Part V The Scope of Refugee Protection, Ch.39 Exclusion

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(p. 711) Chapter 39 Exclusion

1. 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 UDHR 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 UNHCR's 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 viewed interpreting the Convention as part of its article 35 supervisory function, while recognizing that Contracting States' courts would also 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 (p. 712) canons of interpretation.[1] When it is remembered that the Convention will often have been incorporated into domestic law, often in a language different from the original official English and French texts, and, generally, as part of a State's immigration control regime rather than as part of a *protection* framework, the scope for variation and disagreement is clearly 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 has 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 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] 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] Therefore, 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), (p. 713) and 32 are often fused in domestic practice.[6] States often regard these provisions as a suite of measures enabling the deportation of refugees, a view that 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 Refugee 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. In sum, to focus just on exclusion, as much previous scholarship has done, misses the context in which these provisions are applied. As such, this chapter seeks to provide a more comprehensive framework for their analysis.

2. Background to Article 1F

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]

(p. 714) First and foremost, if an individual falls within article 1F, then that person cannot be a refugee. Since the benefits of the Refugee Convention are only accorded to refugees and, in varying degrees, to 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 article 33(2) and, more so, article 32.

According to the *travaux préparatoires*, two purposes were sought to be achieved through article 1F: that serious transgressions prior to entry should bar an applicant from refugee status, and that 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 (CJEU), article 1F is also exhaustive; there are no further grounds for exclusion.[15]

3. Content of Article 1F

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 con(p. 715) tinuing 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.

a. 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] they 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 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 *bis* 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 in article 7(1) of the Rome Statute does not indicate a common understanding.

(p. 716) 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 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 I 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.[24] However, since *Tadić*,[25] it has been accepted that breaches of either could give rise to individual criminal responsibility. Thus, given the principle of *nullum 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 she has committed a war crime, a crime against humanity, or aggression, as defined.

b. Article 1F(b)

The concept of the political offence comes from extradition law, which, during the nineteenth century, developed an exception for fugitive offenders where the crime for which their surrender was sought was political in character.[26] Overthrowing a government (p. 717) was originally seen as the archetypal political offence.[27] 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 twentieth 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 prosecution or 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*,[28] 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.'[29] 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 she would fall within article 1F(b) of the Refugee Convention and forfeit her/his protection under the treaty.

The overlap between serious non-political crime and particularly serious crime in article 33(2) is clear, but the focus must be on 'particularly', not 'non-political', since a particularly serious 'political' crime committed in 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 left undefined, but it ought to be interpreted in its context,[30] that is, it should be compared with war crimes, crimes against humanity, crimes against peace, (p. 718) 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 certain behaviour as a 'serious' crime is indicative that it should be regarded as potentially falling within article 1F(b).

c. 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,[31] 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.[32]

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,[33] articles 1F(a) and 1F(c) can be applied to deny refugee status where it had previously been properly accorded.[34] 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.[35]

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.[36]

(p. 719) d. Burden and Standard of Proof

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 she 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.[37]

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'.[38] 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 that entails 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.[39]

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.[40] 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.[41]

(p. 720) e. 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.[42] Command and superior responsibility suffice.[43] Attempts and conspiracies are enough to satisfy article 1F, but not mere membership of a group.[44] 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.[45]

Joint criminal enterprises (JCEs) 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.[46] 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.[47]

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*,[48] the accused were the principal suppliers of Zyklon B to the concentration camps in Nazi-controlled territories east of the Elbe.[49] This requirement is not settled in international criminal law, and exclusion hearings, which should be more protection-oriented, may or may not adopt it.

International criminal law on aiding and abetting is not clear. The ICTY adopted a singular and very restrictive approach. In *Prosecutor v Perišić*, 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.[50] Subsequently, in (p. 721) *Prosecutor v Taylor*,[51] 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 adopt an autonomous understanding appropriate to the particular process.[52] 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'.[53]

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 article 1F is a limitation on a humanitarian provision, it must be interpreted restrictively, namely, in favour of the applicant for refugee status.[54]

f. 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.[55] 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 (p. 722) 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,[56] and both international human rights law[57] 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.[58] 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,[59] although sometimes that case is overstated.[60] 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.[61] Nevertheless, as regards article 1F, the weight of jurisprudence from different jurisdictions is that there is no proportionality test.

