

# Ending Exclusion under Article 1F of the Refugee Convention and Advancing International Justice\*

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## **Introduction**

Any utopic vision of the international refugee protection regime ought to include at least two core elements: one, all those who are genuinely in need of refugee protection would receive international protection; and two, all those who are responsible for criminality, especially, serious international crimes, would be held accountable for their crimes. Of course, if we lived in a utopian world there would be no refugees and no need for an international refugee protection regime. But since we live in a world where the numbers of forcibly displaced persons are at historically high levels and, seemingly, ever escalating,<sup>3</sup> then it is patently obvious that we live in a world that is far from utopian. In fact, the 2015 - 2016, mass influx of asylum seekers in Europe and elsewhere has spurred the search for new approaches and reforms to the current international refugee protection regime.<sup>4</sup> Indeed, the *New York Declaration for Refugees and Migrants* (UNGA, A/RES/71/1, 3 October 2016) and the subsequent *Global Compact on Refugees* and the *Global Compact for Safe, Orderly and Regular Migration*<sup>5</sup> sought to bring the international community together in an effort to address the unprecedented number of new forcibly displaced persons who were seeking asylum from the unbearable conditions of living within protracted armed conflict and other variants of extreme organized political violence and oppression.<sup>6</sup> In addition, the critics and reformers sought to address some of the more critical issues and concerns confronting the current international

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<sup>3</sup> UNHCR, *Global Trends, Forced Displacement 2020*, (Geneva: UNHCR, 2021) <https://www.unhcr.org/flagship-reports/globaltrends/>. See “Growing displacement despite pandemic.” (accessed April 21, 2022)

<sup>4</sup> As an example, see Alexander Betts and Paul Collier, *Refuge: Rethinking Refugee Policy in a Changing World* (Oxford: Oxford University Press, 2017); Centre for Governance Innovation, and the World Refugee Council, “A Call to Action: Transforming the Global Refugee System,” January 24, 2019, <https://www.cigionline.org/publications/call-action-transforming-global-refugee-system/>. (accessed April 21, 2022)

<sup>5</sup> UNGA, Report of the United Nations High Commissioner for Refugees, Part II, *Global Compact on Refugees*, A/73/2, 13 September 2018, <https://www.unhcr.org/excom/unhcrannual/5ba3a5d44/report-united-nations-high-commissioner-refugees-part-ii-global-compact.html>, and *Global Compact for Safe, Orderly and Regular Migration*, 13 July 2018, [https://refugeesmigrants.un.org/sites/default/files/180713\\_agreed\\_outcome\\_global\\_compact\\_for\\_migration.pdf](https://refugeesmigrants.un.org/sites/default/files/180713_agreed_outcome_global_compact_for_migration.pdf). (accessed April 21, 2022)

<sup>6</sup> James C. Simeon, “Time for a Reset to Address the Principal Cause of Asylum,” *RLI Blog on Refugee Law and Forced Migration*, April 26, 2021, <https://rli.blogs.sas.ac.uk/?s=Simeon>. (accessed April 21, 2022)

refugee protection regime such as States' efforts at limiting access to asylum and equitable burden sharing principally between the States in the Global North and South.<sup>7</sup>

Nonetheless, a more modest effort at seeking to advance a utopic vision and a more just international refugee protection regime is to seek to ensure that all those asylum seekers who are criminally liable are held accountable for their criminality and are prosecuted when there is sufficient reliable and trustworthy evidence on which the asylum seeker is likely to be convicted for their crimes. In short, the prosecution for the commission of serious international crimes ought to replace exclusion from refugee protection. The argument advanced here is that the exclusion clauses, Article 1F, specifically, of the *1951 Convention relating to the Status of Refugees*, may prevent persons from receiving refugee protection because of their criminal liability, but the exclusion clauses are inadequate for advancing international justice or to contributing to a more secure and peaceful world. Indeed, it can be argued that the current refugee status determination process does not serve the interest of prosecuting those who ought to be held to account for their serious international crimes.

The thesis presented here is that serious criminality ought to be part of the inclusionary portion of the *1951 Convention* that defines who ought to be a Convention refugee and not be part of its exclusionary portions. International justice can be best promoted and advanced when those who are responsible for serious criminality are brought to justice. This includes, of course, asylum seekers who have committed serious international crimes. Given the nature of serious international crimes or the *atrocities* crimes – war crimes, crimes against humanity, ethnic cleansing, and genocide<sup>8</sup> – that by definition or, more often than not, take place in situations of extreme political organized violence, that is, war or armed conflict, could well include potentially all those combatants who are trying to flee situations of protracted armed conflict.

