



UNHCR

United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés

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BY FACSIMILE (212-715-8000) & OVERNIGHT MAIL

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Re: Request for Advisory Opinion

Dear Mr. Dixon,

I am writing in response to your request for an advisory opinion from the Office of the United Nations High Commissioner for Refugees (UNHCR) regarding the international standards for exclusion from refugee status as applied to child soldiers. Please note that this opinion does not address the particular facts of your client's case, but rather is intended to outline the exclusion analysis that would apply to child soldier cases in general.

Any exclusion analysis regarding the acts of child soldiers must be undertaken with great care. The use of child soldiers in armed conflict is a practice of increasing international concern and has been condemned by the international community on legal, moral and ethical grounds. Children are often targeted for forcible conscription into military service due to their young age and vulnerability. Many are forced to commit crimes, as well as witness the crimes of others, and as a result are left psychologically and emotionally scarred for years. Access to rehabilitation and social services once a conflict ends is often limited, if not non-existent.

As a general matter, the denial of refugee protection to an individual should be based on an individualized examination of whether the person concerned incurred individual responsibility for acts which may give rise to exclusion. In making this assessment, the individual's personal circumstances need to be taken into account. In the case of child soldiers, issues such as age, mental and emotional maturity, voluntariness of service, and treatment by other military personnel, all factor heavily in determining whether exclusion from refugee protection is appropriate. Given the possible consequences of exclusion, *i.e.*, return to persecution, a holistic examination of all relevant facts is critical.

The Office of the United Nations High Commissioner for Refugees

UNHCR has been charged by the United Nations General Assembly with the responsibility of providing international protection to refugees and other persons within its mandate and of seeking permanent solutions to the problem of refugees by assisting

governments and private organizations.¹ As set forth in its Statute, UNHCR fulfils its international protection mandate by, *inter alia*, "[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto."² UNHCR's supervisory responsibility is mirrored in Article II of the 1967 Protocol relating to the Status of Refugees,³ to which the United States acceded in 1968. The Protocol incorporates the substantive provisions of the 1951 Convention relating to the Status of Refugees.⁴

The views of UNHCR are informed by over 50 years of experience supervising international refugee instruments. UNHCR is represented in 116 countries. UNHCR provides guidance in connection with the establishment and implementation of national procedures for refugee status determinations and also conducts such determinations under its own mandate. UNHCR's interpretation of the provisions of the 1951 Convention and 1967 Protocol are considered an authoritative view which should be taken into account when deciding on questions of refugee law.

Background on Child Soldiers

It is estimated that some 300,000 child soldiers are actively being used in direct conflict in more than thirty countries around the world.⁵ While they are most frequently used by rebel groups, a number of government armies have been reported to use them as well.⁶ In addition to active combatants, the United Nations estimates that more than fifty states have recruited another 500,000 children into their military and paramilitary forces, in violation of international law and, often times, the country's own domestic law.⁷

There are various reasons why an army may choose to recruit children. Often times, when a conflict is prolonged and man power is dwindling, armed forces and rebel groups may use children to replenish their ranks. In addition to serving as active combatants, children are used as spies, messengers, porters, servants, sex slaves, or to lay or clear landmines. Because of a child's unique vulnerability and immaturity, s/he is particularly susceptible to recruitment by manipulation or force. In the majority of conflicts, case studies indicate that the primary method of child recruitment is abduction.⁸ Many child soldiers are taken while at school, at home, on the streets or in the markets.⁹

¹ See *Statute of the Office of the United Nations High Commissioner for Refugees*, G.A. Res. 428(V), Annex, U.N. Doc. A/1775, paras. 1, 6 (1950).

² *Id.*, para. 8(a).

³ The 1967 Protocol relating to the Status of Refugees, 606 U.N.T.S. 267, *entered into force* 4 Oct. 1967 [hereafter "1967 Protocol"].

⁴ The 1951 Convention relating to the Status of Refugees, 189 U.N.T.S. 137, *entered into force* 22 Apr. 1954 [hereafter "1951 Convention"].

⁵ Human Rights Watch, "Facts About Child Soldiers," available at <http://www.hrw.org/campaigns/crp/facts.htm> {last visited on Sept. 12, 2005; See also Human Rights Watch, "Where Child Soldiers are Being Used," available at <http://www.hrw.org/campaigns/crp/where.htm> (last visited on Sept. 12, 2005).

