



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

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This Background Note forms an integral part of UNHCR's [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 September 2003).

will only apply if the individual in question was under a legal obligation to obey the order in question, was unaware that the order was unlawful and the order itself was not manifestly unlawful (the latter being deemed so in all cases of genocide or crimes against humanity).

(ii) Duress/coercion

69. The defence of duress was often linked to that of superior orders during the post-Second World War trials. According to Article 31(d) of the ICC Statute, the defence of duress only applies if the incriminating act in question

results from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided.

There are, therefore, stringent conditions to be met for the defence of duress to arise.

70. Where duress is pleaded by an individual who acted on the command of other persons in an organisation, consideration should be given as to whether the individual could reasonably have been expected simply to renounce his or her membership, and indeed whether he or she should have done so earlier if it was clear that the situation in question would arise. Each case should be considered on its own facts. The consequences of desertion plus the foreseeability of being put under pressure to commit certain acts are relevant factors.

(iii) Self-defence; defence of other persons or property

71. The use of reasonable and necessary force to defend oneself rules out criminal liability. Similarly, reasonable and proportionate action to defend another person or, in the case of war crimes, property which is essential for the survival of the person or another person or for accomplishing a military mission, against an imminent and unlawful use of force, may also provide a defence to criminal responsibility under certain circumstances (see, for example, Article 31(c) of the ICC Statute).

Expiation

72. The exclusion clauses themselves are silent on the role of expiation, whether by serving a penal sentence, the grant of a pardon or amnesty, the lapse of time, or other rehabilitative measures. Paragraph 157 of the Handbook states that:

... The fact that an applicant convicted of a serious non-political crime has already served his sentence or has been granted a pardon or has benefited from an amnesty is also relevant. In the latter case, there is a presumption that the exclusion clause is no longer applicable, unless it can be shown that, despite the pardon or amnesty, the applicant's criminal character still predominates.

73. Bearing in mind the object and purpose behind Article 1F, it is arguable that an individual who has served a sentence should, in general, no longer be subject to the exclusion clause as he or she is not a fugitive from justice. Each case will require individual consideration, however, bearing in mind issues such as the passage of time since the commission of the offence, the seriousness of the offence, the age at which the crime was committed, the conduct of the individual since then, and whether the individual has expressed regret or renounced criminal activities.⁶⁸ In the case of truly heinous crimes, it may be considered that such persons are still undeserving of international refugee protection and the exclusion clauses should still apply. This is more likely to be the case for crimes under Article 1F(a) or (c), than those falling under Article 1F(b).

74. As for lapse of time, this in itself would not seem good grounds for setting aside the exclusion clauses, particularly in the case of crimes generally considered not subject to a statute of limitation. A case by case approach is necessary once again, however, taking into account the actual period of time that has elapsed, the seriousness of the offence and whether the individual has expressed regret or renounced criminal activities.

75. The effect of pardons and amnesties also raises difficult issues. Although there is a trend in some regions towards ending impunity for those who have committed serious violations of human rights, this has not become a widely accepted practice. In considering the impact on Article 1F, consideration should be given as to whether the pardon or amnesty in question is an expression of the democratic will of the relevant country and whether the individual has been held accountable in other ways (e.g. through a Truth and Reconciliation Commission). In some cases, a crime may be of such a heinous nature that the application of Article 1F is still considered justified despite the existence of a pardon or amnesty.

F. PROPORTIONALITY CONSIDERATIONS

76. 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.⁶⁹ State practice on this issue is not, however, uniform with courts in some States rejecting such an approach, generally in the knowledge that other human rights protection mechanisms will apply to the individual,⁷⁰ while others take account of proportionality considerations.⁷¹

⁶⁸ See, for example, the case of O.M., Swiss Asylum Appeals Commission, judgment of 25 March 1999.

⁶⁹ On a similar basis, modern extradition treaties generally include a provision prohibiting the surrender of fugitives to the requesting State where this would lead to their persecution.

⁷⁰ Such mechanisms are discussed above in paragraph 22 and Annex A.

⁷¹ For example, the Belgian Commission permanente de recours des réfugiés has balanced the threat of persecution against the gravity of the crimes committed in the case of Ethiopian asylum-seekers (decisions W4403 of 9 March 1998 and W4589 of 23 April 1998). Proportionality