

Institution: University of Essex
Unit of Assessment: 20 – Law
Title of case study: Refugees and Exclusion: Informing the Global Judiciary
<p>1. Summary of the impact</p> <p>Professor Geoff Gilbert’s research on exclusion in international refugee law has influenced policies of international organisations and courts around the world. His research on extradition prompted the UN High Commissioner for Refugees (UNHCR) to invite Gilbert to write the Global Consultation on exclusion, adopted in 2001 at the 50th Anniversary meeting for the 1951 Convention Relating to the Status of Refugees. This Consultation directly influenced UNHCR’s 2003 <i>Guidelines on Exclusion</i> that have been cited worldwide in hundreds of cases during the impact period. Canadian and German appellate courts have also favourably cited Gilbert’s work directly.</p>
<p>2. Underpinning research</p> <p>Since 1993 Geoff Gilbert has been writing on the overlapping jurisdictions of international extradition law, international human rights law, and international legal protection for refugees. This work has analysed case law, treaties, domestic legislation, and soft law to reveal a tension in international law between the right to protection against oppressive regimes and the need to prosecute international criminal law. The work that underpins Gilbert’s impact focuses particularly on Article 1F of the 1951 Convention Relating to the Status of Refugees, the primary legal document used to define who is a refugee, the rights of refugees, and the legal obligations of states. The 1951 Convention is unusual for a humanitarian instrument in that it allows an individual to be excluded from its protection because of that individual’s behaviour. That exclusion from protection, specified in Article 1F, is in many cases crucial for allowing the prosecution, under international criminal law, of alleged perpetrators. From 1993 to present Gilbert has built a collection of work that analyses the principle of exclusion from refugee status in international law.</p> <p>Gilbert’s work shows that the overlap between the 1951 Convention and international criminal law has been fraught with confusion and a lack of clear guidance. Judgements as to whether a certain individual is to be excluded from refugee status for the purpose of international criminal prosecution often have to heed an opaque complex of constraints from Article 1F, bi- and multi-lateral international treaties, and international human rights law. The contribution of the underpinning research has been to document, analyse, and explain this confusion related to exclusion from refugee status. Gilbert’s publications have covered a range of cases and relevant international law to survey the extent of this confusion, and to suggest ways in which the international community can provide clear guidance on how to employ Article 1F. Much of the underpinning research has also focussed on residuary guarantees where Convention refugee status does not avail. Gilbert has written about the relationship between Articles 1F and 33(2) of the Convention, the latter stating that refugee protection ought not to be afforded to an individual regarded as a danger to the security of the country he or she is in.</p> <p>This research has been published as <i>Transnational Fugitive Offenders in International Law</i>, in which Gilbert analyses – <i>inter alia</i> – the relationship between Article 1F and the prosecution of individuals for war crimes, crimes against peace, crimes against humanity, serious non-political crimes and acts contrary to the purposes and principles of the United Nations. This work was later published in an updated form in Feller, Türk and Nicholson, <i>Refugee Protection in International Law</i>, and translated for use by French readers in 2008. An expanded version of <i>Transnational</i></p>

Fugitive Offenders was published as *Responding to International Crime* (2006). Since 1998 Gilbert has continued to work on the complex array of issues surrounding exclusion from refugee status, including how it is affected both by a hierarchy of different branches of international law and by the legal definition of acts of terrorism.

