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**Pre-Conference Training – Advanced Stream
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Exclusion Under Article 1F(b) and 1F(c)

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Exclusion Under Article 1F(b) and 1F(c)

Serious Non-Political Crimes and Acts Contrary to the Purposes and Principles of the United Nations

PRESENTATION OUTLINE

- 1. The Exclusion Clauses in the *1951 Convention* and the *1969 Organization for African Unity Convention* – virtually identical. (*Refreshers*)**
- 2. The Standard of Proof in the Application of the Exclusion Clauses (*Refreshers*)**
- 3. What constitutes a “serious non-political crime”?**
- 4. What determines whether the crime is political?**
- 5. Article 1F(c) Acts that are Contrary to the Purposes and Principles of the United Nations – *key considerations***
- 6. UNHCR’s Guidelines for the Application of the Exclusion Clauses**
- 7. Some Practice Cases**

Pre-Conference Training – Advanced Stream Article 1F(b) and (c)

1951 Convention & 1969 OAU Convention (Refresher)

All Refugee Rights instruments consist of *inclusion*, *cessation* and *exclusion* provisions.

Article 1F of the *1951 Convention relating to the Status of Refugees*

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

- (a) he has **committed** a **crime against peace, a war crime, or a crime against humanity**, as **defined by the international instruments drawn up to make provision in respect to such crimes**.**
- (b) he has **committed** a **serious non-political crime** outside the country of refuge prior to his admission in that country as a refugee.**
- (c) he has been **guilty** of acts **contrary to the purposes and principles** of the United Nations.**

Article 1(5) of the *1969 Organization of African Unity Convention Governing Specific Aspects of the Refugee Problems in Africa*

5. The provisions of this Convention shall not apply to any person with respect to whom the country of asylum has **serious reasons for considering that:**

- (c) he has been **guilty** of acts **contrary to the purposes and principles** of the Organization of African Unity;**

Pre-Conference Training – Advanced Stream Article 1F(b) and (c)

What is the **standard of proof** for the application of Article 1F of the *1951 Convention* or Article 1(5) of the *1969 OAU Convention*? (Refresher)

The Supreme Court of Canada (SCC) in *Ezokola* pronounced that **exclusion determinations are not determinations of guilt** and therefore are not based on proof beyond a **reasonable doubt** nor the general civil standard of a **balance of probabilities**. The SCC agreed with the British Courts that “**serious reasons for considering**” imports a higher test for exclusion than an expression such as “reasonable grounds for suspecting” and that “considering” approximates to “believing” than to “suspecting.” Accordingly, it sets a standard of proof above “suspecting.”

Ezokola v. Canada (Citizenship and Immigration), [2013] 2 S.C.R. 678.

It is worth noting that this was the recognized standard of proof for “**serious reasons for considering**” that was established by the Federal Court of Appeal in *Ramirez*.

Ramirez v. Canada (Minister of Employment and Immigration), [1992] 2 F.C. 306 (C.A.).

It is important to stress that the exclusion clauses are not dependent on whether the appellant has been charged or convicted of the acts set out in the Conventions.

Moreno v. Canada (Minister of Employment and Immigration), 1993 (FCA), [1994] 1 FC 298.

Pre-Conference Training – Advanced Stream Article 1F(b) and (c)

It is also important to stress that exclusion under **Article 1F(b)** is not dependent on whether a person has been **charged, convicted**, or whether they have an outstanding **extradition** request. **Article 1F(b) is not merely limited to fugitives of justice or punishment.**

Further, at least in Canada, **the completion of a sentence, the current lack of dangerousness, or post-crime expiation or rehabilitation** are *not* bars to exclusion.

Where there is evidence that the person is unable to obtain a fair trial in his country of origin then the Immigration and Refugee Board of Canada can go behind the record to determine whether **the person actually committed the crime.**

What constitutes a “serious non-political crime”?

