

# Refugee Law Class 5

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# UN Declaration on Human Rights, Art. 14

- (1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.
- (2) This right may not be invoked in the case of prosecutions genuinely arising from **non-political crimes** or from **acts contrary to the purposes and principles of the United Nations.**

# UN Charter: Purposes

- **To maintain international peace and security**
- **Respect for human rights**

# UN Charter Principles

- **To *settle international disputes by peaceful means* in such a manner that international peace and security, and justice, are not endangered.**
- **All Members shall refrain in their international relations from the *threat or use of force against the territorial integrity* or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.**



# IMT CRIMES AGAINST PEACE

- planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any war crimes or crimes against humanity
- Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.
- High position of authority

# Crime of Aggression

- a person commits a “crime of aggression” when, being in a position effectively to exercise control over or to direct the political or military action of a State, that person intentionally and knowingly orders or participates actively in the planning, preparation, initiation or execution of an act of aggression which, by its character, gravity and scale, constitutes a flagrant violation of the Charter of the United Nations.

# 1951 Convention on 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 in the international instruments drawn up to make provision in respect of such crimes;
  - (b) He has committed a **serious non-political crime outside the country of refuge prior to his admission to that country as a refugee**;
  - (c) He has been guilty of **acts contrary to the purposes and principles of the United Nations**.

# ICC Crime Against Humanity

- 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:**
- **Murder;**
- **Extermination;**
- **Enslavement;**
- **Deportation or forcible transfer of population;**
- **Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;**
- **Torture;**
- **Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;**
- **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;
- Enforced disappearance of persons;
- The crime of **apartheid**;
- Other **inhumane acts** of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

# Crime Against Humanity

Acts carried out as part of a widespread or systematic attack directed at the civilian population

- Genocide
- Murder
- Rape
- Torture

# ICC Genocide

Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

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



# ICC War Crimes

- **Wilful killing;**  
**Torture or inhuman treatment**, including biological experiments;
- Wilfully causing **great suffering, or serious injury to body** or health;
- Extensive **destruction and appropriation of property**, not justified by military necessity and carried out unlawfully and wantonly;
- Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
- Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
- **Unlawful deportation** or transfer or unlawful confinement;
- **Taking of hostages.**

# ICC War Crimes

- i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
- (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
- (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
- (vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;



# ICC War Crimes

- (vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
- (viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
- (ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- (x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
- (xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;
- (xii) Declaring that no quarter will be given;

# ICC War Crimes

- (xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
- (xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
- (xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
- (xvi) Pillaging a town or place, even when taken by assault;
- (xvii) Employing poison or poisoned weapons;
- (xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- (xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
- (xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition

# ICC War Crimes

- xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- (xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
- (xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
- (xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
- (xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
- (xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

# Duress

- Perpetrator was in danger of imminent harm
- The evil threatened him was on balance greater than or equal to the evil which he or she inflicted on the victim
- He was not responsible for his own predicament

# Superior Orders

- Defence is not accepted if the order was manifestly unlawful or patently and obviously wrong
- Offends the conscience of every reasonable, right-thinking person

# Military Necessity

- Not accepted if the deaths of innocent civilians were a result of **intentional, deliberate** and **unjustified** acts of killing (war crimes/crimes against humanity)



# Complicity

- **Aiding, instigating, or counselled** a perpetrator in commission of war crime or crime against humanity
- Consider: **Method** of recruitment
- **Nature** of Organization
- Claimant's **rank**
- **Knowledge** of atrocities
- Passive/Active role in crimes/duress
- Period of **time** spent in the organization
- **Opportunity to Leave** the organization/desert
- Earliest date person could leave, and consequence for speaking out against crimes, not following orders or desertion
- What happened to others who deserted?