4. Regional Variations

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

a. Africa

Articles I(4), I(5), and III of the OAU Convention are pertinent to this discussion. Paragraphs I(4) and I(5) are similar but not identical to article 1F of the Refugee (p. 723) 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 sight, 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 that have been violated 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 the danger to the security limb of article 33(2). 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] (p. 724) 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.

b. Europe

Europe has a complex set of multilayered 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 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 1, Protocol 7)[69] have all been prayed in aid. The court has also 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 on the 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 (p. 725) 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 (EU) impacts 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, which 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) on serious non-political crimes by extending the timeframe to permit exclusion until status has been determined, rather than only up to the 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 or supporting an association that supports international terrorism could be a threat to national security: mere membership of an organization is not usually sufficient for exclusion.[77]

Paragraphs (4), (5), and (6) of article 14 are the most problematic. Paragraph (5) allows Member States of the EU to apply a provision before status has been decided, which, 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. Thus, paragraph (5) is a significant threat to protection.

(p. 726) Secondly, does 'status granted to a refugee' refer to article 1A(2) of the Refugee Convention or to refugee status as set out in article 2(e) of the Qualification Directive, leaving Refugee Convention status intact?[78] The importance of this is that article 33(2) leaves the person falling within the sub-paragraph as a refugee (unlike article 1F), whereas article 14(4) of the Qualification Directive apparently ends this 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.

5. 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 that international refugee law preserves. However, its limits must be recognized: those that were understood at that time, and those that are 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 (p. 727) 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. Requiring a narrow interpretation of restrictions on humanitarian provisions has to be the proper approach towards article 1F and other constraints on article 1A(2), advancing arguments derived from human rights and international criminal law in the twenty-first century, alongside fundamental principles of criminal justice: benefit of the doubt, expiation, and constraining the scope of participation.

Footnotes:

1 Guy S Goodwin-Gill, 'The Search for the One, True Meaning…' in Guy S Goodwin-Gill and 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.

3 On national security, see also arts 9 and 28.

4 See Bertrand Ramcharan, *Human Rights and Human Security* (Brill 2002); David Forsythe, *Human Rights in International Relations* (4th edn, CUP 2017).

5 See Chapter 50 in this volume.

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', HCR/GIP/03/05 (4 September 2003) see also accompanying Background Note. And see *Abramov v Minister for Justice, Equality and Law Reform* [2010] IEHC 458.

7 UNHCR (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 (but who should still benefit from *non-refoulement*).

8 See Chapters 11 and 36 in this volume.

[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, '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 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] UNHCR (n 6).

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

[12] See Standing Committee of the Executive Committee of the High Commissioner's Programme, 'Note on the Exclusion Clauses', EC/47/SC/CRP.29 (30 May 1997) para 3; see also Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the 24th Meeting (27 November 1951) UN doc A/CONF.2/SR.24, 4–11 (statements of M Herment, Belgium and Mr Hoare, UK).

[13] See Chapter 36 in this volume.

[14] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/1P/4/ENG/REV.4 (1979, reissued 2019). 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, [2011] 1 AC 284, but note para 2 on this point.

[15] Joined Cases C-391/16, C-77/17 and C-78/17 *M v Ministerstvo vnitra, X v Commissaire général aux apatrides et aux apartrides* [2019] OJ C255/2, para 76.

[16] There is not so much an overlap between these articles as a convergence of influences and interactions, like the wakes of three speedboats affecting three separate water skiers on some *Escher-ian* lake on three different planes—see MC Escher, 'Relativity' <http://www.mcescher.com/lw-389/> accessed 13 November 2019.