### ***The Status Quo in Refugee Status Determination***

Refugee rights instruments are characterized by both inclusionary and exclusionary provisions. They define, in legal terms, who is and who is not a person in need of refugee protection. Those who meet the inclusionary portions of the definition of who is a person in need of protection are accepted as refugees unless they also fall within one of the exclusionary provisions. The foundation of the world's international refugee protection regime is premised on the *1951 Convention relating to the Status of Refugees* and its *1967 Protocol* that defines who is a refugee and who ought to be excluded from Convention refugee status.

One of these provisions, Article 1F, the so-called “Exclusion Clauses,” has been the subject of much criticism and contention in terms of both its application and interpretation in determining whether a refugee applicant ought to be excluded from Convention refugee status. Some have even argued that Article 1F of the *1951 Convention* is not in keeping with modern international human rights law and that rather than enhancing the integrity and legitimacy of the international refugee protection system, it actually undermines it and that it can create injustices by excluding persons

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<sup>7</sup> James C. Hathaway is the leading critic in this regard, see <https://michigan.law.umich.edu/faculty-and-scholarship/our-faculty/james-c-hathaway>. (accessed April 21, 2022)

<sup>8</sup> United Nations, Office on Genocide Prevention and the Responsibility to Protect, “Responsibility to Protect,” <https://www.un.org/en/genocideprevention/about-responsibility-to-protect.shtml>. (accessed April 21, 2022)

from Convention refugee status who should not be excluded. Article 1F, it is then argued, ought to be set aside because international law has progressed and developed significantly since 1951 and that rather than excluding persons from refugee protection they should be prosecuted for their involvement in serious international crimes and not merely excluded from refugee protection. Situations of non-international armed conflict or civil war are the most prevalent in the world today. More than two-third of the world's refugees come from only five countries that have been wracked by protracted armed conflict that can last for decades and result in seemingly “endless wars.”<sup>9</sup> War and protracted armed conflict, with all its death and destruction and accompanying economic, social, and public health disruptions and turbulence, inevitably produces mass forced displacement.

The significance of prosecuting those who are responsible for the commission of serious international crimes for international justice and the promotion of international peace and security should not be lost in the turmoil and brazen disregard and trampling of millions of people's most fundamental human rights and respect for their human dignity, that also includes the right to peace itself.<sup>10</sup>

The advancement of international justice requires that those who have been victimized by engineered forced displacement in the form of extreme organized political violence<sup>11</sup> be treated in a “right and fair way” and all those who are responsible for their predicament be held to account and brought to justice through criminal prosecution. Ending impunity for serious international crimes that ‘shock the moral conscience’ of any decent human being should be the prime objective when it comes to advancing international justice and international protection.

### ***The Purpose of the Exclusion Clauses***

The “Exclusion Clauses,” Article 1F of the *1951 Convention relating to the Status of Refugees*, are intended to ensure, according to the UNHCR, the “integrity of the asylum concept” and that the perpetrators of heinous acts and serious common crimes are not granted refugee protection.<sup>12</sup> In short, the “Exclusion Clauses” “help to preserve the integrity of the asylum concept.”<sup>13</sup> Further, in the UNHCR's *2003 Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, it is argued “that certain acts are so grave as to render their perpetrators undeserving of international protection as

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<sup>9</sup>UNHCR, *Global Trends, Forced Displacement 2020*, (Geneva: UNHCR, 2021), <https://www.unhcr.org/60b638e37/unhcr-global-trends-2020>, p. 3. (accessed April 21, 2022)

<sup>10</sup> Donna J. Perry, Christian Guillermet Fernandez and David Fernandez Payana, “The Right to Peace from Ratification to Realization,” *Health and Human Rights Journal*, January 27, 2019, <https://www.hhrjournal.org/2019/01/the-right-to-peace-from-ratification-to-realization/>. (accessed April 21, 2022)

<sup>11</sup> Kelly M. Greenhill, “Strategic Engineered Migration as a Weapon of War.” *Civil Wars*, vol. 10. no. 1. (March 2008): 6-21

<sup>12</sup> UNHCR, EC/47, SC/, CRP 29. “Note on the Exclusion Clauses,” UNHCR Standing Committee, 30 May 1997, <https://www.unhcr.org/excom/standcom/3ae68cf68/note-exclusion-clauses.html>. (accessed April 21, 2022)