⁶ Global International Networks in Education, "Selected Countries Using Child and Young Adult Soldiers," available at <http://www.ginie.org/ginie-crises-links/childsoldiers/countries.html> (last visited on Sept. 12, 2005).

⁷ P.W. Singer, *Children at War*, at 30 (Pantheon Books 2005).

⁸ *Id.*, at 58.

⁹ UNICEF, "Guide to the Optional Protocol on the Involvement of Children in Armed Conflict," at 3, December 2003, at http://www.unicef.org/publications/option_protocol_conflict.pdf (last visited on Sept. 12, 2005).

Children who serve as soldiers are rarely given choices. In fact, for most of them, their only choice is to kill or be killed. They are immature, physically vulnerable, easily intimidated, and typically make very obedient soldiers.¹⁰ Just as they are often recruited through manipulation or force, they are frequently coerced into staying in the group and obeying orders. It is common for children to be drugged in order to overcome their fear or reluctance to fight.¹¹ Additionally, they may be threatened with death, torture, or the death of their loved ones in order to ensure they comply with the demands of their superiors. It is not uncommon for one child soldier to be forced to witness the execution of another dissenting child soldier.¹² Some are forced to commit horrific atrocities, such as killing their neighbors or members of their family, with the idea that such acts will break their spirits, turn them into ruthless soldiers, ostracize them from their community, and prevent them from ever returning home.¹³

For children, being compelled to fight in active combat as well as witness and participate in crimes themselves can be psychologically devastating. Even after the conflict is over, former child soldiers may be left so physically disabled and mentally traumatized that they are unable to successfully rejoin civilian society. Most have never received any formal schooling or vocational training, and few have access to such programs following the conflict. Additionally, other post conflict programs offering family reunification, food and shelter, are often not available to them.¹⁴

The use of child soldiers has been condemned by the international community as the illegal and immoral persecution of children. As a result, there are a number of widely adopted international human rights instruments that explicitly prohibit the use of children in direct combat and/or criminalize the forcible recruitment of child soldiers. These include the 1977 Additional Protocols of the Geneva Conventions,¹⁵ the 1989 Convention on the Rights of the Child,¹⁶ the Rome Statute of the International Criminal Court,¹⁷ the Statute of the Special Court for Sierra Leone,¹⁸ the ILO Worst Forms of Child Labor Convention,¹⁹ and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.²⁰

¹⁰ Human Rights Watch, “Stop the Use of Child Soldiers,” available at <http://www.hrw.org/campaigns/crp/index.htm> (last visited on Sept. 12, 2005).

¹¹ *Id.*

¹² *Id.*

¹³ Singer, *supra* note 7, at 70-71 (explaining that the use of drugs, threats and tattooing are all part of a complex manipulative process of indoctrinating a child into being a soldier).

¹⁴ Human Rights Watch, “Stop the Use of Child Soldiers,” available at <http://www.hrw.org/campaigns/crp/index.htm> (last visited on Sept. 12, 2005).

¹⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 77(2), 1125 U.N.T.S. 3, 39, *entered into force* Dec. 7, 1978 [hereafter “Protocol I”]; Protocol Addition to the Geneva Conventions of 12 August 1949, and Relating to Victims of Non-International Armed Conflicts, June 8, 1977, art. 4(3)(c), 1125 U.N.T.S. 609, *entered into force* Dec. 7, 1978 [hereafter “Protocol II”].

¹⁶ Convention on the Rights of the Child, art. 38, U.N. Doc. 1/44/49 (1989), *entered into force* Sept. 20, 1990.

¹⁷ Rome Statute of the International Criminal Court, art. 8(2)(b)(xxvi), U.N. Doc. A/CONF.183/9 (1998) [hereafter “Rome Statute”]

¹⁸ Statute of the Special Court for Sierra Leone, art. 7, U.N. Doc. S/2000/915 (2002).

¹⁹ ILO Worst Forms of Child Labor Convention No. 182, June 17, 1999, art. 3(a), *entered into force* Nov. 19, 2000, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C182> (last visited Sept. 11, 2005).

