Exclusion and Related Issues

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Introduction

The Refugee Convention was drafted in a very different era, but one that displays many of the characteristics of today. The period 1933–45 had seen persecution of groups based on religion, political opinion, nationality, race, and membership of particular social groups. It had seen States closing their borders to those fleeing that persecution, people who were fleeing statelessness, and those without travel documents. The post-war era saw many people who had been involved in that persecution now displaced themselves and seeking to create new lives where they could hide their past crimes and activities under a new identity. At another level, however, the idea of universal human rights was still very much in its infancy: there were no extant international human rights law treaties with effective treaty bodies to monitor how States treated individuals within their territory or jurisdiction. The idea that international law might provide a forum where individuals could hold States to account was not accepted, with the United Nations still finding its way in this regard, having only recently promulgated the non-binding Universal Declaration of Human Rights in 1948.

That background partly explains the approach taken in the Refugee Convention: the protection of the individual balanced by the capacity to withdraw or deny that protection; and the United Nations High Commissioner for Refugees' supervisory function under article 35, albeit without a forum before which to hold States to account, except insofar as other States would be willing to take cases before the International Court of Justice under article 38. During the almost 70 years of its operation, UNHCR has has viewed interpreting the Convention as part of its article 35 supervisory function, whilst recognizing contracting States' courts would equally interpret it. There has been a willingness by courts to consider UNHCR's views, but there has also been independent interpretation of the treaty as judges and other decision makers have applied their own legal understanding and canons of interpretation.[1] When it is remembered that the Convention itself will often have been incorporated into domestic law, often in a language different from the original official English and French texts, generally as part of a State's immigration control regime rather than a *protection* framework, the scope for variation and disagreement is huge – and that is before one notes that the Convention itself is not consistent in the language it uses when dealing with similar concepts.[2] In the areas of exclusion and national security, these factors are magnified. There is broad scope for differences in interpretation when the Convention uses phrases such as 'serious reasons for considering', 'reasonable grounds for regarding', 'serious non-political crime', 'particularly serious crime', 'danger to the security of the country', and 'national security or public order (*ordre public*)'. Furthermore, as explained below, article 1F can only properly be understood when analysed in the context of international criminal law and the international law of armed conflict.

The language used in articles 1F, 33(2), and 32 of the Refugee Convention is very different, yet much of the domestic case law fuses the concepts. This is not only because domestic legislation has not simply transposed the wording of the Convention and mixed up ideas from the different provisions, but also because the provisions are wrongly perceived as serving a similar function, namely, lawfully removing refugees and asylum seekers from the State. Article 1F provides that the Convention shall not apply to persons with respect to whom there are serious reasons for considering that they have committed (a) war crimes, crimes against humanity, crimes against peace, (b) serious non-political crimes, or those who (c) are guilty of acts contrary to the purposes and principles of the UN Charter. Article 33(2) denies

[1] Guy S. Goodwin-Gill, 'The Search for the One, True Meaning...', in Guy S. Goodwin-Gill & Hélène Lambert, eds., *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union* (CUP, 2010).

[2] For example, consider the relationship between cessation under art 1C(5) and 'unable or unwilling to avail oneself of the protection' of the country of nationality in art 1A(2), let alone the different categorization of 'refugee' depending on which rights are being accorded in arts 12–33.

the benefit of *non-refoulement* to those convicted of a particularly serious crime who are a danger to the community of the country of asylum or where there are reasonable grounds to regard them as a danger to the security of that country, while article 32 prohibits expulsion from the country of asylum 'save on grounds of national security or public order'.[3] The implementation at the domestic level and the trans-jurisdictional borrowing of ideas in the case law render it very difficult to make a clear distinction in any analysis of exclusion and security issues as to whether certain facts will be treated as falling within article 1F or 33(2).[4] As such, while this chapter does not analyse the content of articles 33(2) and 32,[5] it recognizes the connections between these provisions. It should also be noted that UNHCR's separate treatment of each of these provisions leaves the 2003 UNHCR Guidelines on Exclusion failing to address all the issues in some domestic cases, as ideas from articles 1F, 33(2), and 32 are often fused in domestic practice.[6] States often regard these provisions as a suite of measures enabling the deportation of refugees, which view has been enhanced and emboldened by those 2003 Guidelines with their retroactive application of article 1F(a) and 1F(c) where there are serious reasons for considering that there has been criminal behaviour or activity falling within those sub-paragraphs after refugee status has been properly accorded under article 1A(2).[7]

This chapter explores how article 1F was initially understood, before considering its application in practice and the increasing intermingling of certain ideas: exclusion as pre-status and retroactive; the difficulties of conceiving of refugee status without the guarantee of *non-refoulement*; the overlap of the different phrases used in the Convention when dealing with crimes and the security of the country of asylum; and how crimes that are not particularly serious might yet indicate a danger to the security of the hosting State or be contrary to the purposes and principles of the United Nations, a threat to national security, or even simply a public order concern. In addition, standards of proof, sequencing, regional mechanisms, and complementary human rights protection regimes[8] add layers of complexity to the analysis.

Background to article 1F

[3] On national security, see also arts 9 and 28.
[4] See Bertram Ramcharan, *Human Rights and Human Security* (Brill, 2002); David Forsythe, *Human Rights in International Relations* (4th edn, CUP, 2017).
[5] See chapter X, Mathew.
[6] UNHCR, 'Guidelines on International Protection No 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees' UN doc HCR/GIP/03/05 (4 September 2003). And see *Abramov v Minister for Justice, Equality and Law Reform* [2010] IEHC 458 (Irish High Court).
[7] 2013 Guidelines (n 6) para 6. This is often coupled with the use of diplomatic assurances, which are utilized where international human rights law would protect the individual who has been excluded under art.1F or denied the guarantee of *non-refoulement* under art 33(2), or simply made liable to expulsion under art 32 (who should still benefit from *non-refoulement*).
[8] See Vincent Chetail, Jane McAdam, Eve Lester Lester, Cathryn Costello and Colm O Cinnéide above [please provide shorthand names here].

