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**Asylum claims and drug offences: the seriousness threshold of Article 1F(b) of
the 1951 Convention relating to the status of refugees
and the UN Drug Conventions**

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Abstract

Asylum claims lodged by individuals who were involved in drug activities prior to their entry into the country of asylum raise complex questions as to whether they have committed a serious non-political crime under Article 1F(b) of the 1951 Convention and thus shall be excluded from refugee protection.

The 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Trafficking Convention) – which is the relevant international framework for drugs in the field of international criminal law – indiscriminately considers all forms of supply related drug offences as “serious criminal offences”, irrespective of individual criminal responsibility. This conflicts with the complex nature of the drug industry particularly in countries affected by armed conflict and proportionality considerations inherent to Article 1F(b).

Articles 31 and 32 of the Vienna Convention on the Law of Treaties provide a possibility to reconcile the ambiguous wording of the Trafficking convention with Article 1F(b) by means of interpretation. Offences for personal consumption as the least serious drug offences do not reach the seriousness threshold of Article 1F(b). Trafficking offences in turn attain the seriousness threshold only if aggravating circumstances prevail over mitigating circumstances, and if there are no grounds for rejecting individual responsibility or defenses to criminal liability. International, large-scale activities carried out by transnational organized criminal groups are factors that make drug offences most serious.

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I. Introduction

The drug industry is a major multifaceted industry which encompasses a hierarchy of different functions and criminal responsibilities including the production and refinement of raw materials, the transportation, wholesale and retail distribution of the final product and finally, the investment and laundering of profits as well as the management and financing of drug organisations.

Most of the cultivation, production and exportation of drugs such as cocaine and opium has been concentrated in few countries where the drug business has been closely linked to and nourished by civil wars and forced displacement. Colombia has been a case in point.¹ Large parts of the (rural) population hold different functions and responsibilities in the chain of supply. The non-state parties to the armed conflict such as the guerrilla and paramilitary groups are directly involved with the drug business as they depend on its income for financing their military operations. They fight for territorial and population control particularly in strategic drug production areas. This leads to situations of individual persecution and/or generalized violence which force civil populations to flee their homes, either within the country or across international borders.²

Asylum claims lodged by individuals who were involved in drug activities prior to their entry into the country of asylum raise complex questions as to whether they deserve international protection. The 1988 *UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (henceforth *Trafficking Convention*) indiscriminately considers all forms of illicit drug trafficking as an “international criminal activity” and a “serious criminal offence”. Article 1 F(b) of the 1951 *Convention relating to the status of refugees* (henceforth 1951 Convention) stipulates that “the provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee”.

The question arises whether all drug offences enlisted in the Trafficking Convention shall be classified *per se* as “serious non-political” crimes under Article 1F(b) of the 1951 Convention or whether there is a seriousness threshold for drug offences below which certain offences would not merit exclusion.

The present paper looks at the case of Colombia to illustrate the scope and complexity of the drug business in major drug-producing countries, and how it relates to asylum. In this regard, the article outlines the different criminal responsibilities of persons involved in the narcotics industry along the chain of commercialisation. It then

¹ The World Bank Policy Research Working Paper, “Greed and grievance in civil war”, no. WPS2355/2000 (2000), (<http://www-wds.worldbank.org>) states with regard to Colombia that the control of the drug industry is a major cause of the armed conflict, and the grievances this generates induce diasporas to finance further conflict; see also International Narcotics Control Board, “Illicit Drugs and Economic Development”, E/INCB/2002/1 (2002), paragraph 30 on the “destabilization of the state (by drug trafficking)” and International Crisis Group (ICG), “War and Drugs in Colombia”, Latin America Report No 11 (2005), on the link between Colombia’s armed groups and the drug business

² See M. Gottwald, “Protecting Colombian Refugees in the Andean Region: The Fight Against Invisibility”, *International Journal of Refugee Law* (IRJL) Vol.16 No. 4 (2004), 517-546

examines the applicability of the exclusion clauses enshrined in Article 1F of the 1951 Convention to drug offences committed by asylum-seekers prior to admission in the country of asylum. The article will thereafter set out the principal provisions of the Trafficking Convention which constitutes the international criminal framework applicable to drug offences and will interpret them in light of proportionality requirements inherent to Article 1F(b) of the 1951 Convention. Finally, the paper will suggest criteria for defining the seriousness threshold for drug offences and apply them to the different functions within the drug business.

II. Background: illicit crops, armed conflict and forced displacement in Colombia

1. The socio-economic factors behind the drug industry³

Colombia is the world's major coca leaf grower/producer and exporter of cocaine. The area of cultivation grew from 50.000 hectares in 1995 to 144.807 hectares in 2001. In 1998 it was estimated that illicit cultivation generated 69.000 full-time jobs or 2 percent of all agricultural employment.⁴

Economic, social and political conditions in many Colombian regions have greatly favoured illicit cultivation. In the early 1990's, Colombia's trade liberalization led to an agricultural crisis and a concentration of landholdings pushed landless peasants towards the agricultural frontier (border), where conditions are such that few traditional (legal) crops can compete with the illicit ones. Moreover, an ample supply of labour was created by the armed conflict which expelled many peasants from more settled regions. Other factors include increasing poverty levels and fragile institutions, especially in rural areas. According to a study by the World Bank, one out of four Colombians is living in extreme poverty and 27 million Colombians find themselves in a situation of poverty – more than half of the population. In this context, the rural population often has no alternative than to find employment in coca/poppy plantations.

³ This section draws *inter alia* on R.Rocha García, "The Colombian economy after 25 years of Drug Trafficking" (2000); United Nations Office on Drugs and Crime (UNODC), "Colombia: country profile" (2003)

⁴ The United Nations Office on Drugs and Crime (UNODC), "Afghanistan Opium Survey" (2003), provides even more impressive numbers regarding opium cultivation and production in Afghanistan: in 2003 there were 264.000 opium-growing families and a total of 1.7 million people (7% of the total population) employed in Afghanistan's drug industry; see also the report of the International Crisis Group (ICG), "Central Asia: Drugs and Conflict" (2001), Asia Report No.25.

2. *The evolution and structure of the illicit drug industry*⁵

Originally, Colombia's role in the illicit drug industry was limited to manufacturing and trafficking activities. For many years, most of the raw material needed for cocaine production (coca base) was imported from Peru and Bolivia, while the cultivation of coca in Colombia itself remained relatively low. However, during the 1990s, improved control and law enforcement in the border areas of Peru and Bolivia increased the risk and cost of exporting coca. This provided an impulse for the direct cultivation of the crop in Colombia and the country quickly became one of the largest growers of coca in the region.

From 1985 to 1995 drug trafficking was mainly controlled by the drug cartels. The dismantling of the big cartels led to the liberalization and consequent fragmentation of drug trafficking into much smaller and more flexible enterprises which have a low profile. Whereas the cartels were highly structured and hierarchical organizations, the new criminal groups ("baby cartels") are "core groups" which consist of a limited number of individuals who form a relatively tight and structured unit that conducts criminal business. This "core group" may be surrounded by a larger group of associate members, or a network, which is used from time to time, depending on the criminal activity in question. Unlike the cartels who attempted to control all the different phases of trafficking activities, the new narco-trafficking organizations usually subcontract various activities such as cultivation, production and first refinement to other actors. The relationship between armed groups and cartels is multi-faceted. The guerrilla and paramilitaries protect drug kingpins, their laboratories and routes. Drug cartels use the irregular groups to supply coca base.

The chain of production and commercialization encompasses a vast variety of different actors with different functions and criminal responsibilities ranging from the cultivation and processing of drugs to the transport and sale of narcotics. Small-scale farmers grow around 50 percent of the coca while the other half is found on plantations larger than 3 hectares. Most of these plantations are controlled by criminal organizations and rely on the cheap labour provided by coca-leaf pickers ("*raspachinos*").

The demand for coca-leaf and first-stage processed products is highly variable and mobile. Also the supply of leaf is very little structured. The farmer is accustomed to the buyer coming to his land to acquire the crop, which is then moved to processing centres by sophisticated means. Increasingly systematic and consistent law enforcement is causing changes in the collection systems and the need to disperse and decrease the volume transported is acting in favour of "*traqueteros*" (small traffickers and intermediaries). At the same time, production of paste by farmers themselves is becoming more widespread implying their greater involvement in the illicit activity. It

⁵ This section draws *inter alia* on United Nations Office on Drugs and Crime (UNODC), "Results of a Pilot Survey of Forty Selected Organized Criminal Groups in Sixteen Countries" (2002); National Geographic, "Cocaine Country: the Colombian villages where coke is king" (July 2004), pp.34-55; R.Rocha García, "The Colombian economy after 25 years of Drug Trafficking" (2000); United Nations Office on Drugs and Crime (UNODC), "Colombia: country profile (2003)"; United Nations Office on Drugs and Crime (UNODC), "World Drug Report" (2004); International Narcotics Control Board, "Report on the Implementation of Article 12 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988" (2003); International Crisis Group, "War and Drugs in Colombia" (2005), Latin America Report No 11

is estimated that over 60 per cent of the coca farmers turn coca leaf into coca paste in small clandestine laboratories (“kitchens”) on the farm itself. The factors which encourage greater participation by the farmers in the first stages of the coca-processing industry are, on the one hand, the decrease in the yield of primary crops due to the drop in the price of leaf and, on the other, the need to disperse transport because of increased control or traffic.

Since the processing of coca paste into cocaine is more complicated, it necessitates the use of large laboratories which may be located in the areas of coca cultivation or close to ports or airports. The most important ones are situated in remote areas of coca-growing plants, usually in the forest and always close to a river. While the size of the laboratories varies, the larger ones can accommodate up to 200 workers. These large laboratories are self-contained and endowed with all major facilities, including generators, potable water plants, housing and other infrastructure. Clandestine landing strips and river docks make it possible for the laboratories to receive regular supplies of chemical precursors, fuel, coca paste or base, and dispatch cocaine to the main shipping points in Colombia.

The Colombian cocaine industry is dependent on large quantities of chemical inputs whose supply sources vary depending on whether they are being legally imported and then diverted within Colombia or smuggled into the country by road or via the many rivers that make up the Amazon and Orinoco basins. The supply is often arranged by specialized criminal organizations known as precursor cartels. Smuggling occurs across Colombia’s border with Venezuela, Brazil, Peru, Panama and Ecuador. In addition, the large laboratories are continuously experimenting with recycling or using legal substances as substitutes for controlled chemicals .

Trafficking methods and routes, used to transport illicit drugs to Europe and the United States, are constantly evolving in order to avoid tightening government controls. This, for instance, is noted in the changing profile of couriers who transport drugs by air and now include minors, senior citizens and the handicapped. Drug couriers are the preferred method for smuggling smaller quantities of narcotics and the most common substance trafficked by “mules” (couriers) is cocaine. Regarding routes used by couriers, trends show a decrease in the use of direct international routes. Traffickers prefer using transit countries such as Argentina, Chile, Ecuador and Venezuela in order to prevent detection by authorities. Apart from the “mules” that use commercial airlines, small-and medium-sized airplanes continue to be the preferred form of shipment for larger quantities. On the other hand, the success of efforts to prevent drug trafficking by air has increased trafficking via sea routes. It is estimated that 90 per cent of illegal drugs are smuggled by sea.