The role of domestic law is important here in determining what is a “**serious**” offence. There is no requirement for “**equivalency.**” **The gravity of the crime must be judged against international standards.**

Jayasekara v. Canada (Minister of Citizenship and Immigration), [2009] 4 F.C.R. 164 (F.C.A.); 2008 FCA 404.

The Federal Court of Appeal outlined the following factors to consider when deciding whether the crime was serious:

- 1. elements of the crime,**
- 2. the mode of prosecution,**
- 3. the penalty prescribed,**
- 4. the facts, and**
- 5. the mitigating and aggravating circumstances underlying the conviction.**

Pre-Conference Training – Advanced Stream Article 1F(b) and (c)

The Supreme Court of Canada (SCC) in *Febles* stated that the **ten year or more yardstick** is a good indication of the seriousness of the crime and creates a “**rebuttable presumption**.” However, the SCC went on to say,

...the ten-year rule should not be applied in a mechanistic, decontextualized, or unjust manner.

Febles v. Canada (Minister of Citizenship and Immigration), [2014] 3 SCR 431; 2014 SCC 68.

What determines whether the crime is political?

In the Federal Court of Appeal judgement in *Gil*, a two-pronged “incidence” test was proposed:

1. -- **the existence of a political disturbance related to a struggle to modify or abolish either a government or a government policy;**
2. -- **a rational nexus between the crime committed and the potential accomplishment of the political objective sought.**

Gil v. Canada (Minister of Employment and Immigration), [1995] 1 F.C. 508 (C.A.) at 528-529 and 533.

Further, **the gravity of the crime committed to effect change must be commensurate with the degree of repressiveness of the government in question for the crime to be considered a political one.**

“Where it is appropriate to use a proportionality test under Article 1F(b) is in the weighing of the gravity of the crime as part of the process of determining if we should brand it as “political”. ... On the other hand, if the regime is a liberal democracy with constitutional guarantees of free speech and expression (assuming that such a regime could ever produce a genuine refugee) it is very difficult to think of any crime, let alone a serious one, which we would consider to be an acceptable method of political action. **To put the matter in concrete terms, the plotters against Hitler might have been able to claim refugee status; the assassin of John F. Kennedy could never do so.**”

Article 1F(c) Acts that are Contrary to the Purposes and Principles of the United Nations

The SCC dealt with **Article 1F(c)** for the first time in *Pushpanathan*, a case that dealt with drug trafficking and whether the applicant, a Tamil from Sri Lanka, could be excluded from refugee protection under Article 1F(c). The SCC ruled, in a seven to two judgement, that drug trafficking was not contrary to the purposes and principles of the United Nations.

Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982.

The SCC characterized Article 1F(c) in the following terms: “... the purpose of Article 1F(c) can be characterized in the following terms: **to exclude those individuals responsible for serious, sustained or systemic violations of fundamental human rights which amount to persecution in a non-war setting.**”

The SCC further pronounced that,

“The guiding principle is that where there is *consensus in international law* that particular acts constitute sufficiently serious and sustained violations of fundamental human rights as to amount to persecution, or are ***explicitly recognized as contrary to the purposes and principles of the United Nations***, then Article 1 F(c) will be applicable.”

The SCC also identified two categories of acts that fall within **Article 1F(c)**:

1. “... where a widely accepted international agreement or United Nations resolution declares that the commission of certain acts is contrary to the purposes and principles of the United Nations.”

The examples given here to illustrate this category were “**enforced disappearances, torture and international terrorism.**”

2. “those which a court is able, for itself, to characterize as serious, sustained and systemic violations of fundamental human rights constituting persecution.”

The example provided here is any act whereby an international instrument has indicated it is a violation of fundamental human rights.