²⁰ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, art. 2, U.N. Doc. No. A/RES/54/263 (2001), *entered into force* Feb. 12, 2002 [hereafter “Optional

Exclusion Analysis

Some children who are forcibly conscripted into national armies or rebel forces are eventually able to escape and flee their country of origin to seek safety from continued harm or persecution. Often they seek refugee status in the host country. While the exclusion clauses of the 1951 Convention, described in more detail below, do not distinguish between adults and minors, any refugee status determination related to child soldiers must take into consideration not only general exclusion principles, but also those rules and principles that address the special status of children under national and international law. These include, most notably, principles related to the mental capacity of children and their ability to understand and consent to acts that they are requested or ordered to undertake. For those who are still children at the time of their refugee status adjudication, the best interests of the child are of central importance.

In analyzing refugee claims, this Office relies on the 1951 Convention and its 1967 Protocol. UNHCR has issued various documents to provide guidance to States in their interpretation of the 1951 Convention, including the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* (“UNHCR Handbook”),²¹ *Guidelines on International Protection*,²² and other background documents. Of particular relevance to the issue at hand are UNHCR’s *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*²³ and its accompanying *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, which forms an integral part of the

Protocol to Convention on the Rights of the Child”]. With the exception of the Rome Statute and the Statute of the Special Court for Sierra Leone, the United States has either signed or ratified all of these international agreements.

²¹ UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* (1979, reedited, Geneva, Jan. 1992) (hereafter “UNHCR Handbook”). UNHCR issued its *Handbook* in 1979 at the request of its Executive Committee to provide States with guidance on the application and interpretation of the 1951 Convention and its 1967 Protocol. The US Supreme Court has found that, while not legally binding on US officials, the UNHCR *Handbook* provides “significant guidance” in construing the 1967 Protocol and in giving content to the obligations established therein. *See, e.g., I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987).

²² UNHCR has issued these *Guidelines* pursuant to its mandate, as contained in the 1950 *Statute of the Office of the United Nations High Commissioner for Refugees*, in conjunction with Article 35 of the 1951 Convention relating to the Status of Refugees and Article II of its 1967 Protocol. These *Guidelines* complement the UNHCR *Handbook*. They are intended to provide interpretative legal guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff carrying out refugee status determinations in the field. US federal courts have cited UNHCR’s *Guidelines on International Protection* with approval. *See, e.g., Zhang v. Ashcroft*, 388 F.3d 713, 720 (9th Cir. 2004) (citing UNHCR *Guidelines on International Protection: Religion-Based Refugee Claims*); *Castellano-Chacon v. INS*, 341 F.3d 533, 547-48 (6th Cir. 2003) (citing UNHCR *Guidelines on International Protection: Membership of a Particular Social Group*).

²³ UNHCR *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, HCR/GIP/03/05, 4 Sept. 2003 (hereafter “UNHCR *Guidelines on Exclusion*”), available at: <http://www.unhcr.ch/cgi-bin/texis/vtx/publ/opendoc.pdf?tbl=PUBL&id=3f7d48514> (last visited on Sept. 11, 2005).

Guidelines.²⁴ The Executive Committee of the High Commissioner's Programme has also issued relevant guidance in the form of Conclusions.²⁵

Under US law, US courts remain bound to interpret US statutes in a manner consistent with US treaty obligations if fairly possible. In the seminal decision *Murray v. Schooner Charming Betsy*, the US Supreme Court stated that “an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains.”²⁶ This principle has been reiterated by numerous federal courts.²⁷

A. Exclusion from Refugee Status

1. Overview

In providing international protection to refugees, UNHCR and governments are governed by legal provisions which restrict refugee protection in certain circumstances. The 1951 Convention obliges States to deny refugee status to certain persons who would otherwise satisfy the refugee definition. These provisions are commonly referred to as “exclusion clauses.”

Article 1F of the Convention contains those exclusion clauses that address cases where the individual has committed acts so grave as to render him or her undeserving of international protection as a refugee.²⁸ Thus, the primary purpose of Article 1F is to deprive the perpetrators of heinous acts and serious crimes of international refugee protection, and to ensure that such persons do not abuse the institution of asylum in order to avoid being held legally accountable for their acts. These underlying purposes, notably the determination of an individual as *undeserving* of protection, must be borne in mind in interpreting the applicability of Article 1F.

As with any exceptions to provisions of human rights law, the exclusion clauses should be interpreted restrictively. As emphasized in the UNHCR *Handbook*, a restrictive interpretation and application is also warranted in view of the serious possible consequences

²⁴ See UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 Sept. 2003 (hereafter “UNHCR *Background Note on Exclusion*”), available at www.unhcr.ch/cgi-bin/texis/vtx/home?id=search&results=refworld&query=background%20note%20exclusion (last visited on Sept. 11, 2005).