In terms of economic benefits for persons involved in the drug trade, only 1 per cent of the money that is ultimately spent worldwide by drug abusers on maintaining their drug habits is earned as farm income in developing countries. The remaining 99 per cent of the global illicit drug income is earned by drug trafficking groups operating at various other points along the drug trafficking chain. In Colombia, the average yearly net income of small and medium coca growers is less than US\$ 2.000 per hectare, while the revenue generated in the middle and at the end of the chain of commercialization is significantly higher.

3. *The correlation between the drug industry and the armed conflict/forced displacement*⁶

As Colombia's initial ideology-based conflict evolved into a struggle over the drug industry and territorial control, the humanitarian impact of the conflict on the civil population dramatically increased. Until the 1990s the insurgency led a mainly "hit and run" guerrilla war directed against the armed forces in key areas in the interior of the country.

In the 1990s, coinciding with the fall of the large drug cartels, the guerrilla (FARC, ELN) and paramilitary (AUC) gradually expanded their sphere of influence and gained territorial control over significant coca growing areas bordering Panama (Uraba region), Ecuador (Putumayo) and Venezuela (Arauca, North Santander). Paramilitary groups soon started expanding their radius of operation to dispute territories conquered by the guerrilla groups. With the evolution of the conflict, civil populations residing in these territories became military targets as the paramilitaries considered them to be the guerrillas' socio-economic basis.

Since the mid-1990's, drug trafficking has become the major source of income for irregular armed groups. While the guerrilla and paramilitary have traditionally levied taxes on the harvesting, processing and transport of coca, in many areas the insurgents have also taken direct control of cultivation, production and commercialization activities. Irregular armed groups have therefore evolved from being organisations that simply take advantage of narcotics "taxes" and transportation, to ones involved in the entire drug trafficking chain.

In fact, there is a correlation between the levels of violence, the surface area used to cultivate coca and the confrontations amongst the illegal armed groups. Given that the financing of their operations depends heavily on income generated by the drug industry, armed groups fight for both territorial and population control in drug producing areas. Guerrilla and paramilitary groups primarily target persons and communities who are perceived to be supporters or collaborators of the opposing group. They also target those individuals who provide indirect social or economic support to their enemies in the form of shelter, information or food. Civilians residing in these areas have thus come to be considered as key military objectives for these irregular armed groups. This has led to the severe degradation of the non-combatant and protected status of the civilian population. Violations of humanitarian law and human rights such as extrajudicial and arbitrary executions (often in the form of massacres or collective killings) enforced disappearances, tortures, hostage-taking and attacks against the civilian population and civilian targets are suddenly no longer a by-product of the conflict but a deliberate means of counter-insurgency.

⁶This section draws *inter alia* on International Crisis Group (ICG), "Colombia and its Neighbours: the tentacles of instability" (2003), Latin American Report No3; International Crisis Group (ICG), "Colombia's Elusive Quest for Peace" (2002), Latin American Report No1; International Crisis Group (ICG), "Colombia: Negotiating with the Paramilitaries" (2003), Latin America Report No.5; International Crisis Group, "War and Drugs in Colombia" (2005), Latin America Report No 11; U.S. Department of State, "Colombia: Country Reports on Human Rights Practices-2002" (2003); UNHCR, "International Protection Considerations regarding Colombian asylum-seekers and refugees" (2002); M.Gottwald, "Protecting Colombian Refugees in the Andean Region: The Fight Against Invisibility", International Journal of Refugee Law (IJRL) Vol.16 No. 4 (2004)

Equally, forced displacement has become an objective in itself. Entire communities suspected of providing support to the “enemy” are literally “cleansed” or forced to abandon their lands. When the land concerned is of strategic value in terms of cultivation of illicit crops, it is repopulated by supporters of the forces conducting the displacement. Frequently, these mass displacements are announced in advance, with those who fail to follow the order to move finding themselves at risk of massacre or other serious attack upon their physical security. By contrast, armed confrontations between the irregular groups have been rare.

Apart from economic needs (for lack of viable alternatives), local populations are often pressured by guerrillas and paramilitaries to take part in coca cultivation. This in turn increases their risk of suffering repercussions from armed groups (on the accusation of collaborating in the financing of the other).

Estimates suggest that the number of Colombians who fled their country over the past five to seven years in search of international protection may range between 300 000 and 1 million.⁷ There are individuals among them who were involved in drug activities prior to their entry into the country of asylum. Their asylum-claims raise complex questions in refugee status and resettlement procedures as to whether they deserve international protection.

III. Article 1F of the 1951 Convention and drug offences

1. Introduction

Article 1F of the 1951 Convention stipulates that “the provision 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.”

2. The need for a restrictive and evolutionary interpretation of Article 1F

A restrictive interpretation of the exclusion clauses is warranted because they are precisely and exhaustively enumerated, their effect is to derogate from a refugee’s entitlement to international protection and because of the inherently grave consequences of applying exclusion.⁸

⁷ See M. Gottwald, “Protecting Colombian Refugees in the Andean Region: The Fight Against Invisibility”, *International Journal of Refugee Law (IJRL)* Vol.16 No. 4 (2004), p.544

⁸ M. Kingsley Nyinah, “Exclusion under Article 1F: some reflections on context, principles and practice”, *IJRL* Vol12 (2000), Special Supplementary Issue, pp.298-299; G. Gilbert, “Current issues in the application of the exclusion clauses”, in: “Refugee Protection in International Law” edited by E. Feller, V. Türk and F. Nicholson (2003), p.428; G. Gilbert, Editorial, *IJRL* Vol 16 Number 1 (2004);

States have taken an evolutionary approach to the interpretation and application of Article 1F, drawing on developments in other areas of international law since 1951, in particular international human rights law, extradition law and international criminal law.⁹

3. The non-applicability of Articles 1F(a) to drug offences

Regional attempts¹⁰ to classify drug trafficking as a crime against humanity have so far failed the test of general applicability by the international community. In 1987 the classification of drug trafficking as a crime against humanity in a draft convention prepared by the Commission on Narcotic Drugs (CND) was considered controversial and subsequently omitted.¹¹

Likewise, drug offences were not included in the jurisdiction of the International Criminal Court (ICC). Drug offences have been relegated instead to Resolution E annexed to the Final Act of the 1998 Conference, with the recommendation that a Review Conference pursuant to article 111 of the Statute should at some undisclosed future date “consider...drug crimes with a view to arriving at an acceptable definition and then inclusion in the list of crimes within the jurisdiction of the Court”. The UN drug conventions themselves claim not that drug trafficking is an international crime but only that “it is an international criminal activity”.¹² Article 1F(a) is thus not applicable to drug offences.

4. The non-applicability of Article 1F(c) to drug offences

State practice seeks to interpret Article 1F(c) widely, but there is as yet no internationally accepted understanding of all those “acts contrary to the purposes and principles of the United Nations”.¹³

Some States have used Article 1F(c) as a residual category, for instance, in relation to trafficking in narcotics. According to them Article 1F(c) includes acts committed both in the country of refuge and the country of origin.¹⁴

UNHCR, Summary Conclusions – Exclusions from Refugee Status, Lisbon Expert Roundtable (Global Consultations on International Protection, 3-4 May 2001, EC/GC/01/2Track/1), paragraph 4

⁹ UNHCR EXCOM Standing Committee, 2001 (EC/51/SC/CRP.12)

¹⁰ See for example the 1984 Quito Declaration against Traffic in Narcotic Drugs signed by Bolivia, Colombia, Ecuador, Nicaragua, Panama, Peru and Venezuela (A/39/407) which declared drug trafficking to be a crime against humanity

¹¹ See UN General Assembly, Resolution A/RES/39/141 of 14 December 1984 (draft Convention against Traffic in Narcotic Drugs and Psychotropic Substances and Related Activities) whose Article 2 considers that drug trafficking is a “grave international crime against humanity”; N.Boister, „Penal Aspects of the UN Drug Conventions“ (2001), p.52

¹² Preamble of the 1988 Convention

¹³ G. Gilbert, “Current issues in the application of the exclusion clauses”, in: “Refugee Protection in International Law”, edited by E. Feller, V. Türk and F. Nicholson (2003), p.457, G. Gilbert, Editorial, *IJRL* Vol 16 Number 1 (2004)

¹⁴ See UNHCR, Summary Conclusions – Exclusions from Refugee Status, Lisbon Expert Roundtable (Global Consultations on International Protection, 3-4 May 2001, EC/GC/01/2Track/1), paragraph 13; J.Rikhof, “The Treatment of the Exclusion Clauses in Canadian Refugee Law”, 24 *Imm.L.R.* (2d) 31 (1994), p. 62, quoted by Canada’s Trial Division in “*Atef v. Canada (Minister of Citizenship and Immigration)*” (1994), Imm-44014-94

The position of most States, however, has been that given the precisely drawn scope of Article 1F(b), limited as it is to “serious non-political crimes” committed outside the country of refuge, the unavoidable inference is that serious non-political crimes are not included in the general, unqualified language of Article 1F(c). Article 1F(c) thus does not apply to drug offences regardless of whether they have been committed prior or after admission.¹⁵ This has been considered consistent with the expression of opinion of the delegates in the *Collected Travaux Préparatoires of the 1951 Convention Relating to the Status of Refugees*.¹⁶

5. The applicability of Article 1F(b)

The non-political nature of drug offences

In determining whether an offence is “non-political” or is, on the contrary, a “political” crime, regard should first be given to its nature and purpose, this is, whether it has been committed out of genuine political motives and not merely for personal reasons or gain.¹⁷ It is widely accepted that drug offences shall not be considered as political crimes.¹⁸

The “seriousness” of drug offences

During the Global Consultations it became clear that State practice on the interpretation of the term “serious non-political offence” varies, though it was acknowledged that international law imposed certain limitations on the scope of interpretation.