<sup>13</sup> *Ibid.*

refugees.”<sup>14</sup> And the UNHCR also points out that the “obligations under international law may require that the person concerned may be criminally prosecuted or extradited.”<sup>15</sup>

Of course, it would be anomalous in the extreme for those who are responsible for serious international crimes to be given refugee status or refugee protection. Those who are responsible for creating refugees should not have the benefit of a convention intended for the protection of refugees. But does it then follow that all those who have committed serious international crimes be excluded formally from refugee protection altogether? Would it not be sufficient merely to find that such persons do not meet the legal definition of who is a Convention refugee or a person in need of refugee protection? In other words, should this not be incorporated directly within the legal definition of who is a refugee; that is, within the inclusionary provisions of the *1951 Convention*? It has been argued that those persons who are excluded from refugee protection can still be refugees but are simply not entitled to the benefits of refugee status that are found in the Refugee Convention. Not everyone agrees with this view, but it seems logical to think of it in these terms. From this perspective, exclusion means that you cannot receive the benefits of refugee protection even though you meet the definition. In fact, this is what UNHCR's mandate RSD process does. Those who are excluded cannot receive the benefits UNHCR provides to refugees. However, since the UNHCR is not a State, of course, it cannot prosecute individuals for the commission of serious international crimes. But, as noted, their Guidelines state that States may be obligated to prosecute those who are excluded.<sup>16</sup>

### ***The Critique of the “Exclusion Clauses***

Critics have taken issue with the UNHCR’s approach to the “Exclusion Clauses.” Ben Saul, for instance, has argued that “Human rights are *rights*, not privileges, and cannot be suspended for bad behaviour.”<sup>17</sup> And Satvinder Singh Juss has been highly critical of the use of terms such as “undeserving” and “unworthy” in refugee law.<sup>18</sup>

Still others have gone so far as to say that the “Exclusion Clauses” have outlived their purposes and ought to be removed. Justin Mohammed has argued that the “Exclusion Clauses” can

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<sup>14</sup> UNHCR, HCR/GIP/03/05, 4 September 2003, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*. [UNHCR - Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees \(HCR/GIP/03/05\)](#). (accessed April 21, 2022)

<sup>15</sup> *Ibid.*, p. 4, paragraph 8.

<sup>16</sup> UNHCR, HCR/GIP/03/05, 4 September 2003, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*. <https://www.unhcr.org/publications/legal/3f7d48514/guidelines-international-protection-5-application-exclusion-clauses-article.html>. As noted above, p. 4, paragraph 8. (accessed April 22, 2022)

<sup>17</sup> Ben Saul, “Protecting Refugees in the Global ‘War on Terror,’” (October 31, 2008). *Indian Juridical Review*, 2008, Sydney Centre for International Law Working Paper No. 3, Sydney Law School Research Paper No. 08/130, Available at SSRN: <https://ssrn.com/abstract=1292604>, p. 13. (accessed April 22, 2022)

<sup>18</sup> Satvinder Singh Juss, “Complicity, Exclusion, and the ‘Unworthy’ in Refugee Law,” *Refugee Survey Quarterly*, Volume 31, Issue 3, September 2012, pp. 1–39, <https://doi.org/10.1093/rsq/hds011>.

perpetuate injustices rather than uphold the integrity of the international refugee protection regime.<sup>19</sup>

In essence, Mohammed argues that both international human rights law and the international criminal law systems of today are not what they were in 1951 when the *Convention relating to the Status of Refugees* was negotiated under the auspices of the United Nations. There are many more international human rights instruments in place today, along with a full slate of international human rights, the *International Bill of Rights* that was established in 1966,<sup>20</sup> and international human rights and criminal courts such as the European Court of Human Rights, Inter-American Court of Human Rights, the African Court of Justice and Human Rights, the International Criminal Court, and numerous UN special and *ad hoc* criminal courts such as the International Criminal Tribunal of the Former Yugoslavia and the International Criminal Tribunal for Rwanda that were not yet in existence nor were they even contemplated some 70 years ago.<sup>21</sup> The rich international law jurisprudence that exists today was certainly not present in 1951.