Article 1F has been the object of much analysis and discussion over the past 20 years.[9] The 2003 Guidelines and their accompanying Background Note reflect in great part UNHCR's continuing view of the meaning of the provision.[10]

First and foremost, if an individual fall within article 1F, then that person cannot be a refugee. Since the benefits of the Convention are only accorded to refugees and, in varying degrees, asylum seekers, the consequence is that none of the guarantees set out in articles 3 to 34 are available, most notably protection from *refoulement* under article 33(1).[11] This distinction is particularly significant because some rights under the Refugee Convention persist under articles 33(2) and, more so, 32.

According to the *travaux préparatoires*, two purposes were sought to be achieved through article 1F: serious transgressions prior to entry should bar an applicant from refugee status, and no-one who had committed such crimes should escape prosecution through obtaining refugee status.[12] In international human rights law, which applies to everyone, exclusion is an alien concept.[13] Therefore, given that article 1F is a limitation on a humanitarian provision, it must be interpreted narrowly.[14] Moreover, as was stated by the Grand Chamber of the Court of Justice of the European Union, article 1F is also exhaustive; there are no further grounds for exclusion.[15]

Content of article 1F

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[9] See Yao Li, *Exclusion from Protection as a Refugee* (Brill 2017); Geoff Gilbert, 'Current Issues in the Application of the Exclusion Clauses' in Erika Feller, Volker Türk, and Frances Nicholson (eds), *Refugee Protection in International Law*, (CUP 2003); Geoff Gilbert, 'Running Scared Since 9/11: Refugees, UNHCR and the Purposive Approach to Treaty Interpretation' in James Simeon (ed), *Critical Issues in International Refugee Law* (CUP 2010); Geoff Gilbert, 'Hierarchies, Human Rights and Refugees' in Erika de Wet and Jure Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights* (OUP 2012); Geoff Gilbert, 'Exclusion under Article 1F Since 2001: Two Steps Backwards, One Step Forward' in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar 2014); Geoff Gilbert, 'Terrorism and International Refugee Law' in Ben Saul (ed), *Research Handbook on International Law and Terrorism* (Edward Elgar 2014); Geoff Gilbert, 'Exclusion is Not Just about Saying 'No': Taking Exclusion Seriously in Complex Conflicts' in David J Cantor and Jean-François Durieux (eds), *Refuge from Inhumanity: War Refugees and International Humanitarian Law* (Brill 2014); Geoff Gilbert and Anna Magdalena Rüsch, 'Jurisdictional Competence through Protection: To What Extent Can States Prosecute the Prior Crimes of Those to Whom They Have Extended Refuge?' (2014) 12 Journal of International Criminal Justice 1093; Geoff Gilbert, 'Undesirable but Unreturnable: Extradition and Other Forms of Rendition' (2017) 15 Journal of International Criminal Justice 55; Geoff Gilbert and Anna Magdalena Rüsch, 'International Refugee and Migration Law' in Malcolm Evans (ed), *International Law* (5th edn, OUP 2018).

[10] 2003 Guidelines (n 6).

[11] Equally, the person will be outside the remit of UNHCR under paragraph 7(d) of the 1950 Statute of the United Nations High Commissioner for Refugees, 14 December 1950, UNGA res. 428(V) (1950 Statute).

[12] See https://academic.oup.com/ijrl//pages/style_guide for style (adapt UNHCR style there if necessary) See Standing Committee of the Executive Committee of the High Commissioner's Programme, 'Note on the Exclusion Clauses', 47th session, UN doc EC/47/SC/CRP.29, 30 May 1997, para 3, and Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the 24th meeting, UN doc A/CONF.2/SR.24, 27 November 1951, statements of M. Herment, Belgium, and Mr Hoare, UK.

[13] See chapter X, McAdam.

[14] UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, UN doc HCR/IP/4/Eng/Rev.3 (1979, reissued 2011). See also *Gurung v Secretary of State for the Home Department* [2002] UKIAT 04870, para 151.1. *Gurung* was overruled in *JS (Sri Lanka) v Secretary of State for the Home Department* [2010] UKSC 15, but note para 2 on this point.

[15] *Joined Cases C-391/16, C-77/17 and C-78/17, Three requests for a preliminary ruling under art.267 TFEU from the Nejvyšší správní soud (Supreme Administrative Court, Czech Republic) in Case C-391/16, made by decision of 16 June 2016, received at the Court on 14 July 2016, and from the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings, Belgium) in Cases C-77/17 and C-78/17, made by decisions of 8 February 2017 and 10 February 2017, received at the Court on 13 February 2017, in the proceedings*, Judgment of the GCEU 14 May 2019, para.76.

Turning to the content of the sub-paragraphs of article 1F, it is worth noting the provision's interrelatedness with articles 33(2) and 32, even if there is no direct mapping.[16] Article 1F crimes would certainly fall within any set of particularly serious crimes, yet under article 1F there does not need to be a conviction by a final judgment or a continuing danger to the community,[17] but only serious reasons for considering that the applicant for refugee status, or the refugee, has committed such a crime or is guilty of such an act.