Various positions may be taken with regard to the seriousness of drug offences. The first one is to consider that drug offences are per se “serious non-political crimes”

¹⁵ See for example the case of *Pushpanathan v. Minister of Citizenship and Immigration and others* (1998) 4 LRC 365, where Canada’s Convention Refugee Determination Division excluded the claimant under article 1F(c) on account of conviction in Canada of drug trafficking. UN initiatives in the field were considered sufficient to bring the subject within the scope of UN purposes and principles, and the Division did not see any reason to limit exclusion to acts outside the country of refuge. On appeal, the Federal Court found no reason to interfere. Finally, the Canadian Supreme Court held: “there is no indication in international law that drug trafficking on any scale is to be considered contrary to the purposes and principles of the United Nations.... There is simply no indication that the drug trafficking comes close to the core or even forms part of the corpus of fundamental human rights”. The Supreme Court thus concluded as a matter of interpretation and historical fact, that it was not the intention of the signatories to the Convention to classify drug trafficking within Article 1F(c); see also Federal Court (Canada), “*Chan v. Minister of Citizenship and Immigration*” (2000), 4 F.C. 390; J. Sloan, “The Application of Article 1F in Canada and the United States”, *IJRL Vol 12* (2000), Special Supplementary Issue, p.246

¹⁶ Federal Court (Canada), “*Chan v. Minister of Citizenship and Immigration*” (2000), 4 F.C. 390, paragraph 5

¹⁷ UNHCR, “Handbook on procedures and criteria for determining refugee status” (1992), paragraph 152

¹⁸ see *inter alia* UN General Assembly, Resolution A/RES/39/141 from 14 December 1984; Supreme Court (Canada), “*Pushpanathan v. Minister of Citizenship and Immigration and others*” (1998), 4 LRC 365 (SCC), para.73; Board of Immigrations Appeals (USA), “*Matter of Q.T.M.T.*”, Int.Dec.3300 (1996); for national jurisprudence in Europe see S.Kapferer, “Exclusion Clauses in Europe – A comparative Overview of State Practice in France, Belgium and the United Kingdom”, *IJRL Vol12* (2000), Special Supplementary Issue, p.199; UNHCR, “Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees” (2003), G.S.Goodwin-Gill, “The Refugee in International Law” (1996), pp. 107-108

without proceeding to an individualized examination of surrounding factors. This position may be linked to the view of some commentators which conclude that article 1F(b) is meant to be directly linked to extradition, so that it automatically applies to any crime that could give rise to the surrender of a fugitive under extradition law.¹⁹ Following that position, one could argue that as the Trafficking Convention considers all drug offences for trafficking purposes “extraditable” these offences automatically reach the seriousness threshold of Article 1F(b). The penal codes of many countries seem to reflect that view as all drug offences along the chain of commercialisation receive severe penalties.²⁰

A second possibility is to create rebuttable presumptions with regard to different types of drug offences. Goodwin-Gill²¹ refers to UNHCR’s policy regarding Cuban asylum-seekers who arrived en masse in the United States in 1980. The approach taken was to create three categories of crimes.²² The first category of crimes, which includes drug trafficking, rests on the rebuttable presumption of “seriousness” absent any political or mitigating factors, such as the offender’s young age or limited role. A second category – which included *inter alia* possession of drugs other than for personal use – could be considered “serious” only with aggravating circumstances. Finally, a third category of crimes, including possession of drugs for personal use²³, were not to be considered serious. According to Goodwin-Gill “these criteria may still be of general value in the interpretation of the 1951 Convention and the UNHCR Statute, bearing in mind the objective of such provisions to obtain a humanitarian balance between a potential threat to the community of refuge and the interests of the individual who has a well-founded fear of persecution”.²⁴ The 2003 UNHCR Background Note on the Application of the Exclusion Clauses seems to follow the same line of argumentation, as it suggests that there are crimes that are “serious” *per se* (without mentioning however drug trafficking explicitly), while “certain other offences could also be deemed serious if they are accompanied by the use of deadly weapons, involve serious injury to persons, or there is evidence of serious habitual criminal conduct and other similar factors”.

¹⁹ See, for example, J. Hathaway, “The Law of Refugee Status” (1991), p.221 who considers that Article 1F(b) of the 1951 Convention is “simply a means of bringing refugee law into line with the basic principles of extradition law”. Conversely, W. Kälin and J.Künzli, “Article 1F(b): Freedom Fighters, Terrorists, and the Notion of Serious Non-Political Crimes” in *IJRL* Vol12 (2000), Special Supplementary Issue, at pp.64-65 point out that confining the applicability of Article 1F(b) of the 1951 Convention to extraditable crimes would lead to absurd results

²⁰ See national drug laws listed in UNODC Legal Library (http://www.unodc.org/unodc/en/legal_library/index-countries-ir.html); it is noteworthy that excessive punishment (e.g. death penalty for offences committed for personal drug consumption) may amount to persecution within the meaning of the refugee definition. See for instance Administrative Court (Germany), IV/3 E 5053/90 (1993) examining the complementary protection needs of a rejected asylum-seeker from Iran (who had committed drug offences in Yugoslavia and Germany and who claimed to be at risk of being executed upon return to Iran based on the drug legislation of that country which foresees the death penalty for possession of quantities of heroin exceeding 30g)

²¹ G.S.Goodwin-Gill, “The Refugee in International Law” (1996), p. 107

²² J. Sloan, “The Application of Article 1F in Canada and the United States”, *IJRL* Vol 12 (2000), Special Supplementary Issue, p.244

²³ UNHCR, “Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees” (2003), seems to suggest in paragraph 40 that there are offences which are “non-serious” *per se* such as the possession for personal use of illicit narcotic substances.

²⁴ G.S. Goodwin-Gill, “The Refugee in International Law (1996)”, pp.107-108

A third position consists in establishing that in the field of drug offences there are no “serious crimes” *per se*.²⁵ As there is no presumption of “seriousness”, it has to be evaluated with regard to each drug offence based on the circumstances surrounding the offence whether it reaches the threshold enshrined in Article 1F(b).²⁶

The evaluation is difficult given the different connotations of the term “crime” and “serious” in different legal systems.²⁷ When the provision of a multilateral treaty is involved, the gravity of the crime has to be judged against international standards and not simply by its characterization in the host State or country of origin.²⁸ A “serious” crime must be a capital offence or a very grave punishable act. Minor offences punishable by moderate sentences are not grounds for exclusion under Article 1F(b) even if technically referred to as “crimes” in the penal law of the country concerned. Moreover, in determining the seriousness of the crime, mitigating and aggravating circumstances have to be taken into account.²⁹ Equal regard should also be given to general principles of criminal liability in order to determine whether a valid defence, such as duress, exists for the crime in question.³⁰

IV. The international legal framework applicable to drug offences

1. Introduction to the UN Drug Conventions

The current legal and administrative framework for international drug control is laid out in three international Conventions negotiated under the auspices of the United Nations (UN) which harmonise domestic drug offences within broad parameters:

²⁵ See for example B.M.Yarnold, “Doctrinal basis for the international criminalisation process”, 8 Temple International and Comparative Law Review 85 (1994) at p.103, who suggests that drug offences “neither present a threat to world peace nor do they shock the conscience of the world community”

²⁶ See for instance Federal Court (Australia), “Goyal v. Canada (Minister of Citizenship and Immigration)”, 112 F.T.R.137 (1996); see also J. Sloan, “The Application of Article 1F of the 1951 Convention in Canada and the United States”, in IJRL Vol12 (2000), Special Supplementary Issue, referring on page 244 to L. Waldman, “Immigration Law and Practice” (1997): “relying on the case of Goyal v.Canada one commentator concluded: before a person can be excluded due to committing a “serious” non-political crime, there must at a minimum be an analysis of the gravity of the offence, the potential sentence that is likely to be imposed, the past record of the individual, and any mitigating and aggravating matters before the tribunal decides whether or not the offense is sufficiently grave to be considered “serious” for the purposes of Art. 1F(b)

²⁷ A. Grahl-Madsen, “The Status of Refugees in International Law” (1966) vol1, pp. 289-99

²⁸ G.S.Goodwin-Gill, “The Refugee in International Law” (1996), p.106; UNHCR, “Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees” (2003), p.14

²⁹ UNHCR, “Handbook on procedures and criteria for determining refugee status” (1992), paragraph 157; see also J. Sloan, “The Application of Article 1F in Canada and the United States”, IJRL Vol 12 (2000), Special Supplementary Issue, p.244

³⁰ According to paragraph 69 of the UNHCR “Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees” (2003) “duress” results from a threat of imminent threat or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided.

- the Single Convention on Narcotic Drugs, 1961 (henceforth Single Convention)³¹ as amended by the Protocol Amending the Single Convention on Narcotic Drugs, 1961;
- the Convention on Psychotropic Substances (henceforth Psychotropic Convention), 1971³²; and
- the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (henceforth **Trafficking Convention**), 1988³³.

The Single and Psychotropic Conventions contain provisions of predominantly administrative character. Their main purpose is to establish an international system for the control of legal production and legal turnover with narcotic drugs and psychotropic substances. As a result, their penal provisions are of relatively minor importance.

The Trafficking Convention is essentially an instrument of international criminal law and firmly establishes a system of international criminal drug control law that uses criminalization and penalization to combat global drug trafficking. The focus of the legal framework has been to attempt to control the supply of drugs at the source and to impose criminal penal sanctions on all actors involved in the drug business, including illicit drug producers, traffickers, dealers and users.

The UN drug conventions enjoy almost universal adherence³⁴ and thus constitute the relevant international standard³⁵ for characterizing the seriousness of drug offences.

2. The provisions of the UN Trafficking Convention

The Preamble

The Preamble describes illicit traffic as “an international criminal activity” and recognizes “the links between illicit traffic and other related organized criminal activities which undermine the legitimate economies and threaten the stability, security and sovereignty of States.”

The Scope of the Convention

According to article 2 of the Trafficking Convention, its purpose is to promote cooperation among the signatory parties so that they may address more effectively the various aspects of illicit traffic in narcotic drugs and psychotropic substances having an international dimension. By virtue of Article 1(m) “illicit traffic” encompasses all

³¹ United Nations, Treaty Series, vol.520, No.7515

³² United Nations, Treaty Series, vol.1019, No.14956

³³ United Nations, Treaty Series, vol.1582, No.27627

³⁴ 169 States are parties to the 1988 Convention; 180 States are parties to the Single Convention on Narcotic Drugs of 1961 or are parties to that Convention as amended by the 1972 Protocol; 175 States are parties to the Convention on Psychotropic Substances of 1971; for further details see http://www.unodc.org/unodc/en/un_treaties_and_resolutions.html

³⁵ See United Nations, “Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances” (henceforth UN 1988 Commentary), paragraph 3.2

drug offences set out by the Trafficking Convention. The term thus covers both trafficking offences and offences committed for personal consumption..

Drug offences

The cornerstone of the Trafficking Convention is Article 3 on "Offences and Sanctions" which distinguishes between "criminal offences" (Art.3.2), "serious criminal offences" (Art.3.1 and Art 3.7) and "particularly serious offences" (Art.3.5).

"Criminal offences" are set out by Article 3.2 of the Trafficking Convention which requires each Party – subject to its constitutional principles and the basic concepts of its legal system – to establish criminal offences for the intentional possession, purchase or cultivation of drugs for personal³⁶ consumption. An interpretation of article 3(7)³⁷ reveals that the Trafficking Convention considers these offences to be less serious in nature compared to the offences in article 3(1).

Mandatory "serious criminal offences" related to trafficking³⁸ are set out in Article 3(1), and include the following:

- The production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the Single Convention or the Psychotropics Convention;
- The cultivation of opium poppy, coca bush or cannabis plant for the purpose of the production or narcotic drugs contrary to those earlier Conventions;
- The possession or purchase of any narcotic drug or psychotropic substance for the purpose of illicit trafficking;
- The manufacture, transport or distribution of equipment, materials or of substances for the purpose of illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances; and
- The organization, management or financing of any of the above offences.

"Serious criminal offences" differ from "criminal offences" in that they are committed for the purpose of trafficking. Paragraphs 4 and 7 of Article 3³⁹ make clear that the

³⁶ Emphasis added

³⁷ Article 3(7) of the Trafficking Convention provides that "The Parties shall ensure that their courts or other competent authorities bear in mind the serious nature of the offences enumerated in paragraph 1 of article 3. As drug offences for personal use are established in paragraph 2 of article 3 it can be deduced from Article 3(7) that the drafters of the Convention consider drug offences for personal use as less serious than the trafficking offences established in paragraph 1 of article 3.

