ARTICLE 1F(C): THE STEP CHILD OF EXCLUSION

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Article 1F(c) has been the most difficult article to infuse with some independent meaning. While it has the oldest pedigree in that its almost exact formulation as an exclusionary clause was already set out in the Universal Declaration of Human Rights, the drafters of the 1951 Refugee Convention were not able to provide a great deal of specific contents to the words contained in this article, apart from some general and rather vague examples, such as a reference to subversion, which would provide guidance as to what activities which could conceivably fall within its parameters.

While the jurisprudence in respect to articles 1F(a) and 1F(b) show that courts have not found it difficult to make a connection to either international or domestic criminal law concepts for the substantive crimes or the modes of liability, the search for an approach in regards to article 1F(c), which would set it apart from the parameters of the other two articles has been problematic in the national jurisprudence especially because of the lack of connection to a discernable body of international or domestic law.

In an examination of nine western countries (Canada, the US, Australia, New Zealand, Belgium, France, Germany, the Netherlands and the UK), New Zealand and the U.S. have not used article 1F(c) in any refugee determinations while the Netherlands only began to do so in 2006. All countries, which applied this exclusion clause, have utilized it sparingly (except France) and primarily in relation two types of crimes, namely human rights violations and terrorist activities.

While the UK judiciary and a Dutch manual mentioned the use of article 1F(c) for human rights abuses in passing, Australia, Belgium (specifically mentioning genocide), France and Germany have used this provision in cases before the tribunals and the courts. In Canada, the Supreme Court provided a detailed reasoning setting out in which circumstances article 1F(c) could apply.

The connection between terrorism and article 1F(c) was made in resolution 1373 of the Security Council of the United Nations in 2001 and this instrument provided the major impetus to bring terrorism activities under article 1F(c) in addition to using article 1F(b) for this purpose. All the jurisprudence in the seven countries which use this provision to exclude persons for terrorism activities refer to this resolution, while in Belgium and Germany, the judiciary also mentions European instruments making the same connection, such as the Qualification Directive.

There have been attempts to bring other crimes within the realm of this exclusion clause. The Dutch manual indicates that crimes which are subject to universal jurisdiction are also to be considered article 1F(c) crimes while the Supreme Court of Canada mentioned torture, hostage taking, apartheid and forced disappearance. In the United Kingdom, attacks on United Nations personnel were found to be also included within the parameters of this exclusion. On the other hand, judges have rebuffed the attempts to broaden the range of crimes by their governments, namely for drug trafficking in Canada and for violations of United Nations sanctions in the Netherlands. The approach that article 1F(c) crimes could only be committed by high level state

functionaries has been abandoned in the jurisprudence in Belgium, Canada, France, Germany and the UK while this position is partially maintained in the Dutch manual for the senior aspect for both government and non-government entities.

Although the wording in article 1F(c) with respect to responsibility differs from article 1F(a) and (b) in that it refers to guilty rather than committed, this has had no discernable impact on the application of this clause as all countries have applied it to persons who had indirect involvement. This is made explicitly clear in Canada, France, Germany and the UK, in the latter through legislation. In France a naval engineer for the Sea Tigers of the LTTE was caught by article 1F(c) but a person working for the MEK in Iran in which capacity he distributed leaflets and wrote slogans over a period of 18 months was found not to be complicit by a Canadian judge. Previous convictions have been no barrier for the use of this exclusion clause in Belgium, Canada, France and the UK while it has also been said to apply to crimes committed within the country of refuge in Belgium, Canada and France.

Article 1F(c) was intended by the drafters of the Refugee Convention to be a residual clause in relation to the other two exclusion clauses. While such a role could have been usefully fulfilled in the past, it would appear that with the strong development of international criminal law in the last few years with its effect on article 1F(a), fewer activities identified in the past to be exclusively fall within article 1F(c) still maintain this status. For instance, of the four specific activities, apart from terrorism, mentioned by the Canadian Supreme Court, torture, apartheid, forced disappearance and hostage taking, three are now included in the ICC Statute as crimes against humanity while the fourth one, hostage taking, is a war crime in the same instrument and would likely also fall under the crime against humanity of inhumane acts.