²⁵ The UNHCR Executive Committee is an intergovernmental group currently consisting of 68 Member States of the United Nations (including the United States) and the Holy See that advises the UNHCR in the exercise of its protection mandate. While its Conclusions are not formally binding, they represent elements relevant to the interpretation and application of the international refugee protection regime. Conclusions of the Executive Committee constitute expressions of opinion which are broadly representative of the views of the international community. The specialized knowledge of the Committee and the fact that its conclusions are reached by consensus adds further weight. UNHCR Executive Committee Conclusions are available at <http://www.unhcr.ch/cgi-bin/texis/vtx/excom?id=3bb1cb676> (last visited on September 11, 2005).

²⁶ 6 US (2 Cranch) 64, 118 (1804). See also *Weinberger v. Rossi*, 456 US 25, 32 (1982); *Restatement (Third) of Foreign Relations Law of the United States* § 114 (“Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.”).

²⁷ See *Spector v. Norwegian Cruise Line Ltd.*, 356 F.3d 641, 646-47 (5th Cir. 2004) (*rev'd on other grounds by Spector v. Norwegian Cruise Line Ltd.*, 125 S.Ct. 2169 (2005)); *United States v. Suerte*, 291 F.3d 366, 373-74 (5th Cir. 2002); *Mississippi Poultry Ass'n, Inc. v. Madigan*, 992 F.2d 1359, 1365 (5th Cir. 1993).

²⁸ UNHCR *Handbook*, *supra* note 21, at para. 140.

of exclusion for the applicant.²⁹ The exclusion clauses should be used with utmost caution being, in effect, the most extreme sanction provided for by the relevant international refugee instruments.

Article 1F provides that the 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 or principles of the United Nations.³⁰

The grounds for exclusion from refugee status under the 1951 Convention are exhaustively enumerated in Article 1F. To the extent that US statutory provisions differ from those under Article 1F, their scope should be interpreted in a manner consistent with Article 1F.

B. Application of Exclusion Clauses

Application of the exclusion clauses under the 1951 Convention is essentially a three-step process which follows a determination that the person meets the refugee definition (*i.e.*, has a well-founded fear of persecution on account of one of five grounds), if there are indications that he or she may have been involved in conduct which gives rise to exclusion. Under an exclusion analysis, it must first be determined whether the conduct at issue constitutes an excludable act. If this is the case, the person’s individual responsibility for the act must be ascertained. Finally, if individual responsibility is found to exist, it must be determined whether the consequences of exclusion from refugee status are proportional to the seriousness of the act committed. In the context of child soldiers, the particular circumstances and vulnerabilities of children must be taken into consideration at all stages of the analysis.

The standard of proof required under Article 1F of the 1951 Convention for relevant findings of fact is that of “serious reasons for considering.” In UNHCR’s view, this is less than the standard required in criminal proceedings (“beyond reasonable doubt”) but more than mere suspicion. For the “serious reasons for considering” threshold to be met, clear and credible evidence is required.³¹

1. Commission of an Excludable Act

In determining excludability, it must first be determined whether the conduct at issue brings the individual within the scope of one of the 1951 Convention’s exclusion clauses. For acts committed during armed conflict by soldiers, Article 1F(a) is considered the most relevant exclusion clause, in particular those sub-clauses relating to war crimes and crimes against humanity. Crimes against peace, which also fall under Article 1F(a), and acts contrary to the purposes and principles of the United Nations, under Article 1F(c), have generally been interpreted as requiring action by someone in a high position of authority representing a State

²⁹ *Id.*, at para. 149.

³⁰ 1951 Convention, *supra* note 4, at art. 1F.

³¹ See UNHCR, *Background Note on Exclusion*, *supra* note 24, at paras. 107–111.

or a State-like entity.³² Serious non-political crimes, under Article 1F(b) would also generally not apply unless it was determined that the crime was not linked to the armed conflict itself.³³

International humanitarian law and international criminal law provide the relevant criteria in determining whether a given act is a “war crime” or a “crime against humanity.” “War crimes” are serious violations of the laws and customs of war which give rise to criminal responsibility directly under international law, either because this is explicitly provided for in the relevant international instruments,³⁴ or on the basis of customary international law.³⁵ This is reflected in both the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and in the Rome Statute of the International Criminal Court (“ICC”), which constitutes the most recent codification of international standards in this regard.³⁶ “Crimes against humanity” are defined as inhumane acts when committed in the context of widespread or systematic attacks against civilians.³⁷ Whether a “war crime” or “crime against humanity” has been committed depends on the particular facts of the case. As a general matter, however, all material elements of the crime must be established on the basis of clear and credible evidence for the conduct to fall under Article 1F.