3. References to the research

- Gilbert, G. (1998) *Transnational Fugitive Offenders in International Law: Extradition and Other Mechanisms*, Martinus Nijhoff Publishers. ISBN: 9789041110404
- Gilbert, G. (2003) Current issues in the application of the exclusion clauses, in E. Feller, V. Türk and F. Nicholson (eds.) *Refugee Protection in International Law*, Cambridge: Cambridge University Press, 425-78. ISBN: 978-0521532815. Republished as E. Feller et al. (eds.) (2008) *La Protection des Réfugiés en droit international*, Larcier. ISBN: 978-2-8044-2385-8
- Gilbert, G. (2005) Exclusion and evidentiary assessment, in G. Noll (ed.) *Proof, Evidentiary Assessment and Credibility in Asylum Procedures*, Martinus Nijhoff Publishers, 161-78. ISBN: 978-9004140653
- Gilbert, G. (2006) *Responding to International Crime*, Martinus Nijhoff. ISBN: 9789004152762
- Gilbert, G. (2010) Running scared since 9/11: Refugees, UNHCR and the purposive approach to treaty interpretation', in J. C. Simeon (ed.) *Critical Issues in International Refugee Law: Strategies Toward Interpretative Harmony*, Cambridge: Cambridge University Press, 85-118. ISBN: 978-0521199520
- Gilbert, G. (2012) Hierarchies, human rights and refugees, in E. de Wet and J. Vidmar (eds.) *Hierarchy in International Law: The Place of Human Rights*, Oxford: Oxford University Press, 176-205. ISBN: 9780191627767
- Gilbert, G. (2013) Exclusion and cessation, in V. Chetail (ed.) *Research Handbook on International Law and Migration*, Oxford University Press. ISBN: 9780857930040

4. Details of the impact

The primary impact of Gilbert's research has been to inform and influence court judgements throughout the world. This has been achieved through the UN High Commissioner for Refugees' Guidelines on Exclusion, which has provided guidance for a huge number of court cases since 2003. These guidelines were heavily influenced by the research described in section two. Gilbert's research has also been cited directly in court judgements, and has underpinned professional training that he has organised for the UN and the European Council.

The UNHCR 2003 Guidelines on Exclusion

In February 1998 Gilbert presented a paper at a closed symposium for the UK Government's Department for International Development (DfID), attended by representatives of UNHCR and other international agencies. Drawing on the underpinning research, Gilbert's presentation comprised a digest of the principle of Exclusion in article 1F of the 1951 Convention Relating to the Status of Refugees [corroborating source 1]. His presentation led the DfID to invite him to write a Global Consultation paper, commissioned to clarify those issues in international law that he had identified in his research on exclusion. That Global Consultation paper draws on Gilbert's academic research into the regime interaction between different branches of international refugee law, and clarifies the range of issues raised by the overlaps between Article 1F of the 1951 Convention, international treaties, and international human rights law.

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Gilbert's Consultation paper was discussed in UNHCR in 2000 and at the Lisbon Roundtable in 2001 in the presence of UNHCR officials, other international organisations, government ministers, lawyers and academics. Most importantly Gilbert's research, in the form of the Global Consultation paper, contributed significantly to the UNHCR 2003 Guidelines on Exclusion [source 2]: apart from two paragraphs (5 and 6), every issue addressed in the Guidelines is raised in Gilbert's research. The influence of Gilbert's research on the 2003 Guidelines has been attested by the then Chief of the Protection Policy and Legal Advice Section of the Division of International Protection of UNHCR (now the Director of International Protection, UNHCR):

I oversaw the production of the 2001 Global Consultations for the 50th Anniversary of the 1951 Convention, which included Professor Gilbert's paper on Exclusion... This paper directly influenced UNHCR's 2003 *Guidelines on Exclusion* and the accompanying *Background Note*

Director of International Protection, UNHCR

The Guidelines have been cited innumerable times in courts worldwide and form the basis for training on the topic for all UNHCR staff. High profile court citations of the Guidelines include:

- *Hernandez Febles v Canada (Citizenship and Immigration)*, 2012 FCA 324
- *Al-Sirri v Secretary of State for the Home Department* [2012] UKSC 54 (21 November 2012)
- *ABC (A Minor) (Afghanistan), R (On the Application Of) v Secretary of State for the Home Department* [2011] EWHC 2937 (06 December 2011)

Over the last ten years the complex of international legislation surrounding Exclusion has grown much more complicated, and the UNHCR considers the Guidelines in need of revisions. To this end, in January 2013 Gilbert hosted a two day closed-door roundtable attended by experts in international refugee law including senior UNHCR staff, judges, academics, and refugee law practitioners. Gilbert co-organised and contributed to discussions in the symposium, on which the UNHCR will base their revisions.