[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 Council Directive (EC) 2004/38 on the Right of Citizens of the Union and their Family Members to Move and Reside Freely Within the Territory of the Member States Amending Regulation (EEC) No 1612/68 and Repealing Directives 64/221/EEC, 68/221/EEC, 72/360/EEC, 73/148 EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEc and 93/96/EEC [02004] OJ L158/77. cf Joined Cases C-331/16 and C-366/16 *K v Staatssecretaris van Veiligheid en Justitie, HF v Belgische Staat* (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 International Law Commission, 'Fourth Report on Crimes against Humanity by Sean D Murphy, Special Rapporteur', UN doc A/CN.4/725 (18 February 2019) (referred to the Drafting Committee, 7 May 2019). Of course, genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 would count as a 1F crime against humanity.

19 See Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute), art 25(3)(e).

20 See *Prosecutor v Ljube Boškoski and Joran Tarčulovski*, Case No IT-04-82-A ICTY (19 September 2010) paras 19ff, 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 also, interestingly, that the governmental forces were 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 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (First Geneva Convention); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed forces at Sea (adopted 12 August 1949, entered into force 21 October 1951) 75 UNTS 85 (Second Geneva Convention); Geneva Convention relative to the Treatment of Prisoners of War (adopted August 12 1949, entered into force 21 October 1951) 75 UNTS 135 (Third Geneva Convention); Geneva Convention relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1951) 75 UNTS 287 (Fourth Geneva Convention).

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 (Additional Protocol I).

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

24 Eg. Fourth Geneva Convention (n 21) art 3; Protocol Additional to the Geneva Convention of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (Additional Protocol II).

25 *Duško Tadić* (n 23).

26 See Geoff Gilbert, *Responding to International Crime* (Martinus Nijhoff 2006) especially ch 5.

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

28 *T v Secretary of State for the Home Department* [1996] UKHL 8, [1996] AC 742, 785–6 (Lord Lloyd).

29 *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).

30 See Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (Vienna Convention) art 31. 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, and in furtherance, of a political disturbance, not too remote from the ultimate goal of the organization to which the applicant belongs, and is proportionate; *T v Secretary of State for the Home Department* (n 28); *In re Nappi* [1952] 19 ILR 375 (Swiss Federal Tribunal); *Watin* (n 29); *Pavan* (n 29). Given that part of that test is that the crime in question ought not to be too remote from the ultimate goal of the organization to change the political environment in a State, then quite clearly these will be 'serious' just to pass that threshold.

31 See 1950 Statute (n 11).

32 *Georg K v Ministry of the Interior* [1969] 71 ILR 284 (Austrian Admin Court); *Al-Sirri and DD (Afghanistan) v Secretary of State for the Home Department* [2012] UKSC 54, [2013] 1 AC 745.

33 See UNHCR (n 6).

34 See also *Othman (aka Abu Qatada) v Secretary of State for the Home Department* [2007] UKSIAC 15/2005, para 100.

35 See *Canadian Immigration and Refugee Protection Act*, SC 2001, c 27, ch 1, ss 33–43.

36 See *M47/2012 v Director General of Security* (2012) 251 CLR 1, 82 (Hayne J). See also *VV v Secretary of State for the Home Department* [2007] UKSIAC 59/2006 where, from the open evidence, virulent language in his will and two CDs with terrorist information was deemed sufficient.

37 See UNHCR (n 6) para 34. See also the requirements in art 32(2) of the Refugee Convention, where the consequences are not as serious.

38 *Al-Sirri v Secretary of State for the Home Department* [2009] EWCA Civ 222, [2009] Imm AR 115, para 33; *JS (Sri Lanka)* (n 14) 39; *Al-Sirri and DD* (n 32) 75, following UNHCR (n 6) para 34.

39 See UNHCR (n 14) paras 203–4; UNHCR (n 6). See also *Al-Sirri* (n 38) 27 (Sedley LJ).

40 See Michael Bliss, ' "Serious Reasons for Considering": Minimum Standards of Procedural Fairness in the Application of the Article 1F Exclusion Clauses' (2000) 12 (supp) IJRL 92.