³² See UNHCR *Handbook*, *supra* note 21, at para. 163; UNHCR *Guidelines on Exclusion*, *supra* note 23, at paras. 11 & 17; UNHCR *Background Note on Exclusion*, *supra* note 24, at para. 50.

³³ Article 1F(b) would be of greater relevance to acts committed in non-international armed conflicts prior to the mid-1990s. Before that time, the notion of “war crimes” (that is, serious violations of international humanitarian law which give rise to criminal liability directly under international law) was applicable only in international armed conflicts. For the purposes of exclusion, if it is determined that the acts in questions were committed prior to the mid-1990s in a non-international armed conflict, and that the acts were in breach of international humanitarian law, they would need to be assessed against the criteria of Article 1F(b) or, Article 1F(a) – crimes against humanity. For further guidance on the requirements to be met for these categories under Article 1F to apply, see UNHCR, *Background Note on Exclusion*, *supra*, note 24, at paras. 33–45.

³⁴ This applies, in particular, to acts committed in international armed conflicts which constitute “grave breaches” of the four Geneva Conventions of 1949 and Additional Protocol I thereto of 1977, *supra* note 15, art. 85. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (first Geneva Convention), art. 50, 6 U.S.T. 3114, 75 U.N.T.S. 31, *entered into force* Oct. 21, 1950; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (second Geneva Convention), art. 51, 75 U.N.T.S. 85, *entered into force* Oct. 21, 1950; Convention relative to the Treatment of Prisoners of War (third Geneva Convention), art. 130, 6 U.S.T. 3316, 75 U.N.T.S. 238, *entered into force* Oct. 21, 1950; Convention relative to the Protection of Civilian Persons in Time of War (fourth Geneva Convention), art. 147, 6 U.S.T. 3316, 75 U.N.T.S. 287, *entered into force* Oct. 21, 1950.

³⁵ This is the case for acts committed in non-international armed conflict from the mid-1990s onward, which are prohibited under Article 3 common to the four Geneva Conventions of 1949, *supra* note 34, and Additional Protocol II thereto of 1977, *supra* note 15.

³⁶ See Rome Statute, *supra* note 17, art. 8. See also, e.g., Charter of the International Military Tribunal, 8 August 1945, art. 6(b), 566 Stat. 1544, 82 U.N.T.S. 279 (hereafter “London Charter”). “War crimes”, as defined in the four Geneva Conventions of 1949 and Additional Protocols I & II thereto of 1977 and other instruments, include acts such as wilful killing and torture or other inhuman treatment of protected persons in the context of the Geneva Conventions; wilfully causing great suffering or serious injury to body or health; hostage-taking; wanton destruction of civilian settlements; launching indiscriminate attacks on civilians; forced transfer of populations; or rape. See *supra* notes 34 & 15.

³⁷ See, e.g., London Charter, *supra* note 36, art. 6(c); see also Rome Statute, *supra* note 17, art. 7(1). The underlying crimes may include such acts as murder, extermination, enslavement, deportation or forcible transfer, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape and other forms of serious sexual violence, persecution, enforced disappearance, or apartheid.

2. Determination of Individual Responsibility

If it is determined that the conduct at issue falls under one of the exclusion clauses, then personal responsibility must be determined. An individual cannot be excluded from refugee status absent an assignment of individual responsibility. Three issues must be addressed: (1) the involvement of the applicant in the excludable act; (2) whether the applicant had the required mental state (*mens rea*); and, (3) possible grounds for rejecting individual responsibility.

Personal Involvement in Underlying Act

The issue of personal involvement requires a review of the relationship between the person and the underlying act. Factors for consideration include whether the individual committed the act himself, induced its commission by others, made a substantial contribution toward its commission, or incurred responsibility as a superior officer for the crimes of persons under his or her effective command and control. Whether or not the conduct of a person may give rise to individual responsibility needs to be determined in an individualized assessment in light of the context and circumstances of the case in question.

