of the UN Charter are, *inter alia*, the crime of genocide, crimes against humanity, violations of human rights and fundamental freedoms and acts of terrorism. The existing significant number of international criminal law, international human rights law and international humanitarian law, the proceedings and/or decisions of the international criminal tribunals which have ever existed or are still functioning, the ICC, as well as the relevant resolutions of the General Assembly and Security Council of the UN would serve as indispensable references for the High Commissioner to determine whether a person applying a refugee status could be considered as a person who has committed an act or acts qualified as contrary to the UN purposes and principles to, eventually, exclude him from the High Commissioner’s mandate.

III. Exclusion clauses of the CSR

The "exclusion clauses" of the CSR are set out in Article 1, paragraph D-F of this instrument. Under these provisions, categories of persons who are excluded from the application of the CSR are as follows: (a) Persons who are (at present) receiving from organs or agencies of the UN other than the UNHCR protection or assistance (paragraph D, first sentence); (b) A person who is recognized by the competent authorities of the country he has taken residence as having rights and obligations which are attached to the possession of the nationality of that country (paragraph E); (c) Any person with respect of whom there are serious reasons for considering that: (i) 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 (paragraph F(A)); (ii) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee (paragraph F(b)); and (iii) he has been guilty of acts contrary to the purposes and principles of the UN (paragraph F(c)).

- A. Persons who are (at present) receiving from organs or agencies of the UN other than the UNHCR protection or assistance

The provision of Article 1, paragraph D, first sentence of the CSR referred to above, which excludes such persons from the application of the CSR, thus denying them a refugee status and the protection, assistance and benefits derived there from, is similar to the provision of Article 7, paragraph (c) of the UNHCR Statute (see paragraph 14 above), under which the competence of the High Commissioner does not extend to such persons. The subject has been discussed in *supra*, paragraph 14 and, therefore, will not be discussed again here.

- B. A person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country

This provision, stipulated in Article 1, paragraph E of the CSR is similar, practically word by word, to the provision of Article 7, paragraph (b) of the UNHCR Statute (see paragraph 13 above). Such person is therefore excluded from both the High Commissioner's mandate and the application of the CSR. The subject has been discussed in *supra*,

paragraph 13, and, therefore, will not be discussed again.

- C. Any person in respect of whom there are serious reasons for considering that 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

This provision, set forth in Article 1, paragraph F(a) of the CSR is, essentially, the same as the provision of Article 7, paragraph (d), second sentence of the UNHCR Statute (see *supra*, paragraphs 16-25). The slight difference is merely the way the two similar provisions are drafted. Article 7, paragraph (d), second sentence of the UNHCR Statute refers, in general term, to “a crime mentioned in article VI of the London Charter of the International Military Tribunal”. This Article VI includes three categories of crimes, namely crimes against peace (paragraph (a)), war crimes (paragraph (b)) and crimes against humanity (paragraph (c)), which are explicitly mentioned in Article 1, paragraph F (a) of the CSR. The subject has been extensively discussed in paragraph 16-25 above and will not, therefore, be further discussed here.

- D. Any person with respect to whom are serious reasons for considering that he has committed a serious non-political crime outside the country of refuge to his admission to that country as a refugee

This provision, contained in Article 1, paragraph F (b) of the CSR, refers to a part of the categories of persons mentioned in Article 14, paragraph 2, of the UDHR, as referred to in the last sentence of Article 7, paragraph (d) of the UNHCR Statute. To be noted that, while Article 1, paragraph F(b) refers to “non-political crimes” only, Article 14, paragraph 2 of the UDHR, refers to two categories of acts, namely “non-political crimes” and “acts contrary to the purposes and principles of the United Nations”. The CSR does not omit this reference. It simply sets out this reference in a separate subparagraph, *i.e.* subparagraphs (c) of Article 1, paragraph F of the CSR. The subject of the “exclusion clause” relating to persons who have committed non-political crimes has been discussed in *supra*, paragraphs 26-29. It will not be further discussed here.

