

Инициатива качества  
систем убежища

в Восточной Европе и на Южном Кавказе



Asylum Systems  
Quality Initiative

in Eastern Europe and the Southern Caucasus

**Exclusion in RSD  
UNHCR Training  
Baku, Azerbaijan  
September 2013**

# OBJECTIVES

1. To understand when to consider Article 1F of the 1951 Convention
2. To develop a framework of analysis for exclusion cases

# REFERENCE MATERIALS

*UNHCR, Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, 2003*

*UNHCR, Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, 2003*

# INCLUSION AND EXCLUSION CLAUSES

- Inclusion - Does the applicant meet the elements of the refugee definition?
- Exclusion – Even though the applicant meets the refugee definition, he is excluded from protection because:
  - He does not need international protection OR
  - He does not deserve international protection

# THE EXCLUSION PROVISIONS – NOT NEEDING/ DESERVING PROTECTION

## Not needing protection:

Article D – Persons receiving protection from UN agencies other than UNHCR

Article E – Persons having the rights and obligations of another country

## Not deserving protection:

Article 1F - Serious reasons for considering that the person  
has committed a crime against peace, a war crime, or a crime against humanity; has  
committed a serious non-political crime;  
has been guilty of acts contrary to the purposes and principles of the UN

# PROCEDURAL REQUIREMENTS

1. At what stage should exclusion be considered?
2. Who should make exclusion decisions?
3. What kind of notice is required for the applicant?
4. How much disclosure is required for the applicant?
5. Who has the burden of proof?
6. What is the standard of proof?

# 1. AT WHAT STAGE SHOULD EXCLUSION BE CONSIDERED?

Generally – after inclusion. If applicant does not have a well-founded fear of persecution, there is no need to deal with exclusion

If considering exclusion under Articles D and E, more logical approach may be to consider exclusion first

## 2. WHO SHOULD MAKE EXCLUSION DECISIONS?

UNHCR's Position – Specialized units within the first instance RSD procedure

Eligibility Officers (EOs) should be well trained and experienced caseworkers



### 3. WHAT NOTICE IS REQUIRED?

Once the first instance authority decides that there are exclusion issues, it should inform the applicant that:

- Exclusion will be considered
- Identify which exclusion provisions are relevant, and
- Provide particulars

## 4. HOW MUCH DISCLOSURE IS REQUIRED?

The applicant must have an opportunity challenge information that may lead to exclusion

How would you deal with a situation where revealing a source might put the source at risk?

## 5. BURDEN OF PROOF

With inclusion the burden is shared between the applicant and the EO.

Is it the same when deciding exclusion? Why/why not?

## 6. STANDARD OF PROOF

There must be “serious reasons for considering” that the applicant is excludable.

Note that “serious reasons for considering” is not the standard under Articles D and E

# THE EXCLUSION PROVISIONS – NOT DESERVING PROTECTION

Article 1F – There are serious reasons for considering that the person:

- a) Has committed a crime against peace, a war crime, or a crime against humanity
- b) Has committed a serious non-political crime
- c) Has been guilty of acts contrary to the purposes and principles of the UN

# FRAMEWORK OF ANALYSIS

1. Exclusion indicators
2. Classification of the acts
3. Determination of individually responsibility
4. Consideration of proportionality principle

# 1. WHICH OF THE FOLLOWING ARE EXCLUSION INDICATORS?

- The applicant worked for KHAD, the secret police under Najabullah's government in Afghanistan.
- An extradition warrant has been issued for the applicant.
- The applicant has several convictions for shop lifting in his country of origin.
- The applicant did mandatory military service in his country of origin.
- The applicant worked on a farm owned by Osama Bin Laden.

