

ARTICLE 1(F) EXCLUSION CHECKLIST: PAGE 1

February 2017

The rationale for the exclusion clauses under Article 1(f) of the Refugee Convention is to deny protection to Applicants who have committed international crimes so severe as to remove from them the right to international protection. Given the seriousness of this consequence this clause must be applied restrictively and with great care and only after a full assessment of the individual circumstances of the case.

The Exclusion provisions are incorporated into European law under provisions of the QD. While the QD provision on refugees [Article 12] closely mirrors the Convention definition as outlined above, Article 17 [Subsidiary Protection] differs somewhat. The definition of a 'serious' crime does not require that it be 'non political' nor committed 'outside the country of refuge' nor 'prior to his or her admission as a refugee'. The Exclusion provisions are incorporated into domestic law under the International Protection Act 2015. Section 10 deals with refugees, while Section 12 applies to subsidiary protection.

Section 10 reads:

-
- (2) A person is excluded from being a refugee where there are serious reasons for considering that he or she—...
- (a) 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) has committed a serious non-political crime outside the State prior to his or her arrival in the State, or
 - (c) has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.
- (3) A person is excluded from being a refugee where there are serious reasons for considering that he or she has incited or otherwise participated in the commission of a crime or an act referred to in *subsection (2)*.

Section 12 reads:

- (1) A person is excluded from being eligible for subsidiary protection where there are serious reasons for considering that he or she—
 - (a) 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) has committed a serious crime,
 - (c) has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations,
 or
 - (d) constitutes a danger to the community or to the security of the State.
- (2) A person is excluded from being eligible for subsidiary protection where there are serious reasons for considering that he or she has incited or otherwise participated in the commission of a crime or an act referred to in *subsection (1)*.
- (3) A person is excluded from being eligible for subsidiary protection if he or she has, prior to his or her arrival in the State, committed a crime, not referred to in *subsection (1)*, which, if committed in the State, would be punishable by imprisonment and if he or she left his or her country of origin solely in order to avoid sanctions resulting from that crime.

ISSUES	ISSUE DETAILS	✓
--------	---------------	---

SECTION 10 OF THE INTERNATIONAL PROTECTION ACT 2015: EXCLUSION FROM REFUGEE STATUS

Section 10(2)(a)	<p><i>A person is excluded from being a refugee where there are serious reasons for considering that he or she—...</i></p> <p><i>(a) 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.</i></p>	<input type="checkbox"/>
Crimes Against Peace	According to the <u>London Charter</u> a crime against peace involves the "planning, preparation, initiation or waging of a war of aggression, or a war in violation international treaties, agreements, or assurances, or participation in a common conspiracy for the accomplishment of any of the foregoing". Given the nature of this crime, it can only be committed by those in a high position of authority representing State or a State-like entity. In practice, this provision has rarely been invoked.	<input type="checkbox"/>
War Crimes	Certain breaches of international humanitarian law constitute war crimes . Although such crimes can be committed in both international and non-international armed conflicts, the content of the crimes depends on the nature of the conflict. War crimes cover such acts as wilful killing and torture of civilians, launching indiscriminate attacks on civilians, and wilfully depriving a civilian or a prisoner of war of the rights of fair and regular trial.	<input type="checkbox"/>
Crimes Against Humanity	The distinguishing feature of crimes against humanity , which cover acts such as genocide, murder, rape and torture, is that they must be carried out as part of a widespread or systematic attack directed against the civilian population. An isolated act can, however, constitute a crime against humanity if it is part of a coherent system or a series of systematic and repeated acts. Since such crimes can take place in peacetime as well as armed conflict, this is the broadest category under Section 10(2)(a).	<input type="checkbox"/>
International Instruments	Amongst the various international instruments which offer guidance on the scope of these international crimes are the 1948 <u>Convention on the Prevention and Punishment of the Crime of Genocide</u> , the four 1949 <u>Geneva Conventions for the Protection of Victims of War</u> and the two 1977 <u>Additional Protocols</u> , the <u>Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda</u> , the 1945 <u>Charter of the International Military Tribunal</u> (the <u>London Charter</u>), and most recently the 1998 <u>Statute of the International Criminal Court</u> .	<input type="checkbox"/>
Section 10(2)(b)	<p><i>A person is excluded from being a refugee where there are serious reasons for considering that he or she—...</i></p> <p><i>(b) has committed a serious non-political crime outside the State prior to his or her arrival in the State...</i></p>	<input type="checkbox"/>
Serious	'Serious' refers to the nature of the crime. The nature of the act, the actual harm inflicted, the form of procedure used to prosecute the crime, the nature of the penalty, and whether most jurisdictions would consider it a serious crime are all relevant factors. For example, while murder, rape and armed robbery would be serious offences, petty theft would not.	<input type="checkbox"/>
Non-Political Crime	There must be a link between the crime and its alleged political objective; the act in question must also be proportionate to the political objective. Terrorist-type actions which are generally disproportionate to any political objective will normally be 'non-political'. [Applicable only to 'refugee' analysis]	<input type="checkbox"/>
Outside Country of Refuge	The crime must have been committed <i>outside</i> the country of refuge and <i>before</i> the Applicant applied for protection. If the crime was committed after admittance, then the country's criminal laws come into play. [Applicable only to 'refugee' analysis]	<input type="checkbox"/>
Section 10(2)(c)	<p><i>A person is excluded from being a refugee where there are serious reasons for considering that he or she—...</i></p> <p><i>(c) has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.</i></p> <p>As the purposes and principles of the United Nations are quite broad, the scope of this category is unclear and rarely applied except in extreme circumstances where an activity attacks the very basis of the international community's coexistence. Such activity must have an international dimension. It would appear that, generally speaking, only persons who have been in positions of power in a State or State-like entity would appear capable of committing such acts. While some terrorist activities may apply here they may also be covered under Section 10(2)(b).</p>	<input type="checkbox"/>
Section 10(3)	<p><i>A person is excluded from being a refugee where there are serious reasons for considering that he or she has incited or otherwise participated in the commission of a crime or an act referred to in subsection (2).</i></p> <p>This provision, while not in the Refugee Convention, is contained in the 2004 QD and has been added for clarity purposes.</p>	<input type="checkbox"/>