Article 1F(a)

Sub-paragraph (a) applies to war crimes, crimes against humanity, and crimes against peace "as defined in the international instruments drawn up to make provision in respect of such crimes". As such, it is emblematic of the complexities of exclusion: article 1F draws on other sub-disciplines of international law, that is, international criminal law and the international law of armed conflict, but how they should be applied *vis-à-vis* a restriction on a humanitarian provision in an international refugee law treaty is open to interpretation. Although there may have been issues regarding being 'defined in international instruments', particularly as regards crimes against humanity in relation to which there is no specific international convention,[18] those have been effectively resolved by the Rome Statute of the International Criminal Court,[19] even if not every contracting State to the Refugee Convention is a party to the Rome Statute, and while at all times remembering that that article 1F is part of a treaty for humanitarian protection. Crimes against humanity, for the purposes of article 1F, must fall within article 7(1) of the Rome Statute and be part of a widespread or systematic attack on a civilian population with knowledge of that attack. Likewise, a crime against peace would be classified as "aggression" under article 8 of the Rome Statute. The same is not true, though, as regards persecution in article 1A(2) of the Refugee Convention because that is a provision focused on protecting the individual, not characterizing criminality – the use of the same word does not indicate a common understanding.

As for war crimes, there would need to be some form of armed conflict for an applicant to be excluded for this reason,[20] distinguishing war crimes from crimes against humanity. The international law of

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[16] There is not so much an overlap between these articles as a convergence of influences and interactions, like the wakes of speedboats affecting three separate water skiers on some *Escher-ian* lake on three different planes – see M.C. Escher's 1953 Lithograph 'Relativity' <http://www.mcescher.com/gallery/back-in-holland/relativity/>.

[17] Although the Dutch Council of State, Administrative Jurisdiction Division, in *State Secretary of Security and Justice v X*, 201401560/1/V2, 16 June 2015, found that previous exclusion under art.1F proved the person had committed the crimes and that crimes of that nature meant that he constituted 'a direct threat to the Dutch legal order and the peace of mind of the Dutch people' and a 'present danger' for the purposes of art.27 EC Directive 2004/38 http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RVS:2015:2008. *Cf. Joined Cases C-331/16 K. and C-366/16 H.F.*, Judgment of CJEU, 2 May 2018, that held that previous exclusion of a member of the family could not automatically prove that their mere presence was a present and serious danger to the security of the State.

[18] See, however, ILC Fourth Report on Crimes Against Humanity, A/CN.4/725, 18 February 2019, referred to the Drafting Committee 7 May 2019. Of course, genocide under the 1948 Convention (78 UNTS 277), would count as a 1F crime against humanity.

[19] Rome Statute, art.25.3(e). See the Rome Statute of the International Criminal Court, done at Rome on 17 July 1998, in force on 1 July 2002, 2187 UNTS, No. 38544 <http://treaties.un.org> and <www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf> - originally circulated as A/CONF.183/9 of 17 July 1998 and corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The amendments to article 8 reproduce the text contained in depositary notification C.N.651.2010 Treaties-6, while the amendments regarding articles 8*bis*, 15*bis* and 15*ter* replicate the text contained in depositary notification C.N.651.2010 Treaties-8; both depositary communications are dated 29 November 2010.

[20] See *Prosecutor v Ljube Boškoski and Joran Tarčulovski*, IT-04-82-A, 19 September 2010, paras.19 et seq., especially para.22, dealing with art.3 of the ICTY Statute, the Appeals Chamber of the ICTY took into account, amongst many other things, the frequency of the fighting, its geographic scope, the use of heavy weaponry, the role of the ICRC, the mass displacement of persons, but, interestingly, also that the governmental forces were

armed conflict distinguishes between different types of armed conflict – international and non-international. Treaty-based war crimes are set out in the grave breach provisions of the Geneva Conventions of 12 August 1949[21] and Additional Protocol 1 of 1977.[22] However, article 1F(a) war crimes are not limited to those crimes. Grave breaches can only occur in international armed conflicts,[23] and neither common article 3 of the four Geneva Conventions of 1949 nor Additional Protocol II of 1977 explicitly provide for individual criminal responsibility in non-international armed conflicts. However, since *Tadić*,[24] it has been accepted that breaches of either could give rise to individual criminal responsibility. Thus, given the principle of *nullem crimen sine lege*, an applicant should only be excluded if, under the international law of armed conflict or international criminal law, there are serious reasons for considering that s/he has committed a war crime, crime against humanity, or aggression, as defined.

Article 1F(b)

The concept of the political offence comes from extradition law, which, during the 19th century, developed an exception for fugitive offenders where the crime for which their surrender was sought was political in character.[25] Overthrowing a government was originally seen as the archetypal political offence.[26] Almost immediately, the scope of the political offence exemption was queried with respect to crimes of violence, as self-proclaimed alleged anarchists adopted 'propaganda by the deed'. Over the course of the 20th century, courts in various jurisdictions developed the understanding of the political offence, often in response to fugitive offenders whose crimes were described as terrorist in nature.

While extradition and refugee status determination have diametrically opposed objectives – the former facilitating punishment, the latter protection – in this regard they both address the same issue: is the crime in question political in character? Nevertheless, evidence for an extradition hearing is with a view to sending a person back to face trial where any crime would need to be proven beyond reasonable doubt; exclusion from refugee status is the final step in the process leading to deportation, so one should expect more evidence than is demanded for extradition cases.

The leading UK case on political offences relates to exclusion from refugee status. In *T v Secretary of State for the Home Department*,[27] the then House of Lords adopted the Swiss approach to political offences, one that looks for proximity to the ultimate goal of the organization to which the fugitive belongs and proportionality in seeking to achieve that goal: 'Homicide, assassination and murder, is one of the most heinous crimes. It can only be justified where no other method exists of protecting the final rights of humanity.'[28] Therefore, if there are serious reasons to consider that an applicant for refugee status has engaged in indiscriminate violence constituting a crime 'prior to [her/his] admission to that country as a refugee', then s/he would fall within article 1F(b) of the Refugee Convention and forfeit her/his protection under article 33(1).