Worldwide Training for Legal Professionals

In addition to his significant contribution to the primary international legal document on exclusion from refugee status, Gilbert was the founding Director of UNHCR's annual Thematic Refugee Training Programme at the International Institute for Humanitarian Law, Sanremo, Italy. The programme included the findings of his research on Exclusion and trained judges, lawyers and UNHCR staff from all over the world. Gilbert ran the programme from 2005-07 and was involved in the planning and preparation in 2008. As a result of that training, the European Council of Refugees and Exiles used Gilbert as a trainer on Exclusion for judges and lawyers from all over Europe at its Athens workshop in February 2008 [see corroborating source 3].

In October 2009, Gilbert presented a paper on the topic at the European Chapter of the International Association of Refugee Law Judges in Berlin; he was one of only two academics at the conference and the only one to present a paper. He was also invited in 2012 to address refugee law judges and lawyers from Commonwealth states at a workshop sponsored by the Foreign and Commonwealth Office. Gilbert's contributions to training programmes, conferences, and workshops have often led to the use of his research in court cases. In May 2008, Gilbert was invited to speak on Exclusion at the Center for Refugee Studies in Toronto at a closed conference for academics and judges on 'Critical Issues Facing Refugee Law'. The judges attending the conference were from Canada, Australia and Germany. In one instance Gilbert's contribution to the conference impacted on a decision made by a judge in attendance. The German judge in

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attendance at the conference, Dr Harald Dörig, sits on the German Federal Administrative Court (GFAC), and cited Gilbert in the Court's referral to the European Court of Justice. Specifically, Gilbert's research was cited in clarifying that the purpose of exclusion clauses are to ensure that persons not 'deserving' of refugee protection cannot escape criminal prosecution for past acts. This supported the court's decision that exclusion from refugee status can be applied in cases in which the relevant party no longer poses a criminal threat [source 4].

The Impact of Research on Court Decisions

As a consequence of his chapter on Current Issues in Exclusion (2003), in January 2009 Gilbert was asked to write an expert opinion for Jackman & Associates, Toronto, on behalf of Mr Song Dae Ri, a North Korean appealing against a denial of refugee status on grounds of complicity in crimes against humanity. Partly as a result of that opinion, the Canadian Government conceded without going to court that he should not have been excluded and granted him refugee status. Gilbert's research here influenced a significant decision by Canada, as attested by one of the Barristers working on the case: 'This appears to be somewhat unprecedented, as my colleagues tell me that CIC [Citizenship and Immigration Canada] almost always just adopts the exclusion finding of the IRB [Immigration and Refugee Board]' [source 5].

Gilbert's research has also been accepted in several other court judgments [source 6]. Within this REF period, the most pertinent include: *Plaintiff M47/2012 v Director General of Security* [2012] HCA 46 (5 October 2012); and *AH (Algeria) v Secretary of State for the Home Department* [2012] EWCA Civ 395 (2 April 2012).

5. Sources to corroborate the impact [All sources saved on file with HEI, available on request]

1. An Introduction to the Law Relating to the Protection of Displaced Persons in Situations of Armed Conflict, paper for the Department for International Development and Human Rights Centre, University of Essex, 11-13 February 1998
2. Guidelines on International Protection: Application of the Exclusion Clauses, UNHCR, 4 September 2003, available online: <http://www.unhcr.org/3f7d48514.html>
3. Director of International Protection, UNHCR
4. Cited with approval by the German Federal Administrative Court in its reference to the European Court of Justice on Article 12 of the Qualification Directive, BVerwG 10 C 48.07 OVG 8 A 2632/06.A, 14 October 2008: http://www.bverwg.de/medien/pdf/ent_en/10_c_48_07.pdf
5. Barrister from Jackman & Associates
6. *Plaintiff M47/2012 v Director General of Security* [2012] HCA 46 (5 October 2012): <http://www.austlii.edu.au/au/cases/cth/HCA/2012/46.html>
AH (Algeria) v Secretary of State for the Home Department [2012] EWCA Civ 395 (2 April 2012): <http://www.lexisnexis.com/uk/legal/auth/bridge.do?rand=0.3714795910492368>