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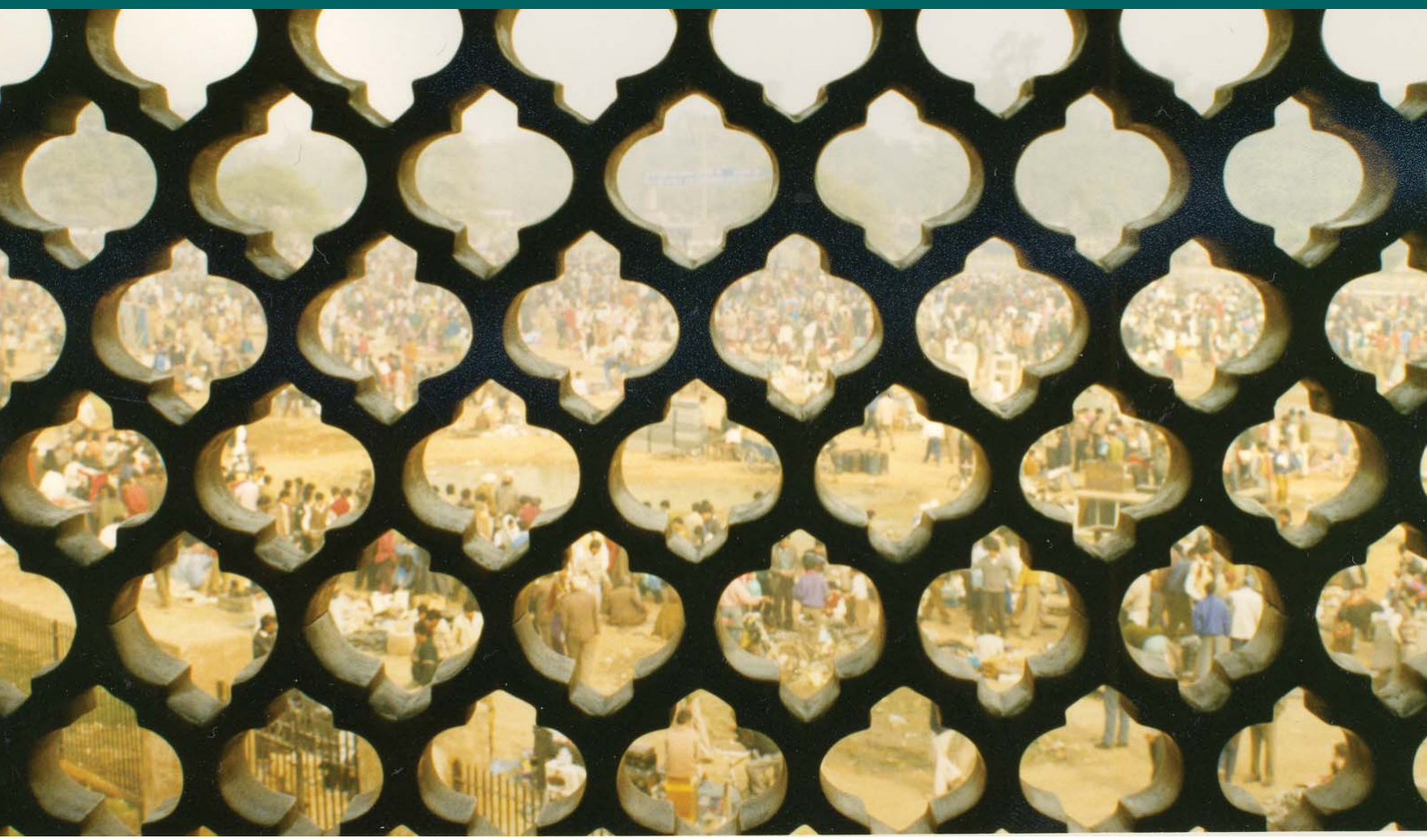

THE NEW ASYLUM DILEMMA:
REFUGEE, WAR CRIMINAL OR TERRORIST?