The overlap between serious non-political crime and particularly serious crime is clear, but the focus must be on 'particularly', not 'non-political', since a particularly serious 'political' crime committed in

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ordered to 'destroy terrorists' and that the Security Council condemned the 'terrorist activities', showing that there is no clear line in international law between armed conflict and terrorism.

[21] 75 UNTS 31, 85, 135 and 287.

[22] Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3.

[23] See *Duško Tadić, a.k.a. 'Dule', Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction before the Appeals Chamber of ICTY*, Case No.IT-94-1-AR72 (2 October 1995), especially paras.134, 137.

[24] *Prosecutor v Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Interlocutory Appeal), Case No IT–94–1–AR72 (2 October 1995).

[25] See Geoff Gilbert, *Responding to International Crime* (Martinus Nijhoff, 2006) especially Ch 5.

[26] *In re Castioni* [1891] 1 QB 149.

[27] [1996] UKHL 8, [1996] 2 WLR 766.

[28] *In re Pavan* [1927–28] Annual Digest of Public International Law Cases 347, 349. *Cf. Watin v Ministère Public Fédéral* [1964] 72 ILR 614 (Swiss Federal Tribunal).

the host State is, at one level, just another crime and, if committed *vis-à-vis* a third State, one that will likely, in practice, not be pursued against a refugee. 'Serious non-political crime' is peculiar to the Convention but is not defined, but it ought to be interpreted in its context,[29] that is, it should be compared with war crimes, crimes against humanity, crimes against peace, and acts contrary to the purposes and principles of the United Nations in terms of seriousness, even if the context is wholly domestic. That several different States treat the behaviour as a serious crime is indicative that it should be regarded as a serious non-political crime.

Article 1F(c)

Sub-paragraph (c) excludes persons who are 'guilty of acts contrary to the purposes and principles of the United Nations'. Not all the purposes and principles could render an individual 'guilty' and, having regard to paragraph 7(d) of the 1950 Statute,[30] the drafters probably considered that it reflected article 14(2) of the UDHR (violations of international human rights law not amounting to crimes against humanity). Nevertheless, it has been interpreted more broadly and applied more widely than simply to persons in senior government positions, who might be recognized as having responsibilities *vis-à-vis* the Charter, and thus Article 1F(c) excludes persons more generally.[31]

The case law on 'danger to the security' of the hosting State under article 33(2) has made direct analogies to article 1F(c), and this interconnectedness is significant. According to paragraph 6 of the 2003 Guidelines,[32] articles 1F(a) and 1F(c) can be applied to deny refugee status where it had previously been properly accorded.[33] Thus, a refugee could lose protection under article 1F(c) or article 33(2) on the same facts. Article 33(2), however, does not deny the refugee the protection of the Convention, and various rights persist after its application. That very overlap raises a concern, though, regarding the scope for domestic courts to apply the Refugee Convention, as filtered through domestic legislation that has fused articles 1F and 33(2) in a manner that undermines the guarantees set out separately in each article.[34]

At one level, it is good that 'danger to the security' of the hosting State is seen as parallel to article 1F(c) because 'guilty of acts contrary to the purposes and principles of the United Nations' ought to be seen as establishing a high threshold. Both are vague, however, and the case law on article 33(2) can be read to suggest that there has been an apparent equalization down.[35]

Burden and Standard of Proof

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[29] See art.31 Vienna Convention on the Law of Treaties, 1969, 1155 UNTS 331. Part of that context must be extradition law because art.1F(b) clearly draws on the concept of the political offence, that is, where a fugitive would not be extradited if their crime were deemed to be political in character – so, only if the crime is not political in character and is sufficiently serious should refugee status be denied. The political character ordinarily depends not so much on motive, but whether the crime was part of and in furtherance of a political disturbance, not too remote from the ultimate goal of the organization to which the applicant belongs and proportionate - *T* v *Secretary of State for the Home Department* [1996] 2 All ER 865; *In re Nappi* (Swiss Fed. Trib, 1952), 19 ILR 375; *Watin* and *Pavan*, both above note 28. Given that part of that test is that the crime in question ought not to be too remote from the ultimate goal of the organisation to change the political environment in a State, then quite clearly these will be 'serious' just to pass that threshold.

[30] Above (n11).

[31] *Georg K* v *Ministry of the Interior*, Austrian Admin Court, 1969, 71 ILR 284; *Al-Sirri and DD (Afghanistan) v Secretary of State for the Home Department* [2012] UKSC 54.

[32] Above, note 6.

[33] See also, *Othman (Abu Qatada) v Secretary of State for the Home Department* SIAC SC/15/2005, 26 February 2007, para.100.

[34] See Canadian Immigration and Refugee Protection Act 2001, SC2001 c.27, Part 1, Division 4.

[35] See *M47/2012 v Director General of Security* [2012] HCA 46, at 68; *VV v Secretary of State for the Home Department* SIAC, SC/59/2006, 2 November 2007, where, from the open evidence, virulent language in his will and two CDs with terrorist information sufficed.