³⁸ Emphasis added

³⁹ Paragraph 4(a) provides that "each party shall make the commission of the offences established in accordance with paragraph 1 (of article 3) liable to sanctions which take into account the **grave** nature (emph. added) of these offences, such as imprisonment or other forms of deprivation of liberty, pecuniary sanctions and confiscation. Paragraph 7 stipulates that "the Parties shall ensure that their courts or other competent authorities bear in mind the **serious** nature (emph added) of the offences

Parties to the Convention consider these offences as “grave” and “serious”. These provisions seem to accept that these offences are in and of themselves always “serious” and “grave” and there can be no instances when they describe relatively minor infractions of the law.⁴⁰

Finally, Article 3(5) stipulates that the offences established by Article 3(1) shall be “particularly serious” when committed under certain aggravating circumstances.⁴¹

All three types of offences shall be sanctioned when committed intentionally. Article 3(3) specifies with regard to the offences in Article 3(1) that “knowledge, intent or purpose required as an element of an offence (...) may be inferred from objective factual circumstances.”

The UN Drug Conventions and human rights

Criticisms of the hardcore criminal law approach adopted by the international drug control system, and the 1988 Trafficking Convention in particular, have arisen in the human rights context. To start with, there are virtually no provisions in the Convention which relate to the protection of human rights. Moreover, the Trafficking Convention does not take into account the wide range of different criminal roles or responsibilities that one may assume within the drug business. Instead, it indiscriminately criminalizes conduct related to different stages of the illicit drug trade under the term “illicit traffic”, irrespective of the criminal responsibility. This would mean that a small peasant farmer who cultivates cocaine in a developing country for the purpose of supporting his family bears as “trafficker” the same criminal responsibility as the leader of a major drug cartel who oversees a multi-million dollar business in all stages of the supply chain. Various provisions of the Trafficking Convention seem to follow that strange logic. A case in point is Article 6 of the Trafficking Convention on “extradition” according to which all drug offences shall be extraditable. Applying that provision literally would lead to the absurd result that hundreds of thousands of small drug peasants in drug producing countries would be extraditable.⁴²

enumerated in paragraph 1 of this article and the circumstances enumerated in paragraph 5 (of article 3) when considering the eventuality of early release or parole of persons convicted of such offences.”

⁴⁰ N.Boister, “Penal Aspects of the UN Drug Conventions” (2001), p.163

⁴¹ Article 3(5) mentions in a non-exhaustive manner the following circumstances: the involvement in the offence of an organized criminal group to which the offender belongs, the involvement of the offender in other international organized criminal activities, the involvement of the offender in other illegal activities facilitated by commission of the offence, the use of violence or arms by the offender, the fact that the offender holds a public office and that the offence is connected with the office in question, the victimization or use of minors, the fact that the offence is committed in a penal institution or in an educational institution or social service facility or in their immediate vicinity or in other places to which school children and students resort to educational, sports and social activities; prior conviction, particularly for similar offences, whether foreign or domestic, to the extent permitted under the domestic law of a Party

⁴² See the statement by the representative of Bolivia (UN Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Official Records, vol II, Summary records of meetings of the Committees of the Whole, Committee I, 24th meeting, para.65), who pointed out with regard to the fact that the Trafficking Convention criminalizes indiscriminately all drug activities including cultivation that “whole batches of the population would be in jeopardy and the prisons would be full to overflowing”; This should be seen as an important argument against those commentators that suggest that Article 1F(b) automatically applies to any crime that could give rise to the surrender of a fugitive under extradition law

The question thus arises of how the Trafficking Convention relates to international human rights and refugee law. Two issues have to be examined in particular: a) whether and to what extent proportionality principles inherent to Human Rights Law are applicable; b) whether all of the drug offences set up by the Trafficking Convention under the term “illicit traffic” reach the seriousness threshold of Article 1F(b) of the 1951 Convention or whether there is a minimum cut-off below which the facts of certain drug cases would not merit exclusion.

V. Interpreting the Trafficking Convention in conformity with Article 1F(b) of the 1951 Convention

1. Compliance of the Trafficking Convention with human rights norms

The 1988 UN Commentary provides that “particular care must be taken to ensure compliance (of the Trafficking Convention) with relevant constitutional protections and applicable international human rights norms”.⁴³ In the same vein, the UN Intergovernmental Expert Group on Extradition states that “compliance with the drug conventions cannot result in human rights breaches and that observance of human rights makes the conventions more effective”.⁴⁴ Finally, the UN General Assembly has emphasized that “respect for all human rights is and must be an essential component of measures taken to address the drug problem” and that “countering the world drug problem is a common and shared responsibility which must be addressed in a multilateral setting, requiring an integrated and balanced approach, and must be carried out in full conformity with the purposes and principles of the Charter of the United Nations and international law, and in particular with full respect for the sovereignty and territorial integrity of States, the principle of non-intervention in the internal affairs of States and all human rights and fundamental freedoms”.⁴⁵ This is in line with Articles 55 and 56 of the UN Charter which impose a duty on States to promote and respect human rights and Article 103 of the UN Charter which provides that “in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”. Considering that the Trafficking Convention does not contain explicit human rights provisions, it is necessary to interpret its wording to bring its meaning in line with international human rights law.

2. Clarification of the meaning of the provisions of the Trafficking Convention

The UN drug conventions are saturated with textual ambiguity.⁴⁶ Clarification of the meaning of their provisions in accordance with Articles 31⁴⁷ and 32⁴⁸ of the Vienna

⁴³ UN 1988 Commentary, paragraph 144

⁴⁴ 1996 Report cited by D.Stafford, “Combating transnational crime: the role of the Commonwealth” in W.C. Gilmore and P.J.Cullen (eds), *Crimes Sans Frontières: International and European Approaches: Hume Papers on Public Policy* Vol.6, no. 1 and 2 (Edinburgh UP, Edinburgh, 1998)

⁴⁵ UN General Assembly, Resolution A/RES/56/124 of 19 December 2001 on “International cooperation against the world drug problem”

⁴⁶ N.Boister, “Penal Aspects of the UN Drug Conventions” (2001), p.22

⁴⁷ Article 31 paragraph 1 of the Vienna Convention on the Law of Treaties stipulates that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the

Convention on the Law of Treaties provides a possibility to reconcile the wording of the Trafficking convention with human rights law by means of interpretation.

First, Article 3 paragraph 1 of the 1988 Convention uses the term “offence” rather than “crime”. “Offence” is, as the UN Commentary on the Convention on Psychotropic Substances⁴⁹ explains, a broader term than “crime” and includes all violations of the criminal law no matter how serious. It is noteworthy that the drug conventions themselves do not claim that drug trafficking is an “international crime”. They rather consider it as an “international criminal *activity*” (emphasis added).⁵⁰ The “seriousness” of this activity has been questioned for example by the Canadian Supreme Court.⁵¹

Also the recent development of the International Criminal Court (ICC) reveals in accordance with Article 31(3) of the Vienna Convention how States view the seriousness of drug offences. Caribbean States called in 1989 for an ICC with subject matter jurisdiction over illicit trafficking in drugs across national frontiers.⁵² However, by the time the new convention for the court was settled in Rome in 1998, these offences were excluded from its jurisdiction.⁵³ What essentially happened was that in spite of the backing of the International Narcotics Control Board (ICB), as the prospect of an ICC became more real, opposition to the inclusion of drug offences within the ICC’s jurisdiction grew. Under this pressure the scope of drug crimes over which the ICC was to have jurisdiction slowly contracted to include only serious offences, then only to exceptionally serious offences having an “international dimension”,⁵⁴ and finally only to large-scale transboundary offences. However, these concessions were not enough. Article 5 of the Rome Statute limits the ICC’s jurisdiction to a set of “core” crimes that concern the international community as a

treaty in their context and in the light of its object and purpose. Paragraph 3 allows recourse to state practice subsequent to the conclusion of a treaty as evidence of what was originally intended by its authors.

⁴⁸ Article 32 of the Vienna Convention on the Law of Treaties provides that “recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusions, in order to confirm the meaning when the interpretation according to article 31 leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable.” I. Brownlie, “Principles of Public International Law” (1998), pp. 632-638, points out that according to the International Law Commission there is no rigid line between “supplementary” and other means of interpretation; articles 31 and 32 should rather operate in conjunction

⁴⁹ United Nations, Commentary on the Convention on Psychotropic Substances (1976), p.348

⁵⁰ Preamble to the 1988 Convention

⁵¹ The Canadian Supreme Court held in “Pushpanathan v. Minister of Citizenship and Immigration and others” (1998), 4 LRC 365, at 395 and 396: “There is no indication in international law that drug-trafficking on any scale is to be considered contrary to the purposes and principles of the United Nations....There is simply no indication that the drug trafficking comes close to the core or even forms a part of the corpus of fundamental human rights”

⁵² UN General Assembly, Official Records, 6th Comm. 44th Session, UN Doc. A/C.6/44/SR.38-41 (1989)

⁵³ See generally N.Boister, “The exclusion of treaty crimes from the jurisdiction of the International Criminal Court: law, pragmatism, politics” (1998), 3 Journal of Armed Conflict Law, pp. 27-43

⁵⁴ Crimes involving illicit traffic in narcotic drugs and psychotropic substances as envisaged by Article 3 (1) of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988 which, having regard to Article 2 of the Convention, are crimes with an international dimension, in: International Law Commission, “Report of the Working Group on a draft statute for an international criminal court” (1994), Article 20(e); International Law Commission, “Report of the International Law Commission on the work of its forty-sixth session” (1994), UN Doc. A/49/355

whole. Exclusion of drug offences from the ICC's jurisdiction was considered a compromise, because it was linked to a future review of the ICC's jurisdiction for inclusion of such crimes.⁵⁵ The problem has been clearly one of distinguishing serious offences from those less serious and crimes with an international dimension from those that do not have such a dimension.⁵⁶ One could argue that as long as the ICC is not given jurisdiction over specific drug crimes there are grounds to presume that no drug offence attains *per se* the seriousness threshold of Article 1F(b) of the 1951 Convention.

Second, as illustrated above, Article 1(m) of the Trafficking Convention sets out that all drug offences shall be considered indiscriminately as "illicit traffic". A contextual interpretation however reveals that the Trafficking Convention actually distinguishes within "illicit traffic" between different levels of seriousness of drug offences. To start with, an interpretation of article 3(7)⁵⁷ reveals that the Trafficking Convention considers offences committed for personal use to be less serious in nature compared to those trafficking offences outlined in article 3(1).⁵⁸ Article 3(5) considers drug offences as "particularly serious" when committed under certain aggravating circumstances. In sum, the Trafficking Convention establishes a seriousness hierarchy of drug offences, with "criminal offences" (for personal use) as the least serious offences at the bottom, "serious criminal offences" (for trafficking purposes) in the middle and "particularly serious offences" (for trafficking purposes) at the top.

A contextual approach also reveals that the drafters of the 1988 Convention also foresaw a distinction within the group of "serious criminal offences": whereas Article 3 paragraph 4 a) suggests that all of the offences of Article 3 paragraph 1 are of "grave nature", Article 3 paragraph 4(c) establishes that "notwithstanding (...), in appropriate cases of a minor nature (...) alternatives to conviction or punishment may be provided". In other words, the drafters of the Convention acknowledged that there are less serious cases among the "serious criminal offences" of Article 3(1).