Required Mental State (Mens Rea)

The mental state, or *mens rea*, of the applicant at the time the excludable act was committed, is critical in assigning individual responsibility for purposes of exclusion from refugee status. In general, to satisfy the *mens rea* requirement, the individual must have acted with both “intent” and “knowledge.” “Intent” has been defined as requiring that the person meant to engage in the conduct at issue or to bring about a particular consequence, or was aware that that consequence would occur in the ordinary course of events.³⁸ “Knowledge” has been defined as an awareness that certain circumstances exist or that a consequence would occur in the ordinary course of events.³⁹

The definitions of certain crimes within the scope of Article 1F contain additional requirements with regard to the mental element. For example, the commission of a war crime requires awareness of the existence of an armed conflict, while a person who commits a crime against humanity must not only have intent and knowledge with regard to the underlying crime (*e.g.*, murder, rape), but also act in the knowledge that his or her crime forms part of an ongoing systematic or widespread attack against civilians. Other crimes require a specific intent. For example, genocide requires an “...intent to destroy, in whole or in part, a national, ethnical racial or religious group...”,⁴⁰ while persecution as a crime against humanity also requires a specific discriminatory intent (persecution “...on political, racial, national, ethnic, cultural, religious, gender, ..., or other grounds...”).⁴¹

Where the person concerned did not have the mental element (*mens rea*) required for a particular offence, a fundamental aspect of the criminal offence is missing and therefore no individual responsibility arises for the crime in question. Grounds for the absence of *mens rea* include, for example, insanity, mental handicap, involuntary intoxication or immaturity. The

³⁸ Rome Statute, *supra* note 17, art. 30(2).

³⁹ *Id.*, art. 30(3).

⁴⁰ See Convention on the Prevention and Punishment of the Crime of Genocide, art. II, 78 U.N.T.S. 277, *entered into force* Jan. 12, 1951; *see also*, Rome Statute, *supra* note 17, art. 6.

⁴¹ *See, e.g.*, Rome Statute, *supra* note 17, art. 7(1)(h). This would be in addition to the *mens rea* requirements for crimes against humanity in general.

latter is particularly relevant when examining the applicability of an exclusion clause to acts committed by children.

Grounds for Rejecting Individual Responsibility

As part of, and in addition to, the above analysis, possible grounds for rejecting or excluding individual responsibility must also be addressed. These grounds can be divided into such categories as lack of mental element (see above), defenses (duress/coercion, self-defense) and expiation (sentence purged, amnesty or pardon given). In the case of child soldiers, in particular, questions of immaturity, involuntary intoxication, duress and/or self-defense often arise. This is discussed further below.

General principles of criminal liability are applicable to the assessment of whether a valid defence exists for the crime in question. The defense of duress, often at issue in the context of forcibly conscripted child soldiers, bears particular mention. Under the Rome Statute, duress is an available defense for all crimes within the Court's jurisdiction.⁴² It applies – with the result that the person concerned shall not be held criminally responsible – if he or she acts necessarily and reasonably to avoid a threat of imminent death, or of continuing or imminent serious bodily harm to him or herself or another person, provided that the person does not intend to cause greater harm than the one sought to be avoided.⁴³ International case-law adds an additional element for consideration, being that the situation leading to the duress must not have been voluntarily brought about by the person coerced.⁴⁴

One element of the defense of duress that has been articulated in the context of persons in armed conflict acting under the orders of others is that of “moral choice.” As stated at the Nuremberg Trials, an individual who is compelled against his will based on an “imminent, real and inevitable” threat to his life, to engage in an act morally repulsive to him, lacks the requisite *mens rea* to commit a crime.⁴⁵ In the *Einsatzgruppen Case*, the American Military Tribunal at Nuremberg stated “there is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns.”⁴⁶ The Tribunal remarked that it would have acquitted the defendants in the *Einsatzgruppen Case* had they acted under a threat that was “imminent, real and inevitable.”

The above criteria also apply in the context of determining exclusion from international refugee protection under Article 1F of the 1951 Convention: if it is established that the person

⁴² *Id.*, art. 31(1)(d).

⁴³ *Id.* When considering exclusion from international refugee protection, it is UNHCR's position that the defense of duress can be available in cases involving murder or unlawful killing, but only on an exceptional basis. While the ICTY found that duress was not a complete defense for war crimes or crimes against humanity involving murder in the *Erdemovic* case, that position was ultimately not adopted by the Rome Statute, which is considered the most recent and authoritative statement to date of international criminal law principles. *Prosecutor v. Erdemovic*, Joint Separate Opinion of Judge McDonald and Judge Vohrah, at para. 88, Case No. IT-96-22-A (I.C.T.Y., Appeals Chamber, Oct. 7, 1997), available at <http://www.un.org/icty/erdemovic/appeal/judgement/erd-asojmcd971007e.htm> (last visited Sept. 11, 2005).