The burden of proof is on the State to show that there are serious reasons for considering that the applicant is suspected of having committed the relevant crimes or acts that fall within article 1F. While the Refugee Convention does not set out any procedure for refugee status determination, given that it is generally accepted that the applicant must show s/he falls within article 1A(2) and that article 1F is a limitation on a humanitarian provision, the burden is on the State to present evidence to exclude someone who would otherwise qualify as a refugee.[36]

The 'serious reasons for considering that' test is less stringent than either 'beyond reasonable doubt' or even 'the balance of probabilities', the usual standards of proof applied by courts in criminal and civil litigation respectively. However, it 'sets a standard above mere suspicion'.[37] Even though the standard of proof is not 'beyond reasonable doubt', exclusion under article 1F is still associated with the attribution of criminal behaviour to an individual with very serious consequences, namely exclusion from refugee status. Thus, while the benefit of the *doubt* should in strict grammatical terms only attach to the beyond reasonable *doubt* test, such a narrow approach belies the commonly understood meaning of the phrase and undermines the accepted view that any limitation on a fundamental right should be interpreted restrictively. [38]

On that issue, how do the different standards of proof in articles 1F and 33(2) affect the protection of the individual? According to the existing jurisprudence, article 1F imposes a more demanding standard.[39] This poses some problems when one has regard to the text in the equally authentic English and French versions of the Convention: while the English text refers to 'serious reasons for considering that' and 'reasonable grounds for regarding', the French text refers to '*raisons sérieuses de penser que*' in article 1F, and to '*raisons sérieuses de considérer comme*' in article 33(2). Thus, at first blush, article 33(2) in the French text uses the same terminology as article 1F in the English text. Unfortunately, it is not that straightforward: in French, there is no difference between '*penser*' and '*considérer*' in this context and the use of different terms can be explained by the phraseology of the rest of the provision – '*penser que*' and '*considérer comme*'. That does mean, though, that the French text equates the standard of proof for articles 1F and 33(2). Nevertheless, the practice in Anglophone courts is to require a higher standard of proof for article 1F exclusion, even if that is not explicit in the French language version of the Convention.[40]

Participation

Article 1F refers to crimes or acts having been committed. Clearly, that covers direct perpetration. What further forms of participation in a crime, though, justify exclusion? Reference can be made to article 25 of the Rome Statute.[41] Command and superior responsibility suffice.[42] Attempts and conspiracies are enough to satisfy article 1F, but not mere membership of a group.[43] Three other potential forms of indirect participation might justify exclusion: joint criminal enterprise, complicity, and aiding and abetting, which cannot always be distinguished in practice.[44]

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[36] See para.34, 2003 Guidelines, above note 6. See also the requirements in art.32.2, where the consequences are not as serious.

[37] *Yasser Al-Sirri v Secretary of State for the Home Department* [2009] EWCA Civ 222, para.33; *JS (Sri Lanka)*, above note 14, at 39; *Al-Sirri and DD*, above note 31, 75, following UNHCR's guidance in the 2003 Guidelines, above note 6, para.34.

[38] See UNHCR Handbook, paras.203-204 and 2003 Guidelines, above note 6. See also, Sedley LJ in *Yasser Al-Sirri*, above note 37, 27.

[39] See Bliss, '"Serious Reasons for Considering": Minimum Standards of Procedural Fairness in the Application of the Article 1F Exclusion Clauses', 12 *IJRL* (supp.) 92, 2000. Is this still the case or have States changed it post-9/11?

[40] *Viz. Yasser Al-Sirri*, above note 37, para.33; *M47*, above note 35, 319. Our thanks are due to Professor Hélène Lambert on this point.

[41] Above note 19.

[42] Art.28, Rome Statute, above note 19.

[43] See *JS (Sri Lanka)*, above note 14, 38 and 49.

[44] With respect to genocide, incitement should also be recognised: Rome Statute, above note 19, art.25.3(e).

Joint criminal enterprises (JCE) in international criminal law were the subject of much debate before the International Criminal Tribunal for the Former Yugoslavia (ICTY), with three different types eventually being recognized. The third type was the most controversial as being too broad, and article 25(3)(d) of the Rome Statute adopts only the first two interpretations.[45] The logic must be that only those types of JCE should suffice to exclude individuals from protection, not the previous broader and more far-reaching type in JCE III.[46]

Complicity was a term used in the Nuremberg cases and the trials in the courts set up by the Allies in post-Second World War Germany and other occupied countries. It is undoubtedly the case that persons who were senior members of government, financiers, and industrialists were deemed complicit in the Nazi era war crimes. However, in all those cases, there was a direct link between the role of the complicit criminal and the crimes perpetrated. For instance, in *Bruno Tesch and Two Others*,[47] the accused were the principal suppliers of Zyklon B to the concentration camps in Nazi-controlled territories east of the Elbe.[48]

International criminal law on aiding and abetting is not clear. The ICTY adopted a singular and very restrictive approach. In *Prosecutor v Perišić*,[49] the Appeals Chamber held 'that specific direction is an element of the *actus reus* of aiding and abetting', that is, that the aider and abettor acted specifically to further the crime, which is difficult to prove where they are remote from its place of perpetration. Subsequently, in *Prosecutor v Taylor*,[50] the Appeals Chamber of the Special Court for Sierra Leone (SCSL) decided '475 … that the *actus reus* of aiding and abetting liability under Article 6(1) of the [SCSL] Statute and customary international law is that an accused's acts and conduct of assistance, encouragement and/or moral support had a substantial effect on the commission of each charged crime for which he is to be held responsible'. Given, however, this disagreement between the different courts and tribunals in the area of international criminal law, courts dealing with exclusion in relation to refugee status determination are entitled to apply the most appropriate approach when deciding whether the applicant has been involved in aiding and abetting. Reference to international criminal law is central to a coherent and informed approach, but the exclusion clause requires that refugee status determination adopts an autonomous understanding appropriate to the particular process. [51] Equally, the Supreme Court of Canada in *Ezokola* held that 'the factors will be weighed with one key purpose in mind: to determine whether there was a voluntary, *significant*, and knowing contribution to a crime or criminal purpose'.[52]

Given the lack of agreement and the complexity of the issues that turn on the specific wording of international criminal law instruments, it is proposed that 'committed' and 'guilty of' in article 1F of the Refugee Convention must be given an autonomous meaning that respects the principle that, since

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[45] Rome Statute above note 45.