41 See *Al-Sirri* (n 38) para 33; *M47* (n 36) para 319. Our thanks are due to Professor Hélène Lambert on this point.

42 See Rome Statute (n 19).

43 ibid art 28.

44 See *JS (Sri Lanka)* (n 14) 38, 49.

45 With respect to genocide, incitement should also be recognized, Rome Statute (n 19) art 25(3)(e).

46 Rome Statute (n 19).

47 An example of JCE III would be where an act by one of the perpetrators, outside the common plan, can still be considered a natural and foreseeable consequence of the common

purpose and the perpetrator willingly took that risk, *Prosecutor v Ntakirutimana and Ntakirutimana*, Case No ICTR-96-10-A and ICTR-96-17-A (13 December 2004) paras 463–6.

48 Case No 9, *Trial of Bruno Tesch and Two Others* (1–8 March 1946) UNWCC, 1 LRTWC 93, 103.

49 Miles Jackson, *Complicity in International Law* (OUP 2015). See also Case No 10, *The United States of America v Alfried Krupp and Others* (Trials of War Criminals before the Nuremberg Military Tribunals, 1948); Case No 58, *Trial of Krupp von Bohlen and Others* (17 November 1947–30 June 1948) UNWCC, 10 LRTWC 69.

50 Case No IT-04-81-A ICTY (28 February 2013) para 30 fn 76. See also paras 37–40 and 42. cf *Prosecutor v Šainović, Pavković, Lazarević and Lukić*, Case No IT-05–87A, ICTY (23 January 2014).

51 Case No SCSL-03-01-A (26 September 2013) paras 466ff. See also ibid paras 2 and 4 (Joint Separate Opinion of Judges Meron and Agius).

52 *Attorney-General (Minister of Immigration) v Tamil X* [2010] NZSC 107 para [32]–[39], [70].

53 *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 SCR 678 para 92 (emphasis added). See also *AA-R (Iran) v Secretary of State for the Home Department* [2013] EWCA Civ 835, 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.’

54 See *R v Secretary of State for the Home Office, ex parte Adan and Aitseguer* [2001] 2 AC 477, 517 (Lord Steyn).

55 UNHCR (n 6) para 24; UNHCR (n 14) para 156; UNHCR, ‘Comments on the European Commission Proposal for a Qualification Regulation: COM (2016) 466’ (February 2018) 20 <http://www.refworld.org/docid/5a7835f24.html> accessed 13 November 2019. See also Sibylle Kapferer, ‘Exclusion Clauses in Europe—A Comparative Overview of State Practice in France, Belgium and the United Kingdom’ (2000) 12 (supp) IJRL 195, 217; *SAM v BFF*, Swiss Asylum Board (27 November 1992); Gilbert (n 9) 450–5.

56 Sir Elihu Lauterpacht and Daniel Bethlehem, ‘The scope and content of the principle of *non-refoulement*: Opinion’ in Feller, Türk, and Nicholson (eds) (n 9). See also Chapter 50 in this volume; Cathryn Costello and Michelle Foster, ‘Non-refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test’ (2015) 46 Netherlands Yearbook of International Law 273. This is even more pertinent for proportionality in relation to article 33(2).

57 *Chahal v UK*, App No 70/1995/576/662 (ECtHR, Grand Chamber, 11 November 1996) 73. See also International Law Commission (n 18) 49–52 regarding draft art 5 of the Draft Articles on Crimes against Humanity.

58 See eg International Convention for the Suppression of Terrorist Bombing (adopted 15 December 1997, entered into force 23 May 2001) 2149 UNTS 256.

59 See Joined cases C-57/09 and 109/09 *Bundesrepublik Deutschland v B and D* [2010] ECR I -10,979. cf *Al-Sirri and DD (Afghanistan)* (n 32) 16, and *Ra 2014/01/0154* (Austrian Supreme Administrative Court, 21 April 2015), both cited in UNHCR (n 55) 19.

60 *B and D* (n 59) paras 109–11.