⁴⁴ See *Prosecutor v. Erdemovic*, Separate and Dissenting Opinion of Judge Cassese, at paras. 16-17, Case No. IT-96-22-A (I.C.T.Y., Appeals Chamber, Oct. 7, 1997), available at <http://www.un.org/icty/erdemovic/appeal/judgement/erd-adojcas971007e.htm> (last visited Sept. 11, 2005).

⁴⁵ *The Einsatzgruppen Case*, 4 Trials of War Criminals 480 (1951), as cited in The Defense of Obedience to Superior Orders: The Mens Rea Requirement, 17 Am. J. Crim. Law 55, 70 (1989).

⁴⁶ *Id.*

concerned acted under duress, he or she should not be considered undeserving of refugee status.⁴⁷ Circumstances which reduce the level of a person's individual responsibility for a crime without, however, giving rise to a valid defence of duress would need to be taken into account as part of the proportionality test, which forms the final stage of the exclusion analysis.

Proportionality

If it is determined that an excludable act has been committed and that the applicant for refugee status bears individual responsibility for its commission, it must then be determined whether the consequences of exclusion from refugee status are proportional to the seriousness of the act committed. Issues for consideration would include any mitigating or aggravating factors in the case and a weighing of the gravity of the offence against the degree of persecution feared upon return.⁴⁸ In the case of child soldiers, possible mitigating factors might include age, the treatment of the child by military personnel or circumstances of service. With regard to the weighing of the seriousness of the crime against the possible harm upon return, it bears note that crimes against peace, crimes against humanity, and acts contrary to the purposes and principles of the United Nations would generally be sufficiently serious to outweigh the degree of persecution feared. War crimes and serious non-political crimes, however, cover a wider range of behaviour such that exclusion may be considered disproportionate to the underlying crime.⁴⁹

C. Application of Exclusion Clauses to Child Soldiers

The 1951 Convention's exclusion clauses do not distinguish between adults and minors. However, as noted earlier, when the application of an exclusion clause for acts committed when the person concerned was under 18 years of age is at issue, regard must be had not only to general exclusion principles, but also to the rules and principles pertaining to the special status of children under international and national law.

The distinction made between adults and children under international law has been articulated, for example, by international criminal courts. Article 7 of the Statute of the Special Court for Sierra Leone provides that the Court does not exercise jurisdiction over any person who was under the age of 15 at the time of the alleged commission of the crime, and states that the Court shall treat any person between 15 and 18 years of age who comes before it "with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child."⁵⁰ The ICC also does not have jurisdiction over persons under the age of 18, lending credence, as one commentator has noted, "to the idea that such

⁴⁷ See UNHCR *Guidelines on Exclusion*, *supra* note 23, at para. 22; UNHCR, *Background Note on Exclusion*, *supra* note 24, at paras. 69–70.

⁴⁸ UNHCR *Guidelines on Exclusion*, *supra* note 23, para. 24 ("The incorporation of a proportionality test when considering exclusion and its consequences provides a useful analytical tool to ensure that the exclusion clauses are applied in a manner consistent with the overriding humanitarian object and purpose of the 1951 Convention.")

⁴⁹ *Id.*

⁵⁰ Statute of the Special Court for Sierra Leone, *supra* note 18, art. 7. Despite having the legal authority to prosecute children between the ages of 15 and 18, the Prosecutor for the Special Court chose not to exercise even this limited authority given that many of the child soldiers were themselves victims of international crimes. See Press Release, Public Affairs Office, The Special Court for Sierra Leone, "Special Court Prosecutor Says He Will Not Prosecute Children," November 2, 2002, available at www.sc-sl.org/Press/pressrelease-110202.pdf (last visited Sept. 11, 2005).

children are essentially victims and, therefore, should be treated as such by the international criminal justice system."⁵¹

Similar considerations would apply in an exclusion analysis concerning acts committed by a child. The exclusion clauses can apply to minors only if they have reached the age of criminal responsibility at the time of the commission of the excludable act. 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,⁵² a child below the minimum age cannot be considered by the State concerned as having committed an excludable offence. For those over this age limit (or where no such limit exists), the maturity of the particular child should still be evaluated to determine whether he or she had the mental capacity to be held responsible for the crime in question. The younger the child, the greater is the presumption that such mental capacity did not exist at the relevant time.