3. Criteria for determining the seriousness of drug offences in regard to the threshold of Article 1F(b)

Aggravating circumstances

Having concluded above that the Trafficking Convention contains a seriousness hierarchy of drug offences and that no drug offence reaches automatically the seriousness threshold of Article 1F(b), the question arises whether the Trafficking Convention contains elements that help in determining which drug offences outlined

⁵⁵ N.Boister, "Penal Aspects of the UN Drug Conventions", p.538

⁵⁶ N.Boister, "Penal Aspects of the UN Drug Conventions", p. 540

⁵⁷ Article 3(7) provides that "the Parties shall ensure that their courts or other competent authorities bear in mind the serious nature of the offences enumerated in paragraph 1 of article 3. As drug offences for personal use are established in paragraph 2 of article 3 it can be deduced from Article 3(7) that the drafters of the Convention consider drug offences for personal use as less serious than the trafficking offences established in paragraph 1 of article 3.

⁵⁸ See also "Pusphanathan v. Minister of Citizenship and Immigration and others" (1998), 4 LRC 365, paragraph 151 where the Canadian Supreme Court acknowledges that "the Trafficking Convention recognizes in Article 3 the distinctions based on the type and scale of activities by treating production, processing, distribution and sale (for trafficking purposes) differently from possession, purchase or cultivation for personal consumption for the purposes of offences and sanctions"

in the Trafficking Convention effectively reach the seriousness threshold of Article 1F(b) of the 1951 Convention.

Article 3(5) of the Trafficking Convention proves helpful in that regard as it enumerates, in a non-exhaustive manner, aggravating circumstances that make the serious drug offences established in Article 3(1) “particularly serious”. While the Trafficking Convention fails to specify the purposes for which a crime shall be considered as particularly serious in the framework of criminal procedures, for the purpose of assessing the applicability of the exclusion clause in Article 1F(b) of the 1951 Convention the aggravating circumstances are useful criteria for examining whether a drug offence reaches the seriousness threshold of Article 1F(b) of the 1951 Convention. The EU Commission, in its “proposal for a council framework decision laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking”⁵⁹, seems to follow the same line by stressing that factors such as the scale and frequency of the trafficking, the nature of the narcotics concerned and the amount of revenue derived are to be considered when assessing the gravity of the offence.

Article 3(5) is not a *numerus clausus* but serves as a strong guide to the kind of factors regarded as aggravating by the 1988 Conference.⁶⁰ The following circumstances may be – explicitly or implicitly - deduced from the Trafficking Convention:

Involvement with international criminal activities. Article 2 of the Trafficking Convention stipulates that “the purpose of this Convention is to promote co-operation among the Parties so that they may address more effectively the various aspects of illicit traffic in narcotic drugs and psychotropic substances having an international (emphasis added) dimension”.

Although not conceived as an overriding safeguard clause governing all the articles of the Convention, whether or not they themselves contain a safeguard clause, article 2 is important because it serves as a statement of guiding principles for the correct interpretation and proper implementation of the substantive articles of the Convention.⁶¹

At the United Nations Conference for the adoption of the Trafficking Convention it was pointed out that the more international impact an offence has the more serious it should be considered to be.⁶²

The fact that drug offences with an international dimension bear a higher degree of seriousness has been reflected in the UN Convention against Transnational Organized Crime.⁶³ The Convention establishes that an offence is transnational in nature if: a) it

⁵⁹ Commission of the European Communities, “Proposal for a Council framework Decision laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking” (2001), COM/2001/0259 final,

⁶⁰ N.Boister, “Penal Aspects of the UN Drug Conventions” (2001), p.166

⁶¹ UN 1988 Commentary, paragraph 2.4

⁶² “Report of the United States Delegation to the United Nations Conference for the adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances”, 101st Congress, Senate, Exec. Rept. 101-15, p.26, quoted in UN 1988 Commentary at paragraph 3.2

⁶³ The Interpretative notes for the official records of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (General Assembly, A/55/383/Add.1) provides in paragraph 7 that “during the negotiation of the Convention, the Ad Hoc Committee (on the

is committed in more than one State, b) it is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; it is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or it is committed in one State but has substantial effects in another State.

The same concern over the seriousness of international criminal activities has been expressed in the draft Statute for an International Criminal Court of the International Law Commission⁶⁴. The draft provides in its Annex under “Crimes pursuant to Treaties” that the ICC should have competence only over drug crimes “which, having regard to Article 2 of the Convention, are crimes with an international dimension”. These crimes constitute by virtue of Article 20 “exceptionally serious crimes of international concern”. It is noteworthy that most national drug legislations consider international drug traffic and other international criminal activities as aggravating compared to merely domestic traffic.⁶⁵

Subparagraph b) of Article 3(5) of the Trafficking Convention explicitly acknowledges that offences with an international dimension present a higher criminal content by stating that “the involvement of the offender in other international organized criminal activities” shall be an aggravating circumstance. Although they must be “other” activities, this need not exclude other activities related in some way to illicit traffic in narcotic drugs or psychotropic substances. Two examples given in the course of the negotiations of the Trafficking Convention were arms smuggling and international terrorism.⁶⁶

For example, in the context of a non-international armed conflict, the fact that a drug offender participated directly in armed or other activities carried out by guerrilla or paramilitary forces, which are considered terrorist organisations by the international community, should be seen as an aggravating factor.

Involvement in the offence of an organized criminal group to which the offender belongs. Art. 3.5 (a) of the UN Trafficking Convention considers “the involvement in the offence of an organized criminal group to which the offender belongs” explicitly as an aggravating circumstance. While the Trafficking Convention does not define the term “organized criminal group”, by virtue of Article 2 of the UN Convention against Transnational Organized Crime, the term “organized criminal group” shall mean a structured group⁶⁷ of three or more persons, existing for a period of time and acting in

Elaboration of a Convention against Transnational Organized Crime) noted with deep concern the growing links between transnational organized crime and terrorist crimes (...)” and that “all States participating in the negotiations expressed their determination to deny safe havens to those who engaged in transnational organized crime by prosecuting their crimes wherever they occurred and by cooperating at the international level”

⁶⁴ International Law Commission, “Report of the International Law Commission on the work of its forty-sixth session” (1994)

⁶⁵ See for instance the above proposal of the EC Commission for a council framework decision laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, wherein the Commission establishes that “large-scale transnational trafficking” shall be considered the most serious case of drug trafficking

⁶⁶ UN 1988 Commentary, paragraph 3.117

⁶⁷ According to the Interpretative notes for the official records of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (General Assembly, A/55/383/Add.1) “the term structured group is to be used in a broad sense so as to include both groups

concert with the aim of committing one or more serious crimes or offences (...) in order to obtain, directly or indirectly, a financial or other material benefit.⁶⁸

According to the UN Commentary to the Trafficking Convention, the important circumstance is that the offence is not committed by an individual acting alone. The text requires not only that the offender should belong to an organized criminal group, but also that the group was actively involved in the offence.

Criminal responsibility of the offender in the chain of commercialisation. In the chain of supply there are different functions and criminal responsibilities ranging from the production of the raw materials, their refinement into the final product, the transportation of the product to their markets, wholesale and retail distribution within these markets, and the investment/laundrying of the profits. The more responsibilities a person has in that system the greater is his criminal involvement in the illicit activity.⁶⁹ For example, a peasant who merely cultivates coca leaves has a lower criminal responsibility than a farmer who in addition processes the raw material into basic paste.⁷⁰ Likewise, a person who directs a major criminal group and controls the commercialisation/export of illicit drugs in an entire region has a greater criminal responsibility than a drug courier transporting drugs by air.

Scale and frequency of the drug offences. Different types of criteria have been proposed for measuring the scale and frequency of drug offences. Regarding cultivation and production, the size of the plantation⁷¹, the number of plants⁷² and the intensiveness of farming⁷³ may serve as indicators. In terms of all drug offences, large-scale organized operations have a higher criminal content than isolated or individual activities carried out by small dealers.⁷⁴ In the case of activities related to the sale, supply and administration of illicit drugs, it has been proposed to distinguish between “commercial quantity”, “trafficable quantity” and “less than a trafficable quantity”. Other aspects to be considered are whether drugs were for private

with hierarchical or other elaborate structure and non-hierarchical groups where the roles of the members of the group need not be formally defined.”

⁶⁸ See also UN Office on Drugs and Crime, “Results of a Pilot Survey of Forty Selected Organized Criminal Groups in Sixteen Countries” (2002),

⁶⁹ See for example Canada’s Supreme Court, “Pushpanathan v. Minister of Citizenship and Immigration and others” (1998), 4 LRC 365 (SCC), paragraph 151: “It is those actually engaged in trafficking who reap most of the profits, cause the greatest harm and therefore bear the greatest responsibility for perpetuating the illicit trade. Those who are merely consumers are often victims themselves and do not bear the same responsibility. The Illicit Traffic Convention recognizes this distinction by treating production, processing, distribution and sale differently from possession, purchase or cultivation for personal consumption for the purposes of offences and sanctions”

⁷⁰ United Nations Office on Drugs and Crime (UNODC), “Alternative Development in the Andean Area, the UNDCP Experience” (2001), p.17

⁷¹ UNODC distinguishes between small-scale and large-scale farms. In its “Colombia 2003 Country Profile” UNODC considers at page 11 that large-scale farming starts as of 3 hectares

⁷² UNODC distinguishes in its model legislation (www.unodc.org/pdf/lap_drug_abuse_bill_20000.p) between four categories: 1-5 plants, 6 to 20, 21 to 1.000, Over 1.000

⁷³ UNODC (“Alternative Development in the Andean Region”, p. 14) distinguishes between traditional forms of cultivation (from 35.000 to 40.000 plants per hectare, hand-weeding with machetes, little or no chemical treatment of plantations) and intensive forms of cultivation (250.000 plants per hectare, use of herbicides, intensive chemical treatment)

⁷⁴ International Law Commission, “Report on the work of its forty-second session” (1990), UN Doc. A/45/10 in: Yearbook of the International Law Commission 1990, vol.II, Part Two,1, p.30; Federal Constitutional Court (Germany), “Cannabis Decision” (1994), BverfG NJW 1994, 1577

consumption or possessed for trafficking, the profit made and the frequency of illicit activities.

Nature of drugs involved. A textual interpretation of the 1988 Convention leads to the result that the Trafficking Convention seems to foresee the same penal consequences for all narcotics without considering their different impact on health. On the other hand, the Preamble of the 1988 Convention establishes as goals not only the fight against illicit drug trafficking but also the protection of the health and welfare of human beings. The differences in the nature of drugs have been acknowledged by the UN⁷⁵ and the EU⁷⁶. National Legislation, UN bodies⁷⁷ and national jurisprudence⁷⁸ have thus distinguished between high risks drugs such as opium, morphine and cocaine and low risk drugs such as Cannabis. High risk drugs are considered as causing unacceptable harm to both society and the user and thus constitute an aggravating factor.

The general criminal profile of the offender. Article 3(5)c) of the Trafficking Convention considers the “offender’s involvement in other illegal activities facilitated by the commission of the offence” as an aggravating circumstance. According to the UN Commentary there are many cases in which the profits derived from illicit traffic or other drug-related offences are used to fund other types of criminal or illegal activities.⁷⁹ In the context of an (internal) armed conflict this may include activities such as arms trade for an irregular armed group

Article 3(5)(d) of the Trafficking Convention foresees that the “use of violence or arms by the offender” is an aggravating circumstance. According to the UN Commentary what is plainly meant is that the offender used violence or arms in the commission of the offence itself.⁸⁰

Paragraph e) foresees that offences shall be considered as particularly serious when the offender holds public office and the offence is connected with the office in question. Finally, paragraph (h) establishes that “prior conviction, particularly for similar offences, whether foreign or domestic (...) is an aggravating circumstance.