After 9/11 and following terrorist attacks a new problem has presented itself with great force: How can Western states – like Norway – guarantee fair procedures and humane treatment of all asylum seekers and simultaneously prevent human rights violators or terrorists from wrongfully being granted refugee status?

The fight against international terrorism has had an impact on the rights of aliens and the protection of refugees. This is illustrated by the UN High Commissioner for Refugees' (UNHCR) active involvement in discussions at different levels with states that are legally bound by the 1951 UN Convention relating to the Status of Refugees ("the 1951 Refugee Convention"). The increase of democratic regimes and the establishment of international criminal courts have also prompted a stronger public demand for prosecution of gross human rights violations and violations of humanitarian law. One may talk of a "snowball effect" on refugee law and practice: When some recipient countries increase their focus on potential war criminals or terrorists among asylum seekers, other recipient countries have to follow suit lest they be considered "safe havens" where criminals may seek refuge without fear of prosecution.

1951 REFUGEE CONVENTION 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 (...);
(b) he has committed a serious non-political crime (...);
(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

This proportional weight on security concerns may, however, jeopardise the protection of genuine refigees. Part of the answer to this new asylum dilemma might be found in a common approach to the exclusion clauses in international law.

Against this background, the difficulty of distinguishing a refugee from asylum seeking war criminals and potential terrorists has been examined in a recent CMIReport (CMI Report R 2006: 2).

REFUGEE LAW

International law and national law in combination form the basis of the legal framework for how refugees and asylum seekers should be treated. The most vital principles are set out in the 1951 Refugee Convention. These principles have subsequently been elaborated in a number of international laws and documents. UNHCR has issued several important documents, including the Handbook on Procedures and Criteria for Determining Refugee Status.

In recent years, the European Union has also become a driving force in the attempt to find international standards to ensure a more uniform and less ad-hoc treatment of refugees who knock on the borders of a particular European country. At the same time, the UN Security Council has issued binding resolutions with regard to the fight against terrorism, which must be taken into account.

The status and application of international refugee law are also complicated by diverging national laws that deal with issues of refugees and asylum. The absence of an international refugee court with final say in the interpretation and application of complicated legal principles, has in particular hampered the development of a more unified international practice. This weakness becomes evident when one takes a closer look at the actual legal practice and jurisprudence of specific countries regarding the law on exclusion.

ANALYSIS OF EXCLUSION

According to the 1951 Refugee Convention article 1 F, the exclusion from refugee status (and thus from asylum) is valid when asylum seekers and refugees are suspected of having committed international crimes. This includes genocide, crimes against humanity and war crimes, terrorist activities or other serious crimes. In this connection, the report clarifies some important legal issues: the principle of legality and the objective as well as the subjective elements of exclusion. It also comments on the scope of application of article 1 F with respect to complicity and attempt, possible areas for impunity from prosecution, and the importance of mitigating or aggravating circumstances. The standard of proof and rules regarding self incrimination are also discussed. Furthermore, a closer analysis as to whether participation in international terrorist networks may give grounds for exclusion is provided, as well as a discussion of whether there is an international obligation to exclude.

The report comments on the relationship between the exclusion clauses and other exclusion rules and international rules of protection outside the 1951 Refugee Convention. It is the opinion of the authors that it is not legally acceptable to consider national security as a separate reason for exclusion from refugee Status, unless the ordinary conditions for exclusion are fulfilled.

PROCEDURAL AND INSTITUTIONAL ISSUES

What would be considered fair exclusion procedures? Some key issues include: inclusion before exclusion, the impact of exclusion for the excluded person, the consequences for the family, exclusion in cases of collective protection, the relationship to punishment, deportation and extradition, as well as the practical organisation of the work related to exclusion procedures. With respect to the latter, the flow of information, procedural safeguards and the duty to report suspicion of crimes are central elements in the discussion. The report also raises the question of whether suspicion ought to be formalised in a so-called "suspicion document". This idea is partly inspired by the British "certification" procedure (see below), without being a carbon copy as such. Whether one should legally establish a formal status for suspected persons who cannot be returned, is also questioned.