# ARTICLE 1F(a)

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes



## 2. CLASSIFY THE ACTS – ARE THEY INTERNATIONAL CRIMES?

Determine this from international instruments that make provision for such crimes:

- 1945 Charter of the International Military Tribunal (the London Charter)
- 1948 Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention)
- 1949 Four Geneva Conventions for the Protections of Victims of War
- 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid
- 1977 Two Additional Protocols to 1949 Geneva Conventions
- 1984 Convention against Torture
- 1993 Statute of the International Criminal Tribunal for the former Yugoslavia
- 1994 Statute of the International Criminal Tribunal for Rwanda
- 1998 Statute of the International Criminal Court

# CRIMES AGAINST PEACE

*London Charter* – Contains only definition of a crime against peace

Crime against peace – arises from the “planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties”

Who can commit a crime against peace? State leaders or persons in high authority within the state

# WAR CRIMES

Grave breaches of international humanitarian law (the law of war or armed conflict).

## Examples:

- Wilful killing of protected persons such as civilians in the context of the four Geneva Conventions.
- Torture or other inhumane treatment
- Wilfully causing great suffering or serious injury
- Attacks on, or indiscriminate attacks affecting, the civilian population or those known to be *hors de combat*
- Attacking demilitarized zones
- Taking civilians as hostages
- Extensive destruction of property not justified by military necessity
- Wilfully depriving a prisoner of war or a civilian the right of a fair trial
- Employing prohibited weapons such as poisonous gases

# WHO CAN COMMIT WAR CRIMES AND AGAINST WHOM?

- Both military persons and civilians can commit war crimes.
- The victims of war crimes can be both military persons and civilians.

# UNDER WHAT CONDITIONS CAN WAR CRIMES BE COMMITTED?

- War crimes can be committed during both international and internal armed conflicts.
- International armed conflict – a war between two states, either declared or undeclared
- Internal armed conflict –
  - Fighting between the state and armed groups
  - Fighting between or among different armed groups

## INTERNAL ARMED CONFLICT - What is the difference between an internal armed conflict and an internal disturbance?

For it to be an internal armed conflict:

- Degree of organization – the groups to the conflict must have some degree of organization
- Level of intensity – has to be higher than situations of internal disturbances and tensions such as riots, isolated and sporadic acts of violence or other acts of a similar nature.
- Protraction – the length or protracted nature of the conflict is a factor.
- Other relevant factors – depends on the situation but would include whether conflict has been formally considered as a matter of concern to the UN and whether the ICRC has expressed any official views

# CRIMES AGAINST HUMANITY

Inhumane treatment of a civilian population in the context of a widespread or systematic attack against it.

## Examples:

- Murder
- Extermination
- Enslavement
- Deportation or forcible transfer
- Torture
- Rape and other forms of sexual violence
- Enforced disappearance
- Apartheid
- Genocide

# WHO CAN COMMIT CRIMES AGAINST HUMANITY?

- Both military persons and civilians can commit crimes against humanity
- The victim is a civilian population



## UNDER WHAT CONDITIONS CAN CRIMES AGAINST HUMANITY TAKE PLACE?

- CAH can take place during times of peace and during times of war (international and internal armed conflict)

### 3. INDIVIDUAL RESPONSIBILITY

- Knowledge and intention must be established in every case. This is called the *mens rea* or mental element of the criminal act.
- Individual responsibility arises where
  - Applicant committed the criminal act, or
  - Applicant made a substantial contribution to the criminal act, knowing that his act or omission would facilitate the criminal conduct

INDIVIDUAL RESPONSIBILITY WHERE APPLICANT MEMBER OF AN ORGANIZATION THAT COMMITTED EXCUDABLE ACTS

Consider the following factors to determine if applicant knew of the crimes being committed and whether he shared in the purposes of the acts:

1. Nature of the organization – Were the crimes committed as part of the organization's regular method of operation?

# FACTORS (CONTINUED)

2. Method of recruitment – Was applicant recruited or did he join voluntarily?
3. The length of time the applicant spent in the organization
4. The applicant's knowledge of atrocities
5. The applicant's rank
6. Did the applicant leave at the earliest opportunity to do so in safety?