Victimization of vulnerable persons. Art. 3.5 (f) of the UN Trafficking Convention foresees that the victimization or use of minors is an aggravating circumstance. According to the Convention on the Rights of the Child, a child is considered to be

⁷⁵ UNODC stresses in its World Drug Report 2000 that “cannabis is less of a problem-drug than heroin or cocaine”. In the World Drug Report 2004 UNODC highlights that the term “problem drug” may be based on the criterion of treatment demand for addiction. Based on that definition, opiates are considered the most serious problem drug in the world, as they are responsible for most treatment demand.

⁷⁶ See for instance European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), “Annual Report on the state of the drugs problem in the European Union” (2001), which defines problem drug use as “injecting drug use or long duration/regular use of opiates, cocaine and/or amphetamines”, and excludes ecstasy and cannabis users

⁷⁷ See for instance UNODC model drug legislation on http://www.unodc.org/pdf/lap_drug-abuse-bill_commentary.pdf

⁷⁸ Supreme Court (Canada), “Pushpanathan v. Minister of Citizenship and Immigration and others” (1998), 4 LRC 365 (SCC); see also Federal Constitutional Court (Germany), “Cannabis Decision” (1994), BverfG NJW 1994, 1577, where the German Constitutional Court held that the equal treatment of soft and hard drugs is incompatible with the concept of justice

⁷⁹ UN 1988 Commentary, paragraph 3.118

⁸⁰ UN 1988 Commentary, paragraph 3.119

every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier. The UN Commentary points out that “use” includes, but is not limited to, exploitation of minors. For example, the use of a minor in the role of a messenger might be sufficient for the subparagraph to apply.⁸¹ Another example is the forced labour children are subject to as leaf pickers on coca cultivations.

Article 3.5 (g) establishes as an additional aggravating circumstance the fact that the offence is committed in a penal institution or in an educational institution or social service facility or in their immediate vicinity or in other places to which school children and students resort for educational, sports and social activities.

Mitigating circumstances

It is hardly surprising that the Trafficking Convention in its approach to criminalize indiscriminately all drug offences does not contain any mitigating circumstances. Nevertheless, in order to determine the seriousness of drug offences, the above aggravating circumstances need to be balanced against possible mitigating factors.⁸²

First, circumstances that come close to defences to criminal liability shall be taken into account as mitigating circumstances. The minority of the offender is an example. In principle, the exclusion clauses of Article 1F can apply to minors, but only if they have reached the age of criminal responsibility. Under Article 40 of the 1989 Convention on the Rights of the Child, States shall seek to establish a minimum age for criminal responsibility. Where this has been established in the host State (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), a child below the minimum age cannot be considered by the State concerned as having committed an excludable offence.⁸³ If no defence to criminal liability is established, the vulnerability of the child, especially those subject to ill-treatment, should be taken into account as a mitigating circumstance when considering the proportionality of exclusion for war crimes or serious non-political crimes.⁸⁴

This also applies to situations falling short of duress. For instance, a coca peasant who fails to demonstrate that he did not have access to licit economic alternatives and thus cannot avail himself of a defence to his individual responsibility may still benefit from the mitigating circumstance of economic hardship, if the benefits reaped from the illicit activity were barely enough to secure the survival of his family.⁸⁵

⁸¹ UN 1988 Commentary, paragraph 3.121

⁸² See for example G.S.Goodwin-Gill, “The Refugee in International Law” (1996), pp.107-108; UNHCR, “Handbook on procedures and criteria for determining refugee status” (1992), paragraph 157

⁸³ UNHCR, “Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees” (2003), paragraph 91

⁸⁴ UNHCR, “Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees” (2003), paragraph 93

⁸⁵ See for example Federal Court of Australia, “Applicant NADB of 2001 v Minister for Immigration & Multicultural Affairs” (2002), FCAFC 326 71 ALD 41, regarding the case of an Iranian asylum-seeker who disclosed to the Australian authorities that he was involved in the sale and transportation of heroin in Indonesia prior to his arrival in Australia. The Administrative Appeals Tribunal examined the avenues of financial support of the offender in Indonesia in order to determine the seriousness of the offence

Other circumstances are related to the offender's criminal record. The fact that an applicant convicted of a drug offence (serious non-political crime) has already served his sentences or has been granted a pardon or has benefited from an amnesty is also relevant. There is a presumption that the exclusion clause is no longer applicable, unless it can be shown that, despite the pardon or amnesty, the applicant's criminal character still predominates.⁸⁶ Likewise, the general good character of the offender has to be taken into account. For instance the fact that the applicant has committed only one offence shall be taken into account when assessing the seriousness of the offence. Finally, other circumstances such as the fact that the offender was merely an accomplice are also relevant factors.⁸⁷

Grounds for rejecting individual responsibility

Unintentional conduct. As reflected in Article 30 of the ICC Statute, criminal responsibility can normally only arise where the individual concerned committed the material elements of the offence with knowledge and intent. Where there is no such mental element (*mens rea*) a fundamental aspect of the criminal offence is missing and therefore no individual criminal responsibility arises⁸⁸

The various types of conduct listed in article 3 paragraph 1 of the Trafficking Convention are required to be established as criminal offences only "when committed intentionally"; unintentional conduct is thus not included. It accords with the general principles of criminal law that the element of intention must be proven in respect to every factual element of the proscribed conduct. It will not be necessary to prove that the actor knew that the conduct was contrary to law. Proof of the element of intention is the subject of a specific provision in article 3 paragraph 3 which states that "knowledge, intent or purpose required as an element of an offence set forth in paragraph 1 may be inferred from factual circumstances."⁸⁹

Constitutional limitations in the country where the offence was committed. Article 3(2) of the Trafficking Convention sets out that State Parties shall "*subject to its constitutional principles and the basic concepts of its legal system* (emphasis added) adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs (...) for personal consumption".

This provision seems to suggest that the possession of narcotic drugs or psychotropic substances for personal consumption is not necessarily *per se* an offence under the Trafficking Convention.⁹⁰ Thus State Parties would not violate the Convention if their

⁸⁶ UNHCR, "Handbook on procedures and criteria for determining refugee status" (1992), paragraph 157; see also A. Grahl-Madsen, "The Status of Refugees in International Law (1966), p.290; Federal Court of Canada, "Chan v. Minister of Citizenship and Immigration" (2000), 4 F.C. 390

⁸⁷ G.S.Goodwin-Gill, "The Refugee in International Law" (1996), pp.107-108

⁸⁸ UNHCR, "Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees" (2003), p. 25

⁸⁹ UN 1988 Commentary, paragraph 3.7

⁹⁰ A number of States have taken the view with regard to the 1961 Single Convention that only possession for distribution and not that for personal consumption is a punishable offence. They have adopted a similar interpretation of the term "cultivation"

domestic courts held criminalisation of personal use to be unconstitutional.⁹¹ Whether legislative decriminalisation of possession of drugs for personal use could be seen to be part of the “basic concepts” of a legal system and thus also escape article 3(2)’s obligation is unclear. Cautious in spite of the limitation clause, some Parties have made reservations to article 3(2)’s criminalisation of personal use on constitutional grounds and because it conflicts with the basic concepts of their legal system. A case in point has been Bolivia which made a reservation to the effect that article 3(2) is inapplicable in Bolivia to the extent that it may be interpreted as establishing “as a criminal offence the use, consumption, possession, purchase or cultivation of the coca leaf for personal consumption”. It declares that such an interpretation “is contrary to principles of its legitimate practices, values and attributes of the nationalities making up Bolivia’s population”.⁹²

Defences to criminal liability

Duress/coercion. Article 31(d) of the Rome Statute of the International Criminal Court stipulates that a person shall not be criminally responsible if (...) the conduct (...) has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be (i) made by other persons; or (ii) constituted by other circumstances beyond that person’s control.

Some civil law systems distinguish between the notion of necessity and that of duress. Necessity is taken to refer to situations of emergency arising from natural forces. Duress, however, is taken to refer to compulsion by threats of another human being.⁹³ The duress-provision in the ICC Statute is thus a mixture of two types of duress: duress as a choice of evils and duress as compulsion⁹⁴

In the context of Colombia and other drug producing countries affected by armed conflict, irregular armed actors often force rural populations to commit drug offences such as cultivating and processing drugs. These populations do not have freedom of “moral choice”, i.e they could disengage from the drug offences only at risk of grave danger to their lives and/or the lives of their relatives. Individual responsibility is also excluded where persons are engaged in the drug business due to economic circumstances. Small scale peasants in remote and underdeveloped areas with no licit economic activities available are more likely to avail themselves of that defence than

⁹¹ N.Boister, “Penal Aspects of the UN Drug Conventions” (2001), refers in Footnote 228 to a vast number of national jurisprudence in regard to Article 3(2) of the Trafficking Convention

⁹² Bolivia justified the reservation on the basis of the historical use of coca leaf, pointing out that it is not a drug, its use does not cause significant harm and criminalization of its consumption would result in a large part of the Bolivian population being criminals. By contrast, Colombia has only gone as far as declaring that article 3(2)’s obligation is conditional upon respect for its constitutional principles

⁹³ International Criminal Tribunal for Former Yugoslavia, “Prosecutor v. Drazen Erdemovic” (1998), ICTY 1, paragraph 59

⁹⁴ E. van Sliedregt, “Defences in International Criminal Law” (2003), on <http://www.isrcl.org/Papers/Sliedregt.pdf>, p.15; see also Supreme Court of Canada, “R.v.Ruzic” (2001), SCC 24, where the Supreme Court of Canada examines the applicability of “duress” to drug offences and analyses relevant jurisprudence in Australia, the United States and the United Kingdom

persons with a higher criminal involvement in the chain of supply.⁹⁵ In these cases a detailed analysis of the surrounding circumstances and economic alternatives is required.

4. The application of the seriousness criteria to the different drug offences

Case by case assessment in due account of personal circumstances

The Trafficking Convention uses the term “illicit trafficking” in a very broad manner. According to Article 1 (Definitions) of the Trafficking Convention the term “illicit trafficking” shall mean any offence set forth in the Convention. The term thus encompasses both offences for personal consumption and trafficking purposes. With regard to the latter, the term covers all stages and forms of criminal involvement in the chain of commercialisation of illicit drugs. It is thus necessary to use the above seriousness criteria to determine on a case by case basis which of the offences enumerated by the Trafficking Convention attains the seriousness threshold of Article 1F(b).

In order to do so, a thorough assessment of the context and individual circumstances of each case is required.⁹⁶ In terms of context, adjudicators need updated country of origin information that outlines the dynamics of the conflict, the presence of armed groups in coca-growing areas as well as the socio-economic and humanitarian conditions in the area where the drug offences were committed. Regarding the applicability of individual circumstances, the individual’s profile as well as family, social and ethnic background or activities are some of the relevant data that need to be collected.