# Subordinates

- Typical subordinate's **reasonable beliefs** about the penalty
- The **subordinate's belief** as to what the penalty is
- Alternatives available to escape execution of the penalty
- Element of moral choice-circumstances of compulsion erases choice
- Lower the rank, less choice
- Manifest illegality of order



# Subordinate's belief in the existence of an imminent real and inevitable threat to life

- **Age**
- **Education**
- **Intelligence**
- **General conditions in which subordinates find themselves**
- **Length of time spent in action**
- **Nature of hostilities**
- **Type of enemy confronted**
- **Opposing methods warfare**
- **Announced penalty for disobeying orders**
- **Probable penalty for disobedience**

# Superior Responsibility

- A Commander may be responsible for international crimes committed by those under his command, but only if there is knowledge or reason to know about them
- Leader is likely to know of crime and share the organization's purpose in committing that crime

# Complicity

- Membership in an organization, which committed international offences as a continuous and regular part of its organization;
- Personal and knowing participation
- Failure to disassociate from the organization at the earliest safe opportunity

# Mere Membership in an Organization

- Canada:
- Where an organization is principally directed to a **limited, brutal purpose**, such as secret police activity, mere membership may by necessity involve **personal and knowing** participation in persecutorial acts

# Presence at the Scene

- Mere presence at the scene of an offense is **not** enough unless he has an **intrinsic connection** with the persecuting group
- *No one can commit international crimes without knowledge or personal participation, being a witness is not enough to exclude unless he had prior knowledge that such act would occur*

# Proportionality

- A very serious crime, e.g. murder, may be accepted as politically motivated if the regime is repressive and does not accept any form of freedom of expression or peaceful change of government. In such case, a person may have little choice but to resort to violence for change. This is not the case in liberal democracies with constitutional protection of freedom of speech.

# Refugee Law Quiz

- The claimant is a Honduran man who was convicted in Oregon of selling \$40 worth of heroin to an undercover police agent and received a sentence of 60 days' imprisonment and 36 months' probation. He was deported after serving his 60-day sentence. There was also an outstanding warrant for his arrest on a charge of selling crack cocaine in California. He admitted the sale. The Oregon offence was similar to the Canadian offence of trafficking in cocaine, which is punishable by up to life imprisonment. The claimant had not completed his Oregon probation. He sought asylum in Canada.
- Can he be excluded? Which issues should be discussed?



# Refugee Law Quiz

- The claimant is an Iranian man who was charged in the United States with possession of 180 pounds of marijuana with intent to distribute. He claimed that he was unable to repay a debt to a loanshark in the US and was forced to "do a job" for the loanshark to wipe out the debt. The "job" consisted of acting as a drug courier on one occasion. He alleged that the loanshark claimed that he did not go to the police because he feared deportation. He seeks asylum.
- Can he be excluded? Identify the relevant issues.



# Refugee Law Quiz

- The male claimant, a citizen of Peru, alleged that he would be targeted by left-wing terrorist organizations because of his previous career in the Peruvian National Police (PNP). He was a low-ranking street level police man. From 1980-1989, he worked in a unit that arrested terror suspects. They delivered them for interrogation. He claimed that his unit captured and killed terrorists. He later asked that "killed" be stricken from his testimony, due to alleged translation error. From the early 1980s to the early 1990s, the PNP engaged in torture and extrajudicial executions. He was aware of the actions committed by the PNP.
- Can he be excluded? What are the relevant issues?

# Refugee Law Quiz

- The claimant was an active part-time member of the Pasdaran (Revolutionary Guard of Iran) and a member of the Basij (a militia controlled by the Pasdaran) while attending university. His membership in those organizations was voluntary. There was documentary evidence that the Pasdaran run clandestine prisons where detainees are subjected to inhumane treatment, including torture. The claimant acknowledged that he was aware that the Pasdaran committed human rights abuses. He played an active role in the July 1999 reprisals against student demonstrations, which resulted in indiscriminate assaults on students and hundreds of arrests.
- Can he be excluded? What are the relevant issues?