# DEFENCES THAT NEGATE INDIVIDUAL RESPONSIBILITY

## 1. Superior Orders – Will only apply where:

- Applicant was legally obliged to follow the order
- Applicant was not aware that the order was unlawful, and
- The order was not manifestly unlawful

# DEFENCES (CONTINUED)

## 2. Duress – This can apply when:

- Applicant was under an imminent threat of death or harm either to himself or to another person, and
- He did not intend to cause greater harm than what he sought to avoid

## DEFENCES (CONTINUED)

3. Self- defense – The applicant must establish that he used only what was reasonable and necessary to defend himself. This would also apply to the defense of another person.

# INDIVIDUAL RESPONSIBILITY (CONTINUED)

In addition to defenses, individual responsibility may be negated where the applicant does not have the mental capacity to be held responsible.

## Examples:

- Insanity
- Mental handicap
- Involuntary intoxication
- Immaturity (minors)



## 4. PROPORTIONALITY CONSIDERATIONS

- A proportionality analysis is when the gravity of the offence is weighed against the consequences of exclusion. Exclusion may not be appropriate because the consequences of exclusion are so severe.
- Proportionality considerations are relevant to less serious war crimes.
- A proportionality analysis is not necessary with respect to more serious war crimes and crimes against humanity.

# OTHER CONSIDERATIONS

- Remorse is not a defense.
- Remorse may be a factor if the applicant has served a sentence for the excludable crime and exclusion may no longer be justified. In this situation, the EO should consider:
  - The seriousness of the offence
  - The passage of time, and
  - Any expression of regret by the applicant

# ARTICLE 1F (b)

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee

# FRAMEWORK OF ANALYSIS

1. Exclusion indicators
2. Classification of the acts
3. Determination of individually responsibility
4. Consideration of proportionality principle

# 1. EXCLUSION INDICATORS

- There is evidence of a crime of some substance
- Note that it is not necessary that the applicant was convicted of a crime
- Note that the crime must be committed outside the country of refuge prior to the applicant's admission to the country as a refugee

## 2. CLASSIFICATION OF THE ACTS

- Must be “serious non-political crime”
- Serious – Not defined but would not be petty crimes. Rather would need to be grave offences such as murder, rape or armed robbery
- Non-political – Factors to consider:
  - The motivation for the act
  - The context in which the offence is committed
  - The methods used
  - The proportionality of the crime in relation of the objectives

# NON-POLITICAL CRIME (CONTINUED)

- To be considered “political” in nature, the political objective should be consistent with human rights
- Where personal motives predominate over political considerations, the crime will be considered “non-political”
- Where there is no clear link between the alleged political objective and the crime OR where the act is disproportionate to the alleged objective, non-political motive predominate
- Acts of violence considered to be of a “terrorist” nature will almost always be considered non-political

### 3. INDIVIDUAL RESPONSIBILITY

The same considerations apply as to *mens rea* with respect to Article 1F(a).

- Knowledge and intent must be established
- Complicity may be sufficient
- The same defenses apply



## 4. PROPORTIONALITY CONSIDERATIONS

- A proportionality analysis is when the gravity of the offence is weighed against the consequences of exclusion. Exclusion may not be appropriate because the consequences of exclusion are so severe.
- Proportionality considerations are relevant to Article 1F(b) crimes

# ARTICLE 1F(c)

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(c) He has been guilty of acts contrary to the purposes and principles of the United Nations

## APPLICATION OF ARTICLE 1F(c)

- Given the general nature of this provision and lack of use, it must be applied with caution.
- The purposes and principles in Articles 1 and 2 of the UN Charter relate to how states are to act in relations with each other. Therefore, this exclusion provision may apply to state leaders whose actions have serious implications for world peace and security.

# CONCLUSION

- Given implications for applicants who otherwise meet the refugee definition, exclusion must be applied restrictively.