Pre-Conference Training – Advanced Stream Article 1F(b) and (c)

The SCC in *Pushpanathan* also determined that “**exclusion under Article 1F(c) is not limited to persons in positions of power and indicated that non-state actors may fall within the provision.**”

The burden of establishing that there are “**serious reasons for considering**” that serious international crimes have been committed falls with the Government (Minister). **The burden of proof lies with the Minister.**

Moreover, the **refugee applicant must be given notice of the applicable exclusion ground** is relevant for their hearing. **The Minister must also be given sufficient notice that exclusion is relevant issue to a case.**

Once a person has been excluded from refugee protection then there is **no consideration of inclusion**. The case has been concluded.

Xie, Rou Lan v. M.C.I. (F.C.A., no. A-422-03), Décary, Létourneau, Pelletier, June 30, 2004

Application of the Exclusion Clauses: Article 1F of the *1951 Convention relating to the Status of Refugees*, HCR/GIP/03/05, 4 September 2003

The UNHCR's Guidelines for application of Article 1F and for Article 1F(c), in particular, is especially relevant here. UNHCR states that **Article 1F(c) is only triggered in extreme circumstances by activity which attacks the very basis of the international community's coexistence.** Such activity must have an international dimension. *Crimes capable of affecting international peace, security and peaceful relations between States, as well as serious and sustained violations of human rights, would fall under this category.* Given that Articles 1 and 2 of the United Nations Charter essentially set out the fundamental principles States must uphold in their mutual relations, it would appear that in principle only persons who have been in positions of power in a State or State-like entity would appear capable of committing such acts. **In cases involving a terrorist act, a correct application of Article 1F(c) involves an assessment as to the extent to which the act impinges on the international plane – in terms of its gravity, international impact, and implications for international peace and security.**

There is no question that the Russian-Ukrainian War is affecting international peace, security and peaceful relations between States as well as producing *serious and sustained violations of human rights.*

Cases to Illustrate Exclusion Under Article 1F(b) and (c)

We will work on some practice cases together to help further the learning and acquisition of the relevant legal principles underlying the Exclusion Clauses under Article 1F(b) and (c).

When analyzing each of these cases, that are drawn from real life cases decided in the Canadian Federal Court system, you may wish to consider the following guiding questions.

- 1. Identify the central legal issue(s) in this appeal.**
- 2. What is(are) the applicable legal standard(s) or principle(s) that ought to apply to the case?**
- 3. How should the appeal be decided and what would be the *ratio decidendi* for your judgement?**

Points Worth Considering for each of the Practice Cases on Articles 1F(b) and 1F(c)

Case Study 3 – Article 1F(b) – Serious Non-Political Crimes

A Somali citizen who entered Canada through the US. He has several criminal charges including battery and domestic assault.

What are the central issues in this case?

What was the claimant's status in the US? Did he claim asylum in the US? If so, what was the outcome? If not, why not?

How many criminal charges does this person have against them? Two appear to be quite serious, battery and domestic assault. If convicted what sentence would likely be imposed for these crimes?

What are the legal standards or principles that ought to apply in this case?

The exclusion clauses are not determinations of an applicant's guilt.

Exclusion is not dependent on whether the person has been charged, convicted, and sentenced.

A sentence of ten years or more is a good yardstick for measuring the “seriousness” of a crime.

How could the appeal be decided and what could be the *ratio decidendi* for your judgement?

If the Minister can establish that the applicant was charged with these crimes, then there would be grounds for excluding the applicant under Article 1F(b).

The second issue would be the applicant's status in the US. Did he claim asylum in the US? If not, why not?

Case Study 4 – Article 1F(b) – Serious Non-Political Crimes

A Greek national who fears a gang over a money dispute. The Minister has presented documents indicating that he was involved in an incident where his wife was beaten and was hospitalized for head trauma and a broken arm. He also threatened his wife with a gun.

What are the central issues in this case?

Are the charges that the applicant faces in Greece “serious”? If he is convicted, would he receive a sentence of 10 years or more?

Is the basis of the applicant’s fear of the gang members who are threatening him merely a common crime? Does he have a basis to claim refugee protection?

