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**Pre-Conference Training – Advanced Stream
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Exclusion Under Article 1F(a)

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Exclusion Under Article 1F(a)

Crimes Against Peace, War Crimes, and Crimes Against Humanity

PRESENTATION OUTLINE

- 1. The Exclusion Clauses in the *1951 Convention* and the *1969 Organization for African Unity Convention* – virtually identical.**
- 2. The Standard of Proof in the Application of the Exclusion Clauses**
- 3. What are the sources for defining the atrocity crimes?**
- 4. Article 1F(a) Crimes Against Peace**
- 5. Article 1F(a) War Crimes**
- 6. Article 1F(a) Crimes Against Humanity**
- 7. Defences: Duress**
- 8. Some Practice Cases**

1951 Convention & 1969 OAU Convention

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;**

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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*?

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.).

The SCC came to a new determination for the test of complicity in *Ezokola* setting aside the test found in *Ramirez*.

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.

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How should Article 1F(a) and Article 1(5)(a) crimes be defined?

- (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*.

What sources should you use to define these most serious international crimes?

The international instruments most frequently used to define these crimes include:

Charter of the International Military Tribunal

Statute of the International Tribunal for the Former Yugoslavia

Statute of the International Tribunal for Rwanda

Rome Statute of the International Criminal Court (*Rome Statute*)

The SCC of Canada in *Ezokola* stated that reference should *not only* be made to the **International Criminal Court (ICC)** but to the growing body of jurisprudence of the international *ad hoc* tribunals and national courts.

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

For example, the **Statute of the International Tribunal for Rwanda**, in its **Article 2**, defines the meaning of **genocide**, and in its **Article 3**, defines **crimes against humanity**.

https://legal.un.org/avl/pdf/ha/ictr_EF.pdf.

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Under the *Rome Statute* the most serious international crimes are defined as follows:

Article 5, *Crimes within the jurisdiction of the Court*

The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

- (a) The crime of genocide;
- (b) Crimes against humanity;
- (c) War crimes;
- (d) The crime of aggression.

Article 6 , *Genocide*

For the purpose of this Statute, "genocide" means any of the following *acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group*, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

<https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

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Article 1F(a) Crimes Against Peace

Historically, a **crime against peace** can only be committed in the context of an international armed conflict. There has never been any court cases or claims for refugee protection that have been decided on this basis in Canada.

Hinzman v. Can. (M.C.I.) (2007), 362 N.R. 1 (FCA). See, in particular, paragraphs 141, 142, and 166 wherein it states, in part, as follows:

[141] ... A crime against peace cannot occur without a breach of international law having been committed by the State in question: *R. v. Jones*, [2006] UKHL 16, at ¶ 16. As a result, in the case of a senior official, the legality of the war in issue could well be germane to the claim.

[142] This presupposes, however, that the involvement and level of the individual is such that he or she could be guilty of **complicity** in a crime against peace. Crimes against peace have been described as "**leadership crimes**": *Jones*, above, at ¶ 16. **That is, it is only those with the power to plan, prepare, initiate and wage a war of aggression who are culpable for crimes against peace.** Mr. Hinzman was not such an individual. As a result, I am of the view that the reference to breaches of international law in *Krotov* does not assist him.

[166] When one is considering the case of a mere foot soldier such as Mr. Hinzman, the focus of the inquiry should be on the law of *jus in bello*, that is, the international humanitarian law that governs the conduct of hostilities during an armed conflict. In this context, the task for the Board will be to consider the nature of the tasks that the individual has been, is, or would likely be called upon to perform "on the ground".

<https://www.refworld.org/pdfid/4716143d0.pdf>. (If you are interested in these issues the judgement is well worth the read.)

Article 1F(a) - War Crimes

The *Rome Statute* defines “war crimes” under **Article 8**, which has three sections and six subsections with over 50 items within those six sections. Clearly, this is a very detailed listing of what constitute war crimes. It states, in part, as follows:

- 1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.**
- 2. For the purpose of this Statute, "war crimes" means:**
 - (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:**
 - (i) Wilful killing;**
 - (ii) Torture or inhuman treatment, including biological experiments;**
 - (iii) Wilfully causing great suffering, or serious injury to body or health;**
 - (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;**
 - (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;**
 - (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;**
 - (vii) Unlawful deportation or transfer or unlawful confinement;**
 - (viii) Taking of hostages.**

Article 1F(a) War Crimes

War crimes are defined by the international instruments that have been drawn up to make provision to such crimes. These can include, in addition, to those listed previously, the four *Geneva Conventions of 1949* and the *Additional Protocols*.

- **The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949.**
- **The Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949**
- **The Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949**
- **The Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949**

All four Geneva Conventions contain an identical *Article 3*, extending general coverage to “conflicts not of an international character.” (**Common Article 3**)

- **Protocol additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1)**
- **Protocol additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol 2)**
- **Protocol additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem (Protocol 3)**

https://www.redcross.org/content/dam/redcross/atg/PDF_s/International_Services/International_Humanitarian_Law/IHL_SummaryGenevaConv.pdf

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Article 1F(a) War Crimes

War crimes can also be defined in national legislation. In Canada, there is the *Crimes Against Humanity and War Crimes Act*. This Act legislated into Canadian law the provisions of the *Rome Statute*.

The SCC in *Finta* set out the requisite *mens rea* (mental state) and *actus reus* (physical element) of a war crime or a crime against humanity under section 7(3.71) of the Canadian *Criminal Code*.1F(a).

R. v. Finta, [1994] 1 S.C.R. 701.

A Quebec Court of Appeal case ruled on what was required to prove that a “war crime” was committed.

Munyaneza v. R., [2014] Q.J. No. 3059.