In general, individual responsibility, and therefore the basis for exclusion, arises where the individual committed, or made a substantial contribution to, the criminal act, with the knowledge that his or her act or omission would facilitate the criminal conduct. Whether the individual’s contribution to the criminal enterprise is substantial or not depends on many factors, such as the size of the criminal enterprise, the functions performed, the position of the individual in the organisation or group, and (perhaps most importantly) the role of the individual in relation to the seriousness and the scope of the crimes committed.⁹⁷

Drug offences for personal consumption and the seriousness threshold

The Trafficking Convention sets out under Article 3.2 that “subject to its constitutional principles and the basic concepts of its legal system, each Party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation

⁹⁵ The UNHCR International Protection Considerations regarding Colombian asylum-seekers and refugees (2002) acknowledge that “apart from economic needs (for lack of viable alternatives), local populations are often pressured by guerrillas, paramilitaries, or drug traffickers to involve themselves in coca cultivation, thereby increasing the risk of repercussions from armed groups (on the accusation of collaborating in the financing of the other), and hence displacement”.

⁹⁶ UNHCR, Summary Conclusions – Exclusions from Refugee Status, Lisbon Expert Roundtable (Global Consultations on International Protection, 3-4 May 2001, EC/GC/01/2Track/1), paragraph 11: “Each case must be viewed on its own facts, calling into question the existence of automatic bars to refugee status based on the severity of any penalty already meted out”.

⁹⁷ UNHCR, “Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees” (2003), paragraphs 51 and 55

of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the 1961 Convention, the 1961 (Single) Convention as amended or the 1971 (Psychotropic) Convention”. Parties would thus not violate the Convention if their domestic courts held criminalisation of personal use to be unconstitutional.⁹⁸

Under the Single Convention, various governments held that only possession for distribution and not that for personal consumption is a punishable offence. They pointed out that the UN Drug Conventions are intended to fight illicit trafficking, and not to punish addicts who are not directly involved in the trafficking itself. The wording “contrary to the provisions of” the earlier conventions could be interpreted as enabling the parties to retain the stance that they had adopted prior to the Trafficking Convention.⁹⁹

The fact that the provisions in paragraph 2 (offences for personal consumption) were kept separate from those in paragraph 1 (offences for trafficking purposes) is a strong indicator that trafficking offences are considered more serious. Various other provisions in the Trafficking Convention which refer only to trafficking offences confirm this view. It is particularly noteworthy that, in accordance with Article 6 on extradition drug, offences for personal consumption are not extraditable.

Offences related to the possession, purchase or cultivation of narcotic drugs or psychotropic substances exclusively for personal consumption usually do not fall under the abovementioned aggravating circumstances, as they generally neither imply membership within a criminal group nor involvement in transnational activities.¹⁰⁰ Accordingly, UNHCR’s background note on the application of the exclusion clauses¹⁰¹ rightly stipulates that possession offences do not reach the seriousness threshold of Article 1F(b).¹⁰²

It is noteworthy, however, that the dividing line between personal consumption and trafficking offences may be blurred. For example, in accordance with paragraph 3 of Article 3¹⁰³ of the Trafficking Convention, larger cultivations will be taken as an indicator for the commission of a supply related offence even when the perpetrator

⁹⁸ For national jurisprudence see N.Boister, “Penal Aspects of the UN Drug Conventions” (2002), Footnote 228

⁹⁹ UN 1988 Commentary, paragraph 3.92; N.Boister, “Penal Aspects of the UN Drug Conventions”, pp.123-130

¹⁰⁰ The authors of the Trafficking Convention saw the offences of possession and purchase for personal use unconnected to the main target of the Convention, the illicit traffic. See the remarks of the chairman of the Working Group of Committee I – United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Official Records, Volume II (New York, 1991) UN Doc. E/CONF.82/16/Add.1, UN Publication Sales No. E.91.XI.1, p.150

¹⁰¹ Paragraph 40 of the UNHCR “Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees” (2003) stipulates that “crimes such as petty theft or the possession for personal use of illicit narcotic substances would not meet the seriousness threshold of Article 1F(b)”

¹⁰² For national jurisprudence see for example American Board of Immigrations Appeals, “Re Fidel Armando Toboso Alfonso” 1990), IJRL/0201, noted at 3 IJRL 475 (1994), where the Board, considering the case of a Cuban national given temporary asylum, held that possession of cocaine, for the purposes of the statutory provision incorporating Article 1F(b), did not amount to a “serious crime”

¹⁰³ Paragraph 3 states that “knowledge, intent or purpose required as an element of an offence set forth in paragraph 1 (trafficking offences) of this article may be inferred from objective factual circumstances”

claims that he cultivated the illicit crops merely in view of personal consumption. The 1988 Commentary believes that the distinction of possession for personal use from possession for trafficking may be facilitated by threshold requirements such as possession of a specified mass of the drug in question.¹⁰⁴

Drug offences for trafficking purposes and the seriousness threshold

The assessment of offences for trafficking purposes in light of the seriousness threshold is more complicated. Article 1 (Definitions) of the Trafficking Convention establishes under paragraph m) that the term “illicit trafficking” shall encompass all categories.

The trafficking offences of Article 3(1) of the Trafficking Convention may be subdivided into six categories:

- i) production of the raw materials;
- ii) their refinement into the final product;
- iii) transportation of the product to their markets;
- iv) wholesale and retail distribution within these markets;
- v) investment/laundrying of the profits.¹⁰⁵
- vi) management/financing of drug organisations

The first five categories relate to different stages in the chain of supply whereas the last one may encompass the entire chain of commercialisation. In principle, any of the offences within the above six categories may reach the seriousness threshold if committed under aggravating circumstances.

Production of the raw materials. “Cultivation” refers to the actual cultivation of the opium poppy, coca bush and cannabis plant.¹⁰⁶ The activities of a peasant living in a remote area, suffering from extreme poverty and cultivating coca leaves on a small plot to secure the survival of his family do not reach the seriousness threshold of Article 1F(b) as mitigating circumstances and possible defences to individual liability prevail over aggravating factors. Conversely, offences committed by an owner of a big drug farm, who uses intensive forms of cultivation (use of herbicides, intensive chemical treatment) and employs coca-leaf workers to produce coca plants on a 20ha field, yielding a significant profit, probably are serious enough to fall under Article 1F(b) given various aggravating circumstances such as the scale of activities and his organizational and managerial role in the supply chain.

In the context of major drug producing countries such as Colombia, there may be grounds for rejecting individual responsibility of persons involved in the cultivation and/or production of illicit drugs. Some persons may simply not have committed the material elements of the offence of cultivation with knowledge and intent. For example, indigenous tribes living in Colombia’s Amazonas department have been

¹⁰⁴ UN 1988 Commentary, paragraph 83; see however N.Boister, „Penal Aspects of the UN Drug Conventions“ (2001), p.128, who points out that threshold requirements are constitutionally vulnerable.

¹⁰⁵ S.E.Flynn, G.M.Grant, “The Transnational Drug Challenge and the New World Order: The Report of the CSIS Project on the Global Drug Trade in the Post-Cold War Era (1993), pp.vii-viii

¹⁰⁶ UN 1988 Commentary, paragraph 3.29

cultivating coca leaves for centuries, yet have recently been forced to cultivate the crop for commercial purposes by insurgent groups. UNHCR's International Protection Considerations regarding Colombian asylum-seekers and refugees acknowledge that "apart from economic needs (for lack of viable alternatives), local populations are often pressured by guerrillas, paramilitaries, or drug traffickers to involve themselves in coca cultivation, thereby increasing the risk of repercussions from armed groups (on the accusation of collaborating in the financing of the other), and hence displacement".¹⁰⁷ In these cases due consideration has to be given to the applicant's freedom of "moral choice", i.e. if the applicant's opposition/disengagement from the criminal acts could, or not, occur only at risk of grave danger to his/her life, and, or the life of the applicant's relatives.

If disengagement is impossible because irregular groups or harsh economic conditions force peasants to grow coca leaves or poppies, the defence of duress/coercion applies. Peasants growing raw materials for drugs are thereby more likely to avail themselves of this defence than offenders with a higher level of criminal involvement in the chain of supply.

"Production" is defined in the Single Convention as the "separation of opium, coca leaves, cannabis and cannabis resin from the plants from which they are obtained".¹⁰⁸ The definition is specific as to the products and the plants from which they are obtained. Taking the example from above, the offences committed by seasonal coca-leaf pickers¹⁰⁹ on a drug farm will most probably not fall under Article 1F(b) as the seriousness of their activities, as mere employees, falls below that of the offences committed by the owner of the cultivation and production structures.

Refinement of raw materials into the final product. "Manufacture" is defined in both the 1961 and 1971 Conventions. The 1961 Convention defines manufacture as "all processes, other than production, by which drugs may be obtained and includes refining as well as the transformation of drugs into other drugs."¹¹⁰ "Extraction" is, according to the UN 1988 Commentary, "the separation and collection of one or more substances from a mixture by whatever means: physical, chemical or a combination thereof."¹¹¹ "Preparation" (also referred to as "compounding") denotes, according to the UN Commentary, "the mixing of a given quantity of a drug with one or more other substances".¹¹²

Although the abovementioned activities imply a higher level of criminal involvement in the chain of supply, the offences do not automatically attain the seriousness threshold. For instance, offences committed by a small peasant who processes raw material into coca paste in a very basic laboratory ("kitchen") in order to obtain a higher market-price will, most probably, not reach the seriousness threshold. If,

¹⁰⁷ UNHCR International Protection Considerations regarding Colombian asylum-seekers and refugees (2002), paragraph 34

¹⁰⁸ 1961 (Single) Convention, art.1, para.1, subpara.(t); UN 1988 Commentary, paragraph 3.14

¹⁰⁹ See US Committee for refugees, "Country report on Venezuela" (2000): the Venezuelan government refoiled in 1999 coca-leaf pickers to Colombia on exclusion and national security grounds; see also International Crisis Group (ICG), "Colombia's borders: the weak link in Uribe's security policy" (2004), Latin America Report No.9, p.12

¹¹⁰ 1961 (Single) Convention, art.1, para.1, subpara.(n)

¹¹¹ UN 1988 Commentary, paragraph 3.16

¹¹² UN 1988 Commentary, paragraph 3.18

however, the peasant is involved in other criminal activities, such as the arms trade, or is carrying out specific tasks for irregular armed groups, such as intelligence services, the seriousness threshold may well be attained in light of various aggravating circumstances. The same distinction holds true with regard to employees in the drug industry. An unskilled worker carrying out specific refinement tasks in a drug production centre which produces six tons of drugs per week¹¹³ may not fall under Article 1F(b) if no other licit employment alternatives exist. By contrast, a chemist who specialises in the manufacture of narcotic drugs and applies his skills to contribute to the production of drugs in a major laboratory, because it allows him to earn substantially more compared to licit economic activities, may well reach the seriousness threshold. In terms of offenders who knowingly supply essential materials or chemicals to produce or cultivate illegal drugs, a person selling precursor substances to a drug laboratory on a contractual basis may reach the seriousness threshold if for example the activities are carried out on a massive scale. By contrast, a person who merely makes inquiries about a future contract with a laboratory will probably not.