What are the legal standards or principles that ought to apply in this case?

To claim refugee protection, one must have a nexus to one of the five grounds of the *1951 Convention*. Exclusion is not dependent on whether the person has been charged, convicted, and sentenced. A sentence of ten years or more is a good yardstick for measuring the “seriousness” of a crime.

How could the appeal be decided and what could be the *ratio decidendi* for your judgement?

This claim for asylum can be rejected in two ways: the claim does not fall within the 1951 Convention because this a common crime, if the claimant’s testimony is accepted; and, the evidence of outstanding aggravated assault charges in Greece for domestic violence. This is a serious non-political crime for which the applicant ought to be excluded from refugee protection.

Case Study 5 – Article 1F(c) – Acts Contrary to the Purposes and Principles of the UN

The applicant is a 30-year-old Sri Lankan Tamil, who joined the LTTE when he was 13 years old. He held various senior positions in the LTTE such as platoon leader, mobile unit lead, chief security guard for the leader of the Intelligence Division, second in command of a combat unit, and so on.

What are the central issues in this case?

Given that the LTTE is widely considered to be terrorist organization, should the applicant be excluded for his activities in various senior capacities with the LTTE in Sri Lanka?

Where did the applicant stay before coming to Canada to make a claim for refugee status? Did he make a claim for refugee status there? If not, why not? If so, what was the outcome of this application for refugee status.

What are the legal standards or principles that ought to apply in this case?

Mere membership in a terrorist organization is not sufficient to exclude an applicant for refugee protection.

To what extent do the acts of the claimant with the LTTE impinge on international peace and security and the peaceful relations among states?

Terrorism is contrary to the purposes and principles of the United Nations.

How could the appeal be decided and what could be the *ratio decidendi* for your judgement?

The claimant's heavy involvement with the LTTE for at least 10 years, and his work transporting munitions, and personnel to Colombo, indicate he was guilty of acts contrary to the purposes and principles of the UN.

Further, he lived in a third country for a period of time and, seemingly, did not seek asylum. This raises many questions including whether he has a well-founded fear of persecution.

Case Study 6 – Article 1F(c) – Acts Contrary to the Purposes and Principles of the UN

A national of Peru who was captured by the Shining Path and forced to work for them and participate in kidnappings and other things before he managed to escape.

What are the central issues in this case?

Does the applicant have the defence of “duress” in this situation with the Shining Path?

Did he leave the Shining Path at the first opportunity?

Is there anywhere else in the country that he can live in safety and not be pursued by the Shining Path?

What are the legal standards or principles that ought to apply in this case?

There is the defence of “duress” in situations where the person is coerced into doing things by threatening them with serious harm, including possibly death.

How could the appeal be decided and what could be the *ratio decidendi* for your judgement?

It is unlikely that the applicant will be excluded because he has the defence of “duress.”

Case Study 7 – Article 1F(c) – Acts Contrary to the Purposes and Principles of the UN

A 35-year-old Libyan national who faces allegations of domestic violence from two former girlfriends, including physical assault with injuries. Although the criminal charges were laid by the police, they were stayed due to a lack of cooperation by the victims.

What are the central issues in this case?

Why does the claimant fear to return to Libya?

Does the claimant meet the requirements of Article 1F(c) of being guilty of acts contrary to the purposes and principles of the UN?

What are the legal standards or principles that ought to apply in this case?

Article 1F(c) should be used for those events that undermine international peace and security and the peaceful relations among states or for serious and sustained violations of human rights against people.

How should the appeal be decided and what would be the *ratio decidendi* for your judgement?

The applicant's domestic violence with two former girlfriends, while detestable, does not rise to the threshold of exclusion on the basis of threatening international peace and security and the peaceful relations among states or serious and sustained human rights violations against people.

Thank you for your kind attention!!

Are there any further questions or comments?