- E. Any person with respect to whom there are serious reasons for considering that he has been guilty of acts contrary to the purposes and principles of the UN

The provision of Article 1, paragraph (c) is, basically, the same with the provision of Article 7, paragraph (d), last sentence. However, the words "has committed" in the UNHCR Statute has been altered in the CSR by the words "has been found guilty". With this change, the provision of the CSR has a narrower coverage, as the former refers only to those persons who have been "found guilty" (of acts contrary to the purposes and principles of the United Nations"), which means that a verdict has been issued by a tribunal or court, while the latter (the UNHCR Statute) refers only to persons, with respect to whom there are serious reasons for considering that the persons concerned have "committed" [an act contrary to the purposes and principles of the UN], who may, eventually, after due examination by the competent tribunal or court concerned, either be found guilty or, on the contrary, not guilty. Under the UNHCR Statute, any person, with respect to whom there are serious reasons for considering that a person has "committed" (not necessarily "been found guilty of") an act contrary to the purposes and principles of the UN, are excluded from the High Commissioner's competence.

The different terms used in the UNHCR Statute and the CSR observed in paragraph 39 above would imply that a larger number of persons would be affected by the relevant provisions of the "exclusion clauses" under the UNHCR Statute than those under the CSR, which relates to "acts contrary to the purposes and principles of the UN.

Paragraphs 30-33 above have discussed the question of acts which are or may be considered as contrary to the purposes and principles of the UN. It will not(,) be discussed again here.

IV. Category of persons subjected to the "exclusion clauses" of the UNHCR Statute but not mentioned in the "exclusion clauses" of the CSR

As referred to in supra, paragraphs 11 (a) and 12, one of the categories of persons subjected to the "exclusion clauses" of the UNHCR Statute are persons who have more than one citizenship, who cannot or are unwilling to avail themselves of the protection of all their countries of citizenship because of their well-founded fear of persecution for reasons of their race,

religion, nationality or political opinion, as stipulated in Article 7, paragraph (a) of the UNHCR Statute.

Similar provision is not found in the CSR. Including such a provision in the CSR would be redundant anyway, as a person who has more than one citizenship would remain under the protection of at least one his countries of citizenship, thus requiring no international protection, unless he cannot or is unwilling to avail himself of the protection of all countries of his citizenship, for reasons referred to in Article 6, paragraph B of the UNHCR Statute.

V. Implications of the application of the “exclusion clauses”

The implications of the application of the “exclusion clauses” denying refugee status and the international protection and benefits derived ~~therefrom~~ on a person, who is outside his country of nationality or habitual residence, would be as follows. If the country of his temporary stay is not a party to the CSR, the UNHCR Statute shall apply and the UNHCR, in cooperation with the country of the person’s temporary stay, the diplomatic or consular mission of the country of the nationality or habitual residence of the person concerned and the relevant international organizations, would endeavor to repatriate such person. This would enable the country of the person’s nationality or habitual residence to prosecute him for the crime he has committed on the basis of which he has been denied a refugee status or, alternatively, to surrender him to the ICC, in the event that the country of nationality or habitual residence of the person concerned is a party to the ICC Statute, the crime committed is a crime under the jurisdiction of the ICC, and the crime was committed after the entry into force of the ICC Statute for the person’s country of nationality or habitual residence.

To be borne in mind, however, that repatriation process would generally take time and might not work, as experiences have shown, for a number of “classic” reasons (the diplomatic or consular mission concerned does not recognize the person concerned as a national or habitual resident of the country of the mission, lack of documentary evidence of the person’s nationality or country of habitual residence, or unwillingness of the persons concerned to repatriate). In these circumstances, the person concerned would become an alien illegally staying in the country where he finds himself, and this country is unable to prosecute him for the crime he has committed in

another country, because the crime **may not** be covered by any national criminal law, or, under the system of national criminal law, a non-national **may be** outside the *ratione personae* of the national criminal law, if the crime has been committed in another country, even though the crime concerned constitutes a *ratione materiae* of the relevant criminal law of the country where the non-national finds himself. Such a situation will, practically, also be faced with by countries which are parties to the CSR following the application of the "exclusion clauses" of the CSR.

VI. Concluding observations

"Exclusion clauses" are absolutely necessary to ensure that only "genuine" asylum seekers are granted refugee status. Such clauses are also instrumental in preventing persons, who have committed or have been involved in serious ordinary crimes or the most serious crimes of concern to the international community as a whole, such as the crime of genocide, crimes against humanity, war crimes, the crime of aggression, crimes of terrorism, and other acts contrary to the purposes and principles of the United Nations, to obtain, unjustly, unjustifiably and illegitimately refugee status, which would hurt the conscience of humankind and defeat the humanitarian ideals of the regime of international protection of refugees.