ARTICLE 1(F) EXCLUSION CHECKLIST: PAGE 2

February 2017

The rationale for the exclusion clauses under Article 1(f) of the Refugee Convention is to deny protection to Applicants who have committed international crimes so severe as to remove from them the right to international protection. Given the seriousness of this consequence this clause must be applied restrictively and with great care and only after a full assessment of the individual circumstances of the case.

The Exclusion provisions are incorporated into European law under provisions of the QD. While the QD provision on refugees [Article 12] closely mirrors the Convention definition as outlined above, Article 17 [Subsidiary Protection] differs somewhat. The definition of a 'serious' crime does not require that it be 'non political' nor committed 'outside the country of refuge' nor 'prior to his or her admission as a refugee'. The Exclusion provisions are incorporated into domestic law under the International Protection Act 2015. Section 10 deals with refugees, while Section 12 applies to subsidiary protection.

Section 10 reads:

-
- (2) A person is excluded from being a refugee where there are serious reasons for considering that he or she—...
- (a) 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) has committed a serious non-political crime outside the State prior to his or her arrival in the State, or
 - (c) has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.
- (3) A person is excluded from being a refugee where there are serious reasons for considering that he or she has incited or otherwise participated in the commission of a crime or an act referred to in *subsection (2)*.

Section 12 reads:

- (1) A person is excluded from being eligible for subsidiary protection where there are serious reasons for considering that he or she—
- (a) 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) has committed a serious crime,
 - (c) has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations, or
 - (d) constitutes a danger to the community or to the security of the State.
- (2) A person is excluded from being eligible for subsidiary protection where there are serious reasons for considering that he or she has incited or otherwise participated in the commission of a crime or an act referred to in *subsection (1)*.
- (3) A person is excluded from being eligible for subsidiary protection if he or she has, prior to his or her arrival in the State, committed a crime, not referred to in *subsection (1)*, which, if committed in the State, would be punishable by imprisonment and if he or she left his or her country of origin solely in order to avoid sanctions resulting from that crime.

ISSUES

ISSUE DETAILS

✓

SECTION 12 OF THE INTERNATIONAL PROTECTION ACT 2015: EXCLUSION FROM SUBSIDIARY PROTECTION STATUS

Section 12

Section 12 mirrors Section 10 with a few important exceptions. Firstly, while Article 10(2)(b) requires that the 'serious' crime be 'non political' and that it be committed outside the state and prior to arrival there are no such limitations under Section 12(1)(b). Secondly, Section 12(1)(d) adds that a person may be excludable where he or she 'constitutes a danger to the community or to the security of the state'. Finally, note the addition of Section 12(3) concerning crimes committed in the home country prior to arrival in the state where those crimes would be punishable here and the sole reason for fleeing the home country was to avoid sanctions resulting from that crime.

FACTORS TO CONSIDER WHEN ANALYSING EXCLUSION UNDER SECTIONS 10 AND 12 OF THE INTERNATIONAL PROTECTION ACT 2015

Individual circumstances

Apart from a thorough consideration of all the facts in the claim, a decision maker must always consider the factors listed below.

Individual Responsibility

For exclusion to be justified, individual responsibility must be established. This can occur where an individual has committed, or made a substantial contribution to the act in question knowing that his or her contribution would facilitate the criminal act. While a presumption may arise due to the person's senior position in an organisation the decision maker must still consider the organisational structure and the person's actions. The mental element [*mens rea*] must also be present. For an analysis of a recent CJEU decision see <http://eulawanalysis.blogspot.ie/2017/01/foreign-fighters-helpers-excluded-from.html>

Defences

Duress may be a defence where the person was in imminent danger to his or her life or to continuing serious bodily harm and the act he or she perpetrated is not more serious than the act feared. *Superior Orders* may apply only where the Applicant was legally obliged to obey the orders, the order itself was not obviously unlawful and the Applicant was not otherwise aware that the order was unlawful. In some cases, where an Applicant has already been *appropriately* punished for the crime, exclusion may no longer apply; although in the case of particularly heinous crimes this exception may not apply.

Proportionality

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. The concept has evolved in particular in relation to Article 1F(b) and represents a fundamental principle of many fields of international law. As with any exception to a human rights guarantee, the exclusion clauses must therefore be applied in a manner proportionate to their objective, so that the gravity of the offence in question is weighed against the consequences of exclusion. Such a proportionality analysis would, however, not normally be required in the case of crimes against peace, crimes against humanity, and acts falling under Article 1F(c), as the acts covered are so heinous. It remains relevant, however, to Article 1F(b) crimes and less serious war crimes under Article 1F(a). It is important to note that in the case of *B&D v. Germany* a decision of the CJEU on November 9, 2010 the court held that 'proportionality' is not required in exclusion cases under (b) and (c). [paragraph 111] However, the rationale underpinning this finding [paragraph 107] would apply equally to (a). That being said the UNHCR takes the position outlined above and it is important to recall that Article 3 of the 2004 QD specifically allows national authorities to use more favourable standards in adjudicating claims.