Similarly, the human rights violations carried out in a non-war crimes context, as alluded to in the same judgment while also underlying most of the body of jurisprudence in France can now been seen as crimes against humanity since a connection to an armed conflict is no longer a requirement in international criminal law. The same can be said for the UK decision, which finds attacks against United Nations personnel to be an article 1F(c) activity since such activities are included in the ICC Statute as war crimes applicable in non-international armed conflicts,[1] as well as in the Convention on the Safety of United Nations and Associated Personnel. In Germany the finding that armed conflicts constituting a breach of international peace was very much connected to the commission of war crimes and crimes against humanity. This connection between international criminal law and article 1F(c) is even stronger with the category of crimes of universal jurisdiction as set out in the Dutch manual.

In addition to the possibility of subsuming article 1F(c) crimes under article 1F(a), all the crimes mentioned could also be article 1F(b) crimes as they meet the seriousness threshold. The judiciary in Canada and the Netherlands has not looked kindly upon the possibility of expanding the number of crimes outside the well-known spectrum of human right violations and terrorism.

If it is unlikely that new categories of crimes can be carved out for article 1F(c) purposes, it would appear that the main function of the provision could very well be to use this provision where the limitations of the other two clauses would make it impossible to bring crimes within

[1] Article 8.2(e)(ii).

their purview. For instance, it might be difficult for the purpose of article 1F(a) to prove the international elements of war crimes or crimes against humanity, such as the presence of an armed conflict or the existence of systematic or widespread attack on a civilian population. In such cases, given the original intention of the drafters of the Refugee Convention to give article 1F(c) a residual meaning to the concepts contained in the other two exclusion articles where some connection to the concepts set out in these provisions combined with the flexibility in refugee law to adjust to new circumstances, article 1F(c) could be of assistance.

Similarly, if a serious crime was committed on the territory of the country of refuge, article 1F(c) could be utilized instead of article 1F(b). With respect to article 1F(b), governments could see an advantage in using article 1F(c) over article 1F(b), as the political exception has no role for terrorist activities when using the former. Even though the political exception has been severely circumscribed for specific terrorist activities and therefore outside the scope of article 1F(b), there is presently no general political exception prohibition for terrorism. The result is that this argument can be raised in the context of article 1F(b). It is possible that the popularity of article 1F(c) for terrorist activities since 2001 is due to this factor, especially in Belgium and the UK.

The limited scope of the crimes, which have been mentioned at the international level as being contrary to the purposes and principles of the United Nations, also has an impact on the scope of extended liability. As the five activities mentioned in this context, namely hostage taking, torture, apartheid, forced disappearance and terrorism all have been regulated in the transnational sphere, the types of extended liability also need to be found in these sources. The forms of liability used are complicity;[2] commit, participate, abet, encourage or co-operate;[3] participates as an accomplice;[4] committing, participating as an accomplice, organizing or directing or participating in common purpose;[5] and commits, orders, solicits or induces the commission of, is an accomplice to or participates, or had command/superior responsibility.[6]

While some of the forms of extended liability are similar as the ones used in international criminal law, the development of the contours of these types of liability will most likely take place at the national criminal level with possibly some guidance derived from the ICC when it will start providing its parameters to the concept of common purpose. The use of transnational law in order to provide meaning to 1F(c) also confirms that the word guilty, which was originally probably included to make only the most senior officials in a state responsible for acts against the United Nations, has lost this special meaning and can now be read in the same manner as committed in the two other exclusion provisions.

In conclusion, it is apparent that the direct connection between 1F(c) to international criminal law is very tenuous and that because of recent developments in other areas of international law it is difficult to carve out an independent meaning for the crimes set out in this article and that for extended liability transnational law provides a better source than international criminal law.

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[2] Article 4 in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
[3] Article III of the International Convention on the Suppression and Punishment of the Crime of Apartheid.
[4] Article 1.2 of the International Convention against the Taking of Hostages.
[5] Article 5 of the International Convention for the Suppression of the Financing of Terrorism, the most recent international terrorism treaty.
[6] Article 6 of the International Convention for the Protection of All Persons from Enforced Disappearance.