[46] An example of JCE III would be where an act by one of the perpetrators is outside the common plan, but still can be considered a natural and foreseeable consequence of the common purpose and the perpetrator willingly took that risk - *Ntakirutimana and Ntakirutimana*, Appeal Judgement, ICTR-96-10-A and ICTR-96-17-A, paras.463–66.

[47] Case No.9, British Military Court, Hamburg, 1-8 March 1946, UNWCC, 1 LRTWC 93, 103.

[48] See also, *The United States of America v Alfried Krupp, et al*, Case No.10, Trials of War Criminals before the Nuremberg Military Tribunals, 1948; Case No.58, United States Military Tribunal, Nuremberg, UNWCC 10 LRTWC 69-175.

[49] IT-04-81-A, 28 February 2013. See also, paras.37-40 and 42.

[50] Case No. SCSL-03-01-A, 26 September 2013, paras.466 et seq. See also, the Joint Separate Opinion of Judges Meron and Agius in *Perišić*, above note 49, paras.2 and 4.

[51] *Attorney-General (Minister of Immigration) v Tamil X* [2010] NZSC 107.

[52] *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40, at para.92 (emphasis added). See also, *AA-R (Iran) v Secretary of State for the Home Department* [2013] EWCA Civ 835 at para.31 in relation to complicity: 'Once there is evidence that he made significant contributions to the acts of an organisation of whose malign activities he was aware, he is complicit in those acts'.

article 1F is a limitation on a humanitarian provision, it must be interpreted restrictively, namely, in favour of the applicant for refugee status.[53]

Proportionality

The final aspect of article 1F also highlights an issue pertinent to article 33(2): proportionality. Should there be a balancing exercise between the nature of the crime or acts for article 1F and the treatment risked in the country of nationality if the applicant for refugee status were to be returned? Academic literature and UNHCR suggest there ought to be.[54] At one level, proportionality is intrinsic to making a full assessment of all the facts of the claim before deciding whether or not to exclude. For example, while it might seem appropriate to exclude someone who shot at another person with the intent to kill, this analysis might change when taking into account additional facts, such as that only a superficial wound was caused, and that the perpetrator would fear being tortured and killed by extremist groups as well as the government if returned to her/his country of origin. Furthermore, the principle of *non-refoulement* is now recognized as customary international law,[55] and both international human rights law[56] and international criminal law have developed exponentially, with several UN anti-terrorism treaties prohibiting surrender where there is a fear of prosecution or punishment on grounds of race, religion, nationality, or political opinion.[57] However, case law weighs heavily against including a proportionality test, based, according to the courts, on a plain reading of the text of the Convention,[58] although sometimes that case is overstated.[59] Even so, the traditionalists asserting the so-called straightforward language of the Convention are not as traditional as they claim. Denmark, participating in the drafting process, argued that one needed to balance the seriousness of the crime against the persecution feared.[60] Nevertheless, as regards article 1F, the weight of jurisprudence from different jurisdictions is that there is no proportionality test.

Regional Variations[61]

For UNHCR, other regional refugee instruments always have to be interpreted within the framework provided by the Refugee Convention.[62]

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[53] See Lord Steyn in *R v Secretary of State for the Home Office, ex parte Adan and Aitseguer* [2001] 2 AC 477, 517.
[54] 2003 Guidelines (n6), para.24. 1979 Handbook above note 14, para.156. UNHCR Comments on Draft Qualification Regulation, February 2018, COM (2016) 466 (February 2018), available at <http://www.refworld.org/docid/5a7835f24.html>, 20. Sibylle Kapferer, 'Exclusion Clauses in Europe – A Comparative Overview of State Practice in France, Belgium and the United Kingdom', 12 *IJRL*, (supp.) 2000, 195 at 217, and *S.A.M. v. B.F.F.*, Swiss Asylum Appeals Board, 27 Nov. 1992; Gilbert 2003, above note 9, 450-55.
[55] Sir Elihu Lauterpacht and Daniel Bethlehem, 'The scope and content of the principle of *non-refoulement*: Opinion', in Feller, Türk and Nicholson, (n9). And see Pene Mathew in this collection, Chapter X, and Cathryn Costello and Michelle Foster, 'Non-refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test', [2015] Netherlands Yearbook of International Law 273.
[56] *Chahal v UK* App. No. 70/1995/576/662 (1996) 73. See also, art.5 ILC Draft Crimes Against Humanity Convention, above note 18.
[57] *Eg*. International Convention for the Suppression of Terrorist Bombing, 1998, 2149 UNTS 256.
[58] See *Bundesrepublik Deutschland* v *B (C-57/09), D (C-101/09)* [2010] ECR I -10979. *Cf. Al-Sirri and DD (Afghanistan)*, above note 31, 16, and Austrian Supreme Administrative Court, 21 April 2015, *Ra 2014/01/0154*, both cited in UNHCR Comments on Draft Qualification Regulation, above note 54, 19.
[59] *B and D* above note 58, at paras.109-11.
[60] UN doc. A/CONF.2/SR.24, 13. However, this is not the present Scandinavian stance. *Cf*. Austrian Supreme Administrative Court *Ra 2014/01/0154*, above note 58, reasserting the Danish position set out in the *travaux préparatoires*.
[61] See chapters by Shuvro Sarker, Debbie Anker, Marina Sharpe, 新垣修 and Maja Janmyr and Dallal Stevens above.
[62] Background Note, para 7 (n6). *Cf*. Marina Sharpe, *The Regional Law of Refugee Protection in Africa*, ch 4 (OUP, 2018).