[188] To prove that a war crime has been committed, in addition to the material and mental elements of the underlying offence, the following contextual elements must be established: **an armed conflict, whether international or not; a nexus between the offences committed and the armed conflict; and the accused knowledge of this nexus.** [emphasis added]

Kamazi, James Mobwano v. M.C.I. (F.C., no. IMM-11654-12), Annis, December 18, 2013; 2013 FC 1261.

The Federal Court of Canada ruled in *Kamazi* that the recruitment of child soldiers was a “war crime.”

Article 1F(a) Crimes Against Humanity

Crimes against humanity can occur in times of war, international or non-international, and peace.

Article 7 of the *Rome Statute* defines **Crimes Against Humanity** as being,

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when **committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:**
 - (a) Murder;
 - (b) Extermination;
 - (c) Enslavement;
 - (d) Deportation or forcible transfer of population;
 - (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
 - (f) Torture;
 - (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
 - (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
 - (i) Enforced disappearance of persons;
 - (j) The crime of apartheid;
 - (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Defences for Article 1F(a) Serious International Crimes

The defence of **duress** is available for certain offences provided that some of these conditions apply.

- **the perpetrator was in danger of explicit or implicit imminent harm;**
- **the perpetrator reasonably believes that the threat will be carried out;**
- **there is no safe avenue of escape;**
- **there is a close temporal connection between the threat and the harm threatened, the evil threatened them was on balance, greater than or equal to the evil which they inflicted on the victim;**
- **the perpetrator is not a party to a conspiracy or association whereby they are subject to compulsion and actually knew that the threats and coercion to commit an offence were a possible result of this criminal activity, conspiracy or association; and they were not responsible for their own predicament.**

It is also important to stress that the law does not function at the level of “heroism.” It does not require a person to desert or disobey an order at the risk to their life.

“Superior Orders” or **“Military Necessity”** are not acceptable defences for the commission of war crimes or crimes against humanity. Further, **“Remorse”** is immaterial in determining the culpability of war crimes or crimes against humanity.

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Complicity is important in the application and interpretation of Article 1F and Article 1(5)

Those who are the **accomplices, aid and abet, instigate, or counsel** a perpetrator in the commission of a crime are just as guilty for the crime as the perpetrator.

The test of complicity in Canadian law is found in the SCC's judgement in *Ezokola*. It is based on the modes of commission as recognized under international criminal law, essentially, "**common purpose liability**," as found in **Article 25** of the *Rome Statute*, and "**joint criminal enterprise**." There are three components of contribution to the "**significant contribution test**."

There must be "**serious reasons for considering**" that the claimant has *voluntarily* made a *significant* and *knowing contribution* to the commission of the crime.

When determining whether a person's conduct meets the *actus reus* and *mens rea* for complicity, the following list of non-exhaustive factors serve as a guide in assessing whether the person has *voluntarily* made a *significant* and *knowing contribution* to a crime or criminal purpose:

- **the size and nature of the organization;**
- **the part of the organization with which the refugee claimant was most directly concerned;**
- **the refugee claimant's duties and activities within the organization;**
- **the refugee claimant's position or rank in the organization;**
- **the length of time the refugee claimant was in the organization, particularly after acquiring knowledge of the group's crime or criminal purpose; and**
- **the method by which the refugee claimant was recruited and the refugee claimant's opportunity to leave the organization.**
- **any viable defences (for example, duress).**

Case Studies on Article 1F(a) or Article 1(5)

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(a).

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 Article 1F(a)

Case Study 1 – Article 1F(a) – Crimes Against Humanity

Lieutenant Colonel in the Afghan National Police (ANP), Head of the Detention Office in Kabul, served in the ANP for 24 years.

What are the central issues in this case?

Does the person meet the standard of proof for “serious reasons for considering?”

What evidence is there that the person was involved with “crimes against humanity?”

Why did he *not* make a claim in the United States?

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

The standard of proof for Article 1F, “serious reasons for considering,” is lower than “a balance of probabilities,” the civil standard of proof, but, above mere “suspecting.” “Considering” approximates to “believing.”

A crime against humanity is a widespread and systematic attack directed against a civilian population with knowledge of the attack.

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

Given the documentary evidence of the widespread abuses that take place in Afghan prisons and given the appellant’s rank and length of service, it is difficult to accept he was unaware of the situation in Afghanistan. The treatment of prisoners in Afghanistan could amount to crimes against humanity. The appellant could be found to be complicit in crimes against humanity.

Case Study 2 – Article 1F(a) – War Crimes

El Salvadoran national who worked in the Air Force for 11 years, 1983-1994. He was a stock clerk in the spare parts warehouse responsible for the A-37-B aircraft.

What are the central issues in this case?

Why does the appellant have a well-founded fear of persecution based on his political opinion? Who are the agents of persecution?

The A-37-B is an attack aircraft, and the documentary evidence indicates that the El Salvadoran Air Force attacked and killed civilians. Is the appellant complicit in “war crimes” because of his work in the Air Force as a spare parts clerk in a warehouse.

Why did he travel to the US on several occasions and why did he not claim refugee protection in the US?

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

The standard of proof for exclusion under Article 1F is “serious reasons for considering,” that is less than a balance of probabilities but more than mere suspicion.

War crimes include, under the *Rome Statute*, “(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; “ as found in Common Article 3 of the four Geneva Conventions of 1949.

Was he appellant complicit in “war crimes”? Was his contribution to these war crimes *voluntary, significant and knowing*?

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

It would be reasonable to expect that he was aware that the Air Force was bombing and killing civilians. To determine whether his contribution was significant and voluntary would require further evidence adduced in questioning the claimant on his work in the Air Force.

His exclusion would hinge on whether he made a *voluntary, significant and knowing* contribution to the war crime of killing the civilian population.

Thank you for your kind attention!!

Are there any further questions or comments?