COMPARATIVE ANALYSIS

A comparative analysis of five Western states – Canada, Denmark, the Netherlands, Great Britain and Norway – illustrates that states which are legally bound by the same international laws, may still have different practice with respect to important legal questions. Procedures and institutional settings also vary from country to country.

Some important highlights: Canada has developed quite advanced procedures and laws relating to exclusion and has set up special institutions mandated to handle alleged war criminals. Canada has also established a close working relationship with international war crimes tribunals. Denmark equally appears to have come quite a long way in establishing special institutions and developing internal procedures of collaboration between the immigration administration and the police regarding investigation of alleged war criminals. In Canada, in particular, and to a certain degree in Great Britain and the Netherlands, the national courts have contributed to the development and clarification of law, including a more precise interpretation of the 1951 Refugee Convention and relevant international law. In Denmark courts have no authority over the asylum administration, whereas in Norway the courts have barely been involved in developing jurisprudence within this field.

As part of its aim to implement anti-terrorist laws, Great Britain has established a special "certification" procedure to be applied in cases where an asylum seeker is suspected of involvement in terrorist activities. According to this procedure, a foreigner might be classified as a "suspected international terrorist". As far as material law is concerned, Canada has in the interplay between its administration and courts developed an interesting thesis on complicity as grounds for exclusion, particularly with respect to membership in an organisation that has been involved in international crimes. Another interesting aspect is the standard of proof in exclusion cases. Norway seems to demand the highest standard of proof of the five countries in question.

MAIN CONCLUSION

There is a need for a more systematic and principled approach to exclusion cases in Norwegian jurisprudence. This implies that the international exclusion clauses ought to be applied more frequently and in more cases than at present. At the same time, the report also emphasises that international law on exclusion suffers from the fact that no international refugee court, or similar organ, has so far been established.

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CMIBRIEF is based on research report commissioned by the Norwegian Ministry of Labour and Social Inclusion by Court of Appeals Judge Terje Einarsen, Senior Researcher Elin Skaar (CMI), and Consultant Vibeke Vevstad.
Editor of CMIBRIEF: Ingvild Hestad

RECOMMENDATIONS:

1. Exclusion should not, as a principal rule, be considered before the protection need has been evaluated.

2. Before a person is excluded, there should be a clear possibility that the asylum seeker has committed the crime he is suspected of.

3. Identification of concrete suspicion of punishable offences and reference to the exact legal basis in exclusion decisions ought to become an integral part of administrative practice.

4. One should consider the establishment of a formalised "suspicion document" to be used in exclusion procedures.

5. The collaboration between the Directorate of Immigration (UDI) and other administrative organs such as the National Bureau of Crime Investigation (Kripos), the Norwegian Police Security Service (PST) and the Prosecutor's Office should be assessed with respect to clarifying rules, guidelines, and routines regarding institutional collaboration and information flow.

6. Lawmakers should clarify the relationship between exclusion, expulsion, prosecution and extradition, as it is important that Norwegian authorities operate on the basis of a common understanding of the system.

7. One should consider the establishment of a separate unit within the Directorate of Immigration (UDI) in order to increase the expertise in this complicated legal field. One should also take into account whether UDI and the Immigration Appeals Board (UNE), according to need, should make use of specialised investigation competences, such as those within Kripos.

8. The resources allocated to administrative work on exclusion cases and related questions should be substantially increased.

9. Norwegian authorities ought to take international initiatives in order to harmonise the application of the exclusion clauses and promote better cooperation in solving international crimes. In particular, the authorities should develop closer formalised cooperation with international war crimes tribunals.

10. Norwegian authorities should work more actively to establish an international refugee court.

Chr. Michelsen Institute
P.O. Box 6033 N-5892 Bergen Norway
e-mail: cmi@cmi.no

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