# Acts contrary to the purposes and principles of the United Nations- Terrorism

- **Acts, methods, and practices of terrorism**
- **Knowingly financing, planning and inciting terrorist acts**

# UN Security Council Resolution 1373

- Calls on States to take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, *before* granting refugee status, for the purpose of ensuring that the asylum seeker has not planned, facilitated or participated in the commission of terrorist acts;
- Ensure, in conformity with international law, that refugee status is not **abused** by the **perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation** are not recognized as grounds for refusing requests for the extradition of alleged terrorists;

# UN Security Council Resolution 1373

- Decides that all states shall:
- Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;
- Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents;
- Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum seeker has not planned, facilitated or participated in the commission of terrorist acts;
- Ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists;



# UN Security Council Resolution 1373

- *Notes* with concern the **close connection between international terrorism and transnational organized crime, illicit drugs, money-laundering, illegal arms-trafficking, and illegal movement of nuclear, chemical, biological and other potentially deadly materials**, and in this regard *emphasizes* the need to enhance coordination of efforts on national, subregional, regional and international levels in order to strengthen a global response to this serious challenge and threat to international security;
- *Declares* that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations;

# Euro-Mediterranean Code of Conduct on Countering Terrorism

- We confirm that we will:
- Refuse Asylum to terrorists and deny them safe haven in accordance with international law
- Concerned with transit migration from sub-Saharan Africa and cooperation in the fight against illegal immigration and trafficking in human beings

# EU JHA

- Respond to security threats of terrorism, organised crime, corruption & drugs, and the challenge of managing mixed migration flows.
- Problem with third countries (partners with EU-Med- Algeria, Egypt, Morocco, Tunisia) include lack of independent judiciaries and police forces which respect human rights. Need to improve institutions to abide by human rights to avoid liability for refoulement/due process violations.



# Serious Non-Political Crime

1. Nature & Purpose: Personal Gain, **No genuine political motive**
- 2. **No Close and Direct Causal Link** between crime and political purpose, not directed at changing the state
- 3. Common Law character outweighs political element
- 4. Atrociousness of offense/**Disproportionate** to the Objective

# Acts not considered to be Political Offenses

**Genocide**

**Hijacking**

**Hostage-taking**

**Offenses against Diplomats**

- Test:
- 1. Is the offense **remote (no close and direct causal link between crime and political purpose)**
- 2. Is the offense **disproportionate** in relation to the political aim

# Serious Non-Political Crime

- Nature of the act
- Actual harm inflicted
- Form of procedure used to prosecute the crime
- Nature of the penalty
- Would most jurisdictions consider this to be a crime?

# Serious Crimes

- **Breaking and Entering**
- **Stealing**
- **Receiving Stolen Property**
- **Embezzlement**
- **Possession of drugs in quantities exceeding personal use**
- **Assault**
- In conjunction with: Use of weapons, injury to persons, value of property involved, type of drugs involved, and evidence of habitual criminal conduct

## **Presumption of serious crime raised by evidence of commission of:**

- **Homicide**
- **Rape**
- **Child molestation**
- **Wounding**
- **Arson**
- **Drug trafficking**
- **Armed robbery**

# Mitigating Factors

- **Minority of Offender**
- **Mental Handicap**
- **Parole**
- **Elapse of 5 years since conviction or completion of sentence**
- **General good character (e.g. one offence)**
- **Offender was merely an accomplice**
- **Provocation and Self-Defence**



# UNHCR Exclusion Procedures

- Inclusion before exclusion unless there is a charge from an international tribunal. An alternative is to stay the refugee determination until after the criminal proceeding is terminated, as its result will be relevant to refugee status

# UNHCR Exclusion Evidence

- Opportunity to **rebut and refute** evidence
- The applicant shall not be excluded if he can give a **reasonable explanation** that he did not commit the crime and there is an **absence of contrary substantial evidence otherwise**
- A person subject to exclusion is still protected by human rights standards as pertaining non-refoulement