The transportation of the product to their markets. “Delivery” covers the physical delivery of goods to a person or a destination. “Dispatch” covers the activity of sending goods on their way, either to a fixed destination known to the sender or to a carrier who will take the goods to a destination of which the sender may be ignorant. “Transport” covers carriage by any mode (land, sea or air). A contract of carriage is not required; merely gratuitous carriage is within the scope of “transport”. “Importation or exportation”: according to the 1961 Convention, the words “import” and “export” mean “the physical transfer of drugs from one State to another, or from one territory to another within the same State”.¹¹⁴

Most national jurisprudence on Article 1F(b) and drug offences concerns transportation offences. The offences of a person who belongs to an international criminal group and frequently transports or conspires to transport larger quantities of high risk drugs, such as heroin, to another country will most probably reach the seriousness threshold.¹¹⁵ A one time courier (“mule”) who transports drugs to another country may also fall under Article 1F(b) if the quantity of drugs is “commercial”.¹¹⁶ Conversely, individual responsibility will be either excluded or mitigated in the case

¹¹³ International Crisis Group (ICG), “Colombia’s borders: the weak link in Uribe’s security policy” (2004), Latin America Report No.9, p.11

¹¹⁴ UN 1988 Commentary, paragraphs 3.24 to 3.28; Court of Appeal (Australia), “T v Secretary of State for Home Department” (1995), 1 WLR 545

¹¹⁵ see for instance Federal Court of Australia, “Tenzin Dhayakpa v. The Minister for Immigration and Ethnic Affairs” (1995), FED No. 942/95; Court of Appeal (Australia), “T v Secretary of State for Home Department” (1995), 1 WLR 545

¹¹⁶ see for example Federal Court of Australia, “Igor Ovcharuk v Minister for Immigration & Multicultural Affairs” (1998), 1314 FCA, where a Russian asylum-seeker brought into Australia 5kg of impure heroin (“commercial quantity”) and was excluded under Article 1F(b). The same ruling confirmed that Article 1F(b) also applies to “continuing offences” (i.e. offences that are committed both outside and inside the country of asylum). See also United States Court of Appeals for the Ninth Circuit, “Mirahmad Feroz v. Immigration and Naturalization Service” (1994), 22 F.3d.225, Fed.R.App.P.34(a), 9th Cir.R.34-4, where an Afghan asylum-seeker imported heroin to the United States. The Court confirmed the BIA’s ruling that the asylum-seeker’s “conviction for heroin importation rendered him ineligible for asylum” without examining the scale of the drug offence (i.e. possession for “private consumption” or “trafficking”, “commercial quantity” and “trafficable quantity” versus “less than a trafficable quantity”)

of a person transporting drugs following coercion by irregular groups or out of extreme economic necessity.¹¹⁷

Wholesale and retail distribution within these markets. “Offering” means, according to the UN Commentary, “providing a person with narcotic drugs or psychotropic substances”; “offering for sale” includes any displaying of goods or other indication that they are available for purchase”.

“Distribution” refers to the movement of goods through the chain of supply, i.e the commercial role for ensuring that goods pass from manufacturer or importer to wholesaler or retailer.

“Sale” refers to an agreement by which the seller provides a product and passes the title of it, in exchange for a certain price in current money, to the other party, who is called the buyer or purchaser, and, on his part, agrees to pay such price.

“Brokerage” refers to the activities of an agent employed to make bargains or contracts on behalf of another”. He or she acts as a middleman, a negotiator or a “fixer”.

In the same manner as categories, none of the above offences attain *per se* the seriousness threshold. A person who, acting on his own, occasionally sells minor quantities of a low-risk drug, such as cannabis, to other adults may not fall under Article 1F(b). Conversely, the activities of a person working for a criminal group and possessing heroin with a street value of some \$10 million will probably attain the seriousness threshold in light of his membership to the criminal group, the nature of the drugs and the scale of the operation.¹¹⁸

Similarly, the activities of a person who finds himself in financial difficulties, lacks valid documentation establishing his citizenship and is later able to find other avenues of financial support when he stops acting as a middle man (selling heroin in the country of origin) and a courier may reach the seriousness threshold.¹¹⁹

The investment/laundering of profits derived from drug offences. According to the UN 1988 Commentary, the provisions of the Trafficking Convention strike at

¹¹⁷ See for instance Supreme Court of Canada, “R.v.Ruzic” (2001), SCC 24 which involved the case of a Yugoslav citizen who landed in Toronto carrying two kilograms of heroin strapped to her body and a false Austrian passport. She claimed that she should be relieved from criminal liability as a man in Belgrade, where she lived in an apartment with her mother, had threatened to harm her mother unless she brought the heroin to Canada. The Supreme Court acquitted her on grounds of duress. See also the case of United States v. Contento-Pachon, 723 F.2d 691 (9th Cir.1984) where the US Court of Appeals had to decide over the case of a person who had been coerced by an individual in Colombia to smuggle cocaine into the United States. The accused was told that if he did not comply, his wife and child in Colombia would be harmed. The accused complied with the request and did not seek police assistance in Colombia because he believed police there were corrupt. The US Court of Appeals found that the defense of duress applies as the consequences for non-cooperation would have been immediate and harsh

¹¹⁸ This example draws on the case of “Pushpanathan v. Minister of Citizenship and Immigration and others (1998), (1998), 4 LRC 365 (SCC); it should be recalled however that Article 1F(b) does not encompass drug offences committed in the country of asylum but requires that the offences are committed prior to admission

¹¹⁹ Federal Court of Australia, “Applicant NADB of 2001 v Minister for Immigration & Multicultural Affairs” (2002), FCAFC 326 71 ALD 41

money-laundering.¹²⁰ In all cases the offender must know that the proceeds are derived from any of the drug offences established by the UN drug conventions. This suggests that it is not necessary to demonstrate that he was aware of the precise offence which had been committed.

The seriousness of the offences depends once again on the surrounding circumstances. The offences committed by a small drug peasant who sells a small amount of coca paste to a local middle-man and then deposits the price obtained at the local bank are less serious than those committed by a regional drug cartel leader who transfers several millions of dollars, obtained from the sale of a drug shipment, to various bank accounts.

Organisation, management or financing of drug offences. The focus of these provisions is the leadership of drug trafficking groups.¹²¹ "Organization" and "management" are apt to describe the activities of those actors who belong to organized criminal groups and direct the activities of subordinates while keeping themselves well away from direct involvement in illicit trafficking. "Financing" refers to the provision of capital needed for illicit operations. Most of the offences committed within this category will present aggravating circumstances¹²² and thus reach the seriousness threshold of Article 1F(b). An example is the head of a regional paramilitary unit who is in charge of all drug-money collection offices in the north of his country.¹²³

5. *A short word to the "double balancing test"*

The objective of the present paper has been to apply within Article 1F(b) of the 1951 Convention a balancing test with regard to drug offences: which among the offences established by the Trafficking Convention are sufficiently serious so as to justify exclusion ?

The remaining question, which goes beyond the scope of this article, is whether there is a double balancing test permitting the applicant to raise the fear of persecution to outweigh exclusion from refugee status as being a disproportionate consequence of that exclusion. In those countries where the courts have refused to apply the double balancing test, there existed the safety net of protection provided by Article 3 of the Convention Against Torture or Article 3 of the European Human Rights Convention.¹²⁴ Where no such protection is available or effective, for instance in the determination of refugee status under UNHCR's mandate in a country which is not party to the relevant human rights instruments, the application of exclusion should

¹²⁰ According to N.Boister, "Penal Aspects of the UN Drug Conventions" (2001), Footnote 155, money laundering involves the physical introduction of the drug proceeds into the financial system, through for example a cash deposit, the disguising of the origins of the proceeds by creating complex layers of financial transactions or the integration of the layered funds back into the economy as legitimate funds.

¹²¹ UN 1988 Commentary, paragraph 3.32

¹²² e.g. involvement in organized criminal groups and international criminal activities, criminal responsibility in the chain of commercialisation, scale and frequency of offences and general criminal profile of the offender

¹²³ International Crisis Group (ICG), "Demobilising the Paramilitaries in Colombia: an achievable goal ?" (2004), Latin America Report No8, p.14

¹²⁴ G. Gilbert, "Current issues in the application of the exclusion clauses", in: "Refugee Protection in International Law" edited by E. Feller, V. Türk and F. Nicholson (2003), p.453

take into account fundamental human rights law standards as a factor in applying the balancing test.¹²⁵

VI. Conclusion

The drug business in major producing countries is a highly complex illegal industry generating jobs for tens of thousands of people whose activities range from the cultivation to the laundering of drug proceeds – whether within organized criminal groups or individually. The criminal responsibilities associated with these activities vary considerably. A small peasant who lives in a remote area of a developing country and resorts to the cultivation of illicit crops because he lacks licit economic alternatives that allow him to secure the survival of his family obviously presents a different criminal profile than the leader of a drug cartel who oversees all stages of supply of a trans-national drug organisation yielding a profit of several millions of dollars. In a complex (non-international) armed conflict situation such as Colombia, where the drug business is closely linked to the non-state parties to the conflict, massive human rights violations and forced displacement, the small drug peasant, the leader of the drug cartel and many other criminal profiles of civil populations may end up as asylum-seekers in other countries. This raises complex questions as to whether they deserve international protection under the 1951 Convention relating to the status of refugees.

The wording of the UN Trafficking Convention - which is the relevant international framework for drugs in the field of international criminal law – applies the term “illicit traffic” to criminalize all functions along the supply chain in an indiscriminate manner, irrespective of individual criminal responsibility. In this manner it also applies to offences related to personal drug consumption. This conflicts with proportionality considerations inherent to international human rights law. The concept of proportionality, while not expressly mentioned in the 1951 Convention relating to the status of refugees, has evolved in particular in relation to Article 1F(b) in so far as a non-political crime has to be “serious” in order to trigger the application of the exclusion clause against an asylum seeker.

The conflict between the two UN Conventions may be resolved based on the UN Charter and by means of interpretation. To start with, by virtue of Articles 55, 56 and 103, the UN Charter the Trafficking Convention has to comply with international human rights law even if it does not contain explicit human rights provisions. Whereas the wording of the Trafficking Convention seems to suggest that all drug trafficking offences meet the seriousness threshold of Article 1F(b) *per se*, an interpretation in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties leads to a different result. First, the fact that the International Criminal Court was not given jurisprudence over specific drug offences is an indicator that the “gravitas” with which the international community views illicit drug traffic is relative. Second, a contextual interpretation reveals that the Trafficking Convention actually distinguishes between different levels of seriousness: “criminal offences” for personal consumption as the least serious offences, “serious criminal offences” (for trafficking purposes) as more serious offences and “particularly serious offences”

¹²⁵ UNHCR, Summary Conclusions – Exclusions from Refugee Status, Lisbon Expert Roundtable (Global Consultations on International Protection, 3-4 May 2001, EC/GC/01/2Track/1), paragraph 12

(committed under aggravating circumstances for trafficking purposes) as the most serious offences.

It is safe to conclude that offences committed for personal consumption are the least serious drug offences in the framework of the Trafficking Convention and thus will in most of the cases not reach the seriousness threshold of Article 1F(b). With regard to trafficking offences the picture is more complex. While none of the trafficking offences can be presumed to be serious *per se*, any of them can attain the seriousness threshold if aggravating circumstances prevail over mitigating circumstances, and if there are no grounds for rejecting individual responsibility or defences to criminal liability. The Trafficking Convention is thereby useful in defining the aggravating circumstances: an interpretation of its preamble and its provision on “particularly serious offences” reveals that international, large-scale activities carried out with organized criminal groups are factors that make drug offences most serious. This has been reflected in the UN Convention against Transnational Organized Crime.

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