The issue of whether a child has the necessary mental state to be held individually responsible for an excludable act is of central importance. It must first be determined that the child was sufficiently mature to understand the nature of his or her conduct and the consequences of the actions being undertaken, and thus to commit, or participate in the commission of, the material elements of a crime with the requisite intent and knowledge. In making this determination, it is necessary to assess the child's emotional, mental and intellectual development.

Where mental capacity is established, particular attention must be given to whether other grounds for rejecting individual responsibility exist. As noted above, many child soldiers commit crimes during armed conflict after being involuntarily drugged. Many were forcibly conscripted and forced to act under threats of death and/or torture, either directed against them or against a loved one. It is necessary to examine whether the circumstances in which a child committed a crime within the scope of Article 1F amounted to duress. Factors to be taken into consideration when making this determination include the age at which the child became involved with the (armed) group or organization; the reasons for which he or she joined (voluntary or coerced or in defence of oneself or of others); the consequences of refusal to join; the length of time as a member; the possibility of not participating in such acts or of escape; the forced use of drugs, alcohol or medication (involuntary intoxication); promotion within the ranks of the group due to actions undertaken; the level of education and understanding of the events in question; and the trauma, abuse or ill-treatment suffered by the child as a result of his or her involvement.

As noted above, even if the circumstances do not give rise to a defence, the vulnerability of the child, especially those subjected to ill-treatment, should be taken into account when considering the proportionality of exclusion.

For those who are still children at the time of their refugee status determination, regard should be had to the fundamental obligation to act in the "best interests" of the child. Specially trained staff should deal with cases where exclusion is being considered in respect of a child applicant. The "best interests" principle should also underlie any post-exclusion action. Articles 39 and 40 of the Convention on the Rights of the Child are also relevant as

⁵¹ Max duPlessis, "Children under International Criminal Law," *African Security Review*, Vol. 13, No. 2, 2004, available at <http://www.iss.co.za/pubs/ASR/13No2/EduPlessis.htm> (last visited Sept. 11, 2005).

⁵² If the age of criminal responsibility is higher in the country of origin, this should also be taken into account (in the child's favor).

they deal with the duty of States to assist in the rehabilitation of victims (which would include child soldiers) and establish standards for the treatment of children thought to have infringed criminal law.

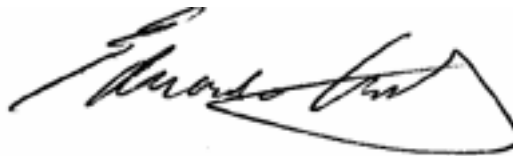
Conclusion

The exclusion clauses are intended to deny refugee status to those who are undeserving of refugee protection. The consequences of exclusion, *i.e.*, return to persecution, are potentially severe. As a result, it is important that the rigorous standards required of an exclusion analysis be followed. A thorough and individualized assessment must be undertaken, taking into consideration the nature of the acts allegedly committed, the personal responsibility of the applicant with regard to those acts, and the proportionality of return against the seriousness of the act.

In the case of child soldiers, particular care must be taken, both because of their age and the circumstances surrounding their involvement in the armed conflict. It should be recalled that the forcible conscription of children under the age of 18 is a violation of human rights law.⁵³ The conscription of children under the age of 15, whether forcible or not, and their active use in hostilities is considered a war crime.⁵⁴ Child soldiers are often just as much victims of war and human rights abuses as they are possible perpetrators of such offenses. A holistic approach to determining refugee status, with the consideration of all relevant factors in an individual case, is essential in determining who should benefit from refugee status and who should not.

We trust the above analysis is useful to you and the adjudicators considering your client's case.

Sincerely,



Eduardo Arboleda
Deputy Regional Representative

⁵³ Optional Protocol to Convention on the Rights of the Child, *supra* note 20, art. 2.

⁵⁴ Rome Statute, *supra* note 17, art. 8(2)(b)(xxvi). *See also*, UN Security Council Resolution 1539 (2004), available at www.un.org/special-rep/children-armed-conflict/KeyDocuments/Resolution/S-RES-1539English.html (last visited Sept. 11, 2005).