# UNHCR Exclusion Evidence

- The **Burden of Proof lies with the Government** which must indicate the specific crimes the applicant is accused of.
- Proof includes **Clear, credible evidence:**
- **Credible confession**
- **Legitimate and verified evidence**
- **Consideration of all facts and mitigating circumstances**
- **Warrant from an international court**
- **Never accept secret evidence or false information**
- **Membership in a political party or organization is not necessarily enough**

# Proportionality

- Use in relation to serious non political crimes or some war crimes
- Weigh gravity of offence against the consequences of exclusion
- Exclusion should not be based on sensitive evidence that cannot be challenged by the individual concerned.

# Revocation of refugee status

- Where facts which would have led to exclusion only come to light after grant of refugee status.
- State may choose to prosecute or extradite
- But CAT, ECHR, IACHR, ACHR prohibit return to country where there is risk of torture

# Ruma Mandal-State Responsibility for Individual Injurious Acts

- a State is responsible for the acts of private persons, including refugees, who are on its territory where:
- (a) the individual's conduct is deemed injurious to another State, and
- (b) the State has failed to show "due diligence" with respect to regulating the individual's behaviour.
- Host state must act with «due dilligence» to prevent injurious act where there is opportunity or to apprehend and punish him.



# Ruma Mandal- Due diligence

- The foreseeability of the individual's conduct,
- The resources available to the State
- The physical difficulties of combating the risk.

# Ruma Mandal

- State not required to prohibit criticism or propaganda against another State (freedom of expression)
- Where the refugee becomes engaged in subversive activities aimed at the violent overthrow of the government of another State, this may trigger responsibility of the host State. Insofar as a State is obliged not to take part in any activities aimed at the violent disposal of another State's regime, it is arguably under a similar duty to prevent individuals in its territory from attempting the same.
- The 1970 UN Declaration on Friendly Relations :  
... no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.

States may not let individuals launch military attack against another state, but less clear with respect to lesser actions in context of self-determination.

# Ruma Mandal

- Where an organisation's support for a particular movement in a third State is likely to cause violence in the host State (for example, because of ethnic affiliations or the effect on regional stability), arguably the host State has discretion to take action against that group. Prohibiting the making of public statements may suffice, but in more extreme circumstances it may be necessary to shut down the whole organisation.

# Ruma Mandal

- Where aid is only being given to those associated with the rebel movement and the objective appears to be to strengthen their fighting capability, rather than relieve suffering, this may be construed as a form of subversion that the host State must act against.

# Ruma Mandal

- Where the exiled group provides significant financial or logistical support (information-gathering, equipment) to individuals involved in a violent struggle against a government in a third State, this would arguably amount to subversive behaviour. The host State is obliged to take reasonable measures to crack down on such activity, subject to any considerations relating to the right of self-determination.
- Moreover, where the recipients of such support are engaged in terrorist activity, the host State may well be under an obligation to prevent and punish such activity pursuant to UN Security Council Resolution 1373 (2001).

# Ruma Mandal

- A decision on the part of the host State to shut down such organisations altogether could be problematic, in so far as the freedom of expression and right of association of its members are affected. Where the organisation is also involved in legitimate political activity, for example commenting on public affairs in another country, not allowing it to pursue such activities could be unlawful unless a credible risk to national security or public safety in the host State can be established.



# Ruma Mandal

- The host State is arguably under a customary law duty to take reasonable measures to prevent persons in its territory from using it as a launch pad for violent incursions into another State. Moreover, it may well also be under a treaty obligation to punish persons in its territory who have committed violent acts against another State if the conduct falls within the scope of one of the Conventions concerned with international terrorism. An obligation to prevent and punish violent acts against another State by a refugee may also flow from UN Security Council Resolution 1373(2001).
- Exceptions: Self-Determination, Liberation from Apartheid, etc.