

Sam is a national of Goldland who has applied for asylum in Silverland. During his interview with the asylum authority, Sam explains that he belonged to an organization which opposed the authoritarian government of Goldland and sought to bring about democratic change. After many years of unsuccessful campaigning, during which a number of the members of the organization were subjected to harassment and threats by the authorities, the organization decided to carry out selective attacks against installations of the police and the military.

Sam was personally involved in one incident, in which he and three other members of the organization set off a car bomb in a busy street of the capital when a military truck passed by. Sam connected the wires of the car bomb, which had been planted by two other members of the organization and was detonated by the fourth in the group. Three soldiers were seriously injured. Two civilians who happened to walk past the car just as it exploded were killed. Sam said that he was sorry about the death of the civilians, which he described as unfortunate but inevitable. This was the only attack carried out by the organization.

Immediately after the incident, the authorities began arresting members of the organization. There are reports from a number of renowned human rights groups according to which some of those arrested were tortured and subsequently disappeared. Sam feared that he too would be arrested. Therefore, he decided to leave for Silverland and apply for asylum. Silverland is Party to the 1951 Convention and 1967 Protocol. It has also ratified the 1984 Convention Against Torture and the 1966 International Covenant on Civil and Political Rights.

Exam questions (Both BA and MA level):

- 1) Which issues does this case raise? List the issues in the order in which they should be considered.
- 2) Does Sam qualify for refugee status? List the relevant inclusion criteria of the refugee definition and consider if they are met.
- 3) Do exclusion considerations arise in this case? If so, which is the relevant provision of the 1951 Convention? List the stages of the exclusion analysis and note the issues which would need to be considered at each of these stages.

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This is an adaptation of an exercise made for UNHCR's RSD course. Both BA and MA students receive the same exam question, although we reasonably expect a higher degree of knowledge, attention to detail and critical thinking for MA level than for BA level. Thus, the achievement requirements should be adjusted for students who take the subject at BA level.

Firstly, it must be established whether Sam is eligible for refugee status under the 1951 Convention. This requires an examination of two issues:

- i The inclusion criteria set out in Article 1A(2) of the 1951 Convention, and if they are met,
- ii Whether or not one of the exclusion clauses provided for in Article 1F of the 1951 Convention is applicable.

Secondly, students have to consider whether Sam meets the inclusion criteria of the refugee definition (found in 1951 Refugee Convention Article 1A):

1. Is he outside the country of origin or habitual residence? Yes, this criterion is satisfied.
2. Does Sam have a well-founded fear? Yes. The subjective element (“fear”) required is satisfied: Sam has applied for asylum in Silverland, as he was afraid of being arrested. Sam fears being arrested if he were to be returned to Goldland. Whether or not this fear is wellfounded must be assessed in light of the available country-of-origin information. From the case summary, it would appear that there is a reasonable possibility that Sam would be arrested and that he may be tortured by State agents if returned to Goldland. There is also a risk that he may disappear. Thus, the objective element is also satisfied. Putting the two elements together, his fear of being arrested can be considered well-founded.
3. Persecution. Yes. With regard to the arrest and detention which is likely to follow, it is necessary to determine whether this would constitute legitimate deprivation of liberty for the purposes of criminal prosecution rather than persecution. On his own admission, Sam was personally involved in one violent incident which resulted in the killing of two persons and serious injury to three others. In view of this, the authorities of Goldland would be justified in ordering his arrest and detention, and in prosecuting Sam for these acts. However, as noted above, there is a reasonable possibility that he will face threats to his life and physical integrity due to torture and possible disappearance if returned to Goldland. This clearly amounts to persecution.
4. Does Sam have a well-founded fear linked to one of the 1951 Convention grounds? Yes. Sam has a well-founded fear of persecution which is related to his political opinion. Students could reasonably argue that the above considerations indicate that Sam is indeed a refugee as the inclusion criteria are met.

Thirdly, students should examine whether any exclusion considerations arise in this case. It is clear that exclusion considerations under the 1951 Refugee Convention’s Article 1F arise.

Students should list the stages of the exclusion analysis and note the issues which would need to be considered at each of these stages.

1. Is exclusion triggered? Yes, Exclusion considerations are triggered by Sam’s own statements according to which he was personally involved in a violent incident which caused the death of two persons and serious injury to three others, and his membership in an organization involved in further violent acts which may give rise to exclusion. Thus, there are indications that Sam may have been associated with acts within the scope of Article 1F, and it is necessary, therefore, to conduct an exclusion assessment.
2. Are there acts within the scope of Article 1F with which the applicant is linked? Yes. In the present case, it is the applicant’s association with the detonating of a car bomb in a busy street, which was directed against an army truck and killed two civilians as well as seriously injuring three soldiers which may give rise to his exclusion. This incident must be examined in light of the relevant clause of Article 1F. There is no

indication in the case summary this act took place during an armed conflict. Thus, Article 1F(a) – war crimes – is not relevant. Likewise, on the basis of the information available, none of the other categories under Article 1F(a) – crimes against humanity; crimes against peace – are applicable. The same applies for Article 1F(c) – acts contrary to the principles and purposes of the United Nations –, as there are no indications that the acts in question had an impact on international peace and security. Rather, it is necessary to consider whether the acts in question come within the scope of Article 1F(b), that is, whether they are:

Serious: causing the death of two persons and seriously injuring three others by detonating an explosive device would be considered serious crimes in most if not all jurisdictions.

Non-political: it would appear that the acts in question were politically motivated, but that given the absence of a clear and direct link between the crime and its alleged political objective and the methods used (detonating a car bomb in the capital involved a risk of indiscriminate harm and indeed resulted in the death of two passers-by), these acts failed to meet the predominance and proportionality tests required under Article 1F(b) for a crime to be considered political.

The remaining two criteria under this exclusion clause (outside the country of refuge, prior to admission to that country), are also met. Thus, the killing of two civilians and causing serious injury to three soldiers are serious nonpolitical crimes within the meaning of Article 1F(b). It must also be established whether there is clear and credible information linking the applicant to the acts in question. In the present case, this link is provided by Sam's own statements, which are deemed credible.

3. Has the applicant incurred individual responsibility for the acts in question? Yes. Through his acts, Sam would seem to have made a substantial contribution to the killing of two civilians and serious injury to three soldiers, and it would also appear to be established that he did so in the knowledge that his acts had a significant effect on the commission of the crime. He can therefore be considered to have incurred individual responsibility through aiding or abetting. There is nothing in the case summary to suggest that there may be circumstances which would negate individual responsibility in Sam's case (e.g. lack of mental element, or a valid defence) – the asylum authority should nevertheless examine the possible existence of such factors.
4. Proportionality assessment: The acts for which Sam is determined to be responsible are serious crimes. As noted in UNHCR's Background Note on Exclusion (at paragraph 78), where a person has intentionally caused death or serious injury to civilians as a means of intimidating a government or a civilian population, he or she is unlikely to benefit from proportionality considerations.

Students will likely find that an exclusion clause applies in Sam's case. Attentive students will nevertheless note that even if Sam is not eligible for refugee status, he continues to enjoy protection against refoulement under customary international law as well as the human rights instruments that Silverland has ratified.