61 Conference of Plenipotentiaries (n 12) 13. However, this is not the present Scandinavian stance. cf *Ra 2014/01/0154* (n 59) reasserting the Danish position set out in the *travaux préparatoires*.

62 UNHCR (n 6) para 7; cf Marina Sharpe, *The Regional Law of Refugee Protection in Africa* (OUP 2018) ch 4. On regional protection generally, see Chapters 15 to 24 in this volume.

63 See Standing Committee (n 12) para 3.

64 UNHCR (n 6) fn 7.

65 *Organisation mondiale contre la torture, Association Internationale des juristes démocrates, Commission internationale des juristes, Union interafricaine des droits de l'Homme v Rwanda*, African Commission on Human and Peoples' Rights, Comm Nos 27/8, 46/91, 49/91, 99/93 (October 1996).

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

67 See *Labsi v Slovakia*, App No 33809/08 (ECtHR, 15 May 2012) para 117, the court held that it was to decide simply 'whether that individual's deportation [is] compatible with the [ECHR]'. Note that while the court is limited to deciding cases as regards 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.

68 See *R (on the application of Lord Carlile of Berriew QC and others) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] AC 945 para 57.

69 Protocol No 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 22 November 1984, entered into force 01 November 1988) ETS 117, art 1. See Chapter 36 in this volume.

70 See *Saadi v Italy*, App No 37201/06 (ECtHR, Grand Chamber, 28 February 2008); *Othman* (n 34) 252, 276, 292, 490; for the Anglo-Jordanian MoU see 134–44. On diplomatic assurances generally, see Home Office, *Deportation with Assurances* (Cm 9462, 2017).

71 *Maaoui v France*, App No 39652/98 (ECtHR, Grand Chamber, 5 October 2000); cf *QX v Secretary of State for the Home Department* [2020] EWHC 1221 (Admin).

72 *Raza v Bulgaria*, App No 31465/08 (ECtHR, 11 February 2010) 63. In *Labsi* (n 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 v Romania*, App No 33118/05 (ECtHR 15 February 2011) 44. 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 of the Refugee Convention: see *Krasniqi v Austria*, App No 41697/12 (ECtHR, 25 April 2017) 46.

74 See EU Qualification Directive. 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' (July 2010). See also European Commission, 'Proposal for a Regulation of the European Parliament and of the Council 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 and Amending Council

Directive 2003/109/EC of 25 November 2003 Concerning the Status of Third-Country Nationals Who Are Long-Term Residents' COM (2016) 466 final; UNHCR (n 55).

75 EU Qualification Directive, preambular paras 3 and 4.

76 Article 17 does much the same for subsidiary protection from serious harm, but that will not be discussed in this chapter.

77 See *JS (Sri Lanka)* (n 14).

78 See Pieter Boeles, 'Non-refoulement: Is Part of the EU's Qualification Directive Invalid?' (*EU Law Analysis*, 2017) <http://eulawanalysis.blogspot.com/2017/01/non-refoulement-is-part-of-eus.html?spref=tw> accessed 15 November 2019. Part of this debate turns on the parallel application of the EU Qualification Directive, 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 [2008] OJ L348/98; see also Case C-562–13 *Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v Moussa Abdida* (GC, 18 December 2014). To a large extent, this is a question of EU law and is not pertinent to the interpretation of the Refugee Convention.

79 In *EN (Serbia) and KC (South Africa) v Secretary of State for the Home Department* [2009] EWCA Civ 630, [2010] QB 633, 62–5. See also *IH (s.72: 'Particularly Serious Crime') Eritrea v Secretary of State for the Home Department* [2009] UKAIT 00012.

80 See *M v Ministerstvo vnitra* (n 15) paras 99–100.

81 ibid para 105.

82 See also Chapter 11 in this volume; Vincent Chetail, 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law' in Ruth Rubio-Marín (ed), *Human Rights and Immigration* (OUP 2014) 37; Jane McAdam, *Complementary Protection in International Refugee Law* (OUP 2007) ch 6.