Africa

Articles I(4), I(5), and III of the OAU Convention are pertinent to this discussion. Articles I(4) and (5) are similar but not identical to article 1F of the Refugee Convention. It is the differences that raise questions. The OAU Convention 'ceases to apply' if a person commits 'a serious non-political crime outside his country of refuge after his admission to that country as a refugee', or seriously infringes the purposes and objectives of the OAU Convention. Article I(5) effectively extends article 1F(c) to cover the purposes and principles of the African Union, too. While article I(4)(f) looks, at first blush, like article 1F(b) of the Refugee Convention, it is more akin to the particularly serious crime limb of article 33(2). Unlike article 1F(b), it is not enough that there are merely 'serious reasons for considering that' the serious non-political crime has been committed by this refugee. The rest of the provision referring to the geographical location of the crime would indicate not so much that there is danger to the community of the country of refuge, but that the refugee is a threat to national security or public order. This is difficult to reconcile completely with the Refugee Convention, but it is possible to read it sufficiently narrowly. Sub-paragraph (g), on the other hand, has no direct correlation with the text of the Refugee Convention, but does reflect part of the *travaux préparatoires* on the purpose of article 1F generally: refugee status was to be protected from abuse by prohibiting it from being granted to undeserving cases, namely, those who had committed serious transgressions prior to entry. Here, there is an intrinsic link 'between ideas of humanity, equity and the concept of refuge'.[63] As such, it is no great leap to exclude someone who has 'seriously infringed the purposes and objectives of [the OAU] Convention'.[64] As for article I(5), it does follow article 1F, except as regards sub-paragraph (c). Following the same basic principle, that the OAU Convention complements the Refugee Convention, someone applying under the OAU Convention should only be excluded if the purposes and principles of what is now the African Union are in line with those of the United Nations.

Article III requires OAU Convention refugees to conform to the laws and regulations of the country of asylum and to 'abstain from any subversive activities against any Member State of the [AU]'. There is no individual consequence set out in the article for its violation, but 'subversive activities' could fall within article I(4)(g). Moreover, there are parallels with article 2 of the Refugee Convention and the concept could, on appropriate facts, be brought within the remit of article 1F(c) applied retroactively or article 33(2)'s danger to the security limb. Only if the subversive activities were to fall within article 1F(c) or article 33(2) of the Refugee Convention could a State use them to remove a refugee's protection under the OAU Convention. Regardless, like all the provisions that render the Convention inapplicable or remove the guarantee of *non-refoulement*, the State would still have to respect international human rights law. In *Organisation mondiale contre la torture, Association Internationale des juristes démocrates v Rwanda*,[65] the African Commission of Human Rights applying the African Charter of Human and Peoples' Rights prohibited the deportation of refugees accused of subversive activities within Article III.

Europe

Europe has a complex set of multi-layered legal regimes.[66] The Council of Europe's European Court of Human Rights does not apply the Refugee Convention, but it provides protection from *refoulement* under human rights law[67] Where persons are not protected under the Refugee Convention, the court

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[63] See Standing Committee of the Executive Committee of the High Commissioner's Programme, 'Note on the Exclusion Clauses', 47th session, UN doc. EC/47/SC/CRP.29, 30 May 1997, para.3.

[64] Background Note 2003, fn7 (n6).

[65] <caselaw.ihrda.org/doc/27.89-46.91-49.91-99.93/print/>

[66] See Geoff Gilbert, 'Europe, International Law and Refugees' 15 European Journal of International Law 963 (2004),

[67] See *Labsi v Slovakia* App. No.33809/08, para.117, European Court of Human Rights (Third Section), 15 May 2012, the Court held that it was to decide simply 'whether that individual's deportation [is] compatible with the [ECHR]'. Nb. While the Court is limited to the Council of Europe member States, the rights in the ECHR are mirrored in the ICCPR and the other regional human rights mechanisms, so the arguments are transposable. See below, 'serious harm' and subsidiary protection.

often deals with those who would otherwise be refugees. Usually, this is based on freedom from torture or inhuman or degrading treatment (article 3) or arbitrary deprivation of life (article 2), but family life (article 8), the right to liberty (article 5), fair trial (article 6), freedom of expression (article 10),[68] and freedom from expulsion for aliens (article 7, Protocol 1)[69] have all been prayed in aid. The court has also been taken a strict line against diplomatic assurances that were being used to deport to the country of nationality under article 32, the assurance allegedly discounting the threat to life or freedom.[70] While the European Court of Human Rights has held that article 6 on the right to a fair trial does not apply to deportation or extradition proceedings,[71] it has held that, under article 13's right to an effective remedy, domestic courts cannot be overly deferential to the executive in carrying out a meaningful analysis of proportionality with respect to an expulsion order.[72] Akin to article 32(2) of the Refugee Convention, the court has established proper procedures for deportation hearings as set out in article 1(2) of Protocol 7.[73] The Refugee Convention is applied more restrictively and protection is denied or limited under article 1F, but international human rights law mitigates some of its harshness.

The European Union does impact directly on refugee protection through its Common European Asylum System (CEAS), particularly the Qualification Directive.[74] While the Qualification Directive claims in its preamble to be based on the Refugee Convention and Protocol that form the cornerstone of international refugee protection,[75] it does not faithfully transpose the text, and this is pertinent to the discussion here. Articles 12 and 14 of the Qualification Directive aim to implement article 1F, but do so along with articles 33(2) and 32.[76] Article 12(2) repeats article 1F, but broadens the reach of sub-paragraph (b) by extending the timeframe to permit exclusion for serious non-political crimes until status has been determined, not up to point of entry to the territory of the country of asylum. One of the most egregious glosses concerns preambular paragraph 37, which states that belonging to an association that supports international terrorism (or supports such an association) could be a threat to national security: mere membership of an organization is not usually sufficient for exclusion.[77]

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[68] See *R (on the application of Lord Carlile of Berriew QC and others) v Secretary of State for the Home Department* [2014] UKSC 10, para.57.
[69] ETS 117 (1984). See McAdam, above
[70] See *Saadi v Italy* App. No.37201/06, European Court of Human Rights (Grand Chamber), 28 February 2008. And see, *Othman*, above note 33**Error! Bookmark not defined.**, 252, 276, 292, 490 – the Anglo-Jordanian MoU is set out at pp.134-44. On diplomatic assurances generally, see Anderson and Walker, *Deportation with Assurances* Cm 9462, July 2017.
[71] *Maaoui v France* App. No. 39652/98, European Court of Human Rights (Grand Chamber), 5 October 2000.
[72] *Raza v Bulgaria* App. No.31465/08, European Court of Human Rights (Fifth Section), 63, 11 February 2010. In *Labsi*, above note 67, 137, the Court held that to be effective in deportation proceedings, starting a complaint under the ECHR must have a suspensive effect on domestic proceedings.
[73] *Geleri c. Roumanie* App. No.33118/05, 44, European Court of Human Rights (Third Section), 15 February 2011. Given that States can control entry to their territory and that criminal convictions can justify expulsion, the right to a family life under art 8 ECHR will generally not override exclusion under arts 1F, 33(2), or 32 Refugee Convention – see *Krasniqi v Austria*, App. No.41697/12, 46, European Court of Human Rights (Fourth Section), 25 April 2017.
[74] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 337/9. See also, UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (COM(2009)551, 21 October 2009). And see the Draft Qualification Regulation, COM(2016) 466 final, 13 July 2016, and UNHCR Comments on the European Commission Proposal for a Qualification Regulation, above note 54.
[75] Above, note 74, Preambular paras.3 and 4.
[76] Art.17 does much the same for subsidiary protection from serious harm, but that will not be discussed in the paper.
[77] See *JS (Sri Lanka)*, above note 12.

Sub-paragraphs (4), (5), and (6) of article 14 are the most problematic. Sub-paragraph (5) allows Member States of the EU to apply a provision before status has been decided that, under the Refugee Convention, can only be used against recognized refugees. While there may be situations where an applicant for refugee status has committed a particularly serious crime and would be a danger to the community, it may seem redundant to carry out an article 1A(2) determination only to immediately remove the guarantee of *non-refoulement*. However, article 14(5) of the Qualification Directive allows States to deny refugee status to someone with respect to whom there are mere 'reasonable grounds for regarding him or her as a danger to the security of the Member State in which he or she is present'. The Refugee Convention excludes under article 1F(c) where there are 'serious reasons for considering that' the applicant for refugee status 'is guilty of acts contrary to the purposes and principles of the United Nations', a much stricter demand. Sub-paragraph (5) is a significant threat to protection.

Secondly, does 'status granted to a refugee' refer to article 1A(2) of the Refugee Convention or refugee status as set out in article 2(e) of the Qualification Directive, leaving Refugee Convention status intact?[78] The reason that this is important is that article 33(2) leaves the person falling within the sub-paragraph a refugee (unlike article 1F), whereas article 14(4) of the Qualification Directive apparently ends status. This contradiction has been noted in domestic case law.[79] The individual would remain a refugee under the Refugee Convention and would remain, even within the EU, entitled to the guarantee of *non-refoulement* unless they were to fall within article 1F as well. That is part of the reasoning behind the conjoined Belgian and Czech cases,[80] where the CJEU held that those whose Qualification Directive status was revoked or refused under article 14(4) and 14(5) would continue to benefit from all the Refugee Convention rights set out in article 14(6), as well as the rights accorded to 'refugees' in the Refugee Convention.[81] Article 14(6) holds that even after losing Qualification Directive status, the rights in article 33 of the Refugee Convention (protection from *refoulement*), persist.

Conclusion

Exclusion is an unusual concept for the contemporary world of protection where international human rights law applies to all human beings no matter what they might have done.[82] It is a relic of the immediate post-war era which international refugee law preserves. However, its limits must be recognized: those that were understood at that time, and those that have been part of the progressive development of international refugee law since 1951. Even so, when thinking about the Refugee Convention, one needs to be aware of contemporary attitudes to those seeking to enter the territory of a State in circumstances that immigration law would not usually permit. Their entry is permitted because they qualify as refugees; States see article 1F, along with articles 33(2) and 32, as a way of preserving control of their own borders. Narrowly interpreting any restriction on a humanitarian provision has to be the proper approach to understanding article 1F and other constraints on article 1A(2).

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[78] See Boeles, *Non-refoulement*: is part of the EU's Qualification Directive invalid? <http://eulawanalysis.blogspot.com/2017/01/non-refoulement-is-part-of-eus.html?spref=tw>. Part of this debate turns on the parallel application of the Qualification Directive, above note 74, and Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (hereafter, Returns Directive) – see also, *Case C-562-13 Abdida*, Judgment of the Court (Grand Chamber), 18 December 2014. To a large extent, this is a question of EU law and not pertinent to the interpretation of the Refugee Convention.

[79] In *EN and KC v Secretary of State for the Home Department* [2009] EWCA Civ 630, 62-65. And see *IH (s.72; 'Particularly Serious Crime') Eritrea v Secretary of State for the Home Department* [2009] UKAIT 00012.

[80] Above note 15, paras.99-100.

[81] Above note 15, para.105.

[82] *Cf.* Chetail, in this volume, chapter X, who argues that the Convention is redundant. Where individuals can access human rights treaty bodies, there may be some justification for this assertion, but globally a narrow interpretation of the Refugee Convention may be the only form of protection. See also, Jane McAdam, *Complementary Protection in International Refugee Law*, OUP 2007, Ch.6.