Mohammed argues that there was no judicial mechanism that had jurisdiction over serious international crimes in the early 1950s. Moreover, universal jurisdiction, that allows States to prosecute individuals for serious international crimes, was yet to be applied to any degree. Universal jurisdiction became an important principle in international law in 1949.<sup>22</sup>

What is implied here is that the “Exclusion Clauses” of the *1951 Convention* are antiquated and that if the Refugee Convention were negotiated today, they would not be required. Indeed, whenever the “Exclusion Clauses” are applied today, they can potentially conflict with other conventions such as the *1989 Convention on the Rights of the Child*, as in the case of child soldiers, or the *1984 Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment and Punishment*, when it involves those who are criminally liable for acts of torture. What is required is the proper application and interpretation of international treaties as outlined by the *1969 Vienna Convention on the Laws of Treaties*. State parties to these international instruments must always take into consideration the most recent relevant treaties and how they might modify the interpretation of the *1951 Convention*. Clearly, this complicates the legal application and interpretation process of a refugee law decision-maker immensely and, consequently, increases the potential for errors to be made. Indeed, it has been found that the judicial review grant rate for cases involving the exclusion clauses is higher for these cases than on average.<sup>23</sup>

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<sup>19</sup> J. Mohammed, “Exclusion in International Refugee Law: 20<sup>th</sup> Century Principles for 21<sup>st</sup> Century Practice,” CARFMS May 2011, McGill University, <https://carfms.org/wp-content/uploads/2014/11/Mohammed.ExclusionRefugeeLaw.doc.pdf>. (accessed April 22, 2022)

<sup>20</sup> UNHCHR, (Fact Sheet No. 2 (Rev.), *The International Bill of Rights*, <https://www.ohchr.org/sites/default/files/Documents/Publications/Compilation1.1.en.pdf> (accessed April 22, 2022)

<sup>21</sup> UN Documentation: International Law, “Courts and Tribunals,” Dag Hammarskjöld Library, <https://research.un.org/en/docs/law/courts> and The United States Department of Justice, International Courts, <https://www.justice.gov/jmd/ls/international-courts>. (accessed April 22, 2022)

<sup>22</sup> “Universal Jurisdiction,” Trial International, <https://trialinternational.org/topics-post/universal-jurisdiction/>. (accessed April 22, 2022)

<sup>23</sup> James C. Simeon, “The Application and Interpretation of International Humanitarian Law and International Criminal Law in the Exclusion of those Refugee Claimants who have Committed War Crimes and/or Crimes Against Humanity in Canada,” *International Journal of Refugee Law*, Volume 27, Issue 1, March 2015, pp. 75–106, <https://doi.org/10.1093/ijrl/eev001>.

It is also relevant to point out that Article 33(2) of the *1951 Refugee Convention* allows for persons who are determined to be in need of refugee protection but are subsequently found to be a danger to national security and/or a threat to their host community, to be refouled, contrary to contemporary international norms and laws with the possible result of great injustices. This, undoubtedly, contradicts the customary international law principle of non-refoulement. Nonetheless, the Supreme Court of Canada upheld the constitutionality of doing so under exceptional circumstances and under appropriate procedures in its landmark judgement in *Suresh*.<sup>24</sup>

Taking all of the foregoing into consideration, Mohammed goes so far as to call for scrapping the “Exclusion Clauses” by means of a new Protocol to the *1951 Convention* that would repeal Article 1F. Accordingly, if Article 1F were repealed and Article 1A(2) were amended to read that the person has never been responsible for serious criminality such persons could not be determined to be Convention refugees. If there is sufficient reliable and trustworthy evidence of the refugee applicants’ criminal responsibility, then they ought to be prosecuted for their alleged crimes. If upon prosecution, the refugee applicants are found to be not guilty of the alleged offences then they can be reconsidered for refugee protection.

It is important to note that under Article 1F the standard of proof for the exclusion clauses is “serious reasons for considering.”<sup>25</sup> This is a lower standard of proof than a balance of probabilities, the civil standard of proof. Critics of the exclusion clauses have argued that such standards of proof for excluding refugee applicants on alleged criminality are unfair, particularly, given the criminal law guarantees are absent in the administrative law applications of immigration and refugee law and practice.<sup>26</sup> Those who have critiqued the exclusion clauses on these grounds would presumably support a process of refugee law adjudication that allows the criminal courts to determine a person’s guilt or innocence with respect to serious criminality.

But what of those refugee applicants who are not prosecuted and where there is not sufficient trustworthy and reliable evidence upon which to base criminal charges and/or to obtain a conviction? This would likely only cover a small and diminishing group of refugee applicants as the legal standard for those who are not included in the definition of Convention refugee would rise to that akin to determining when someone ought to be prosecuted for a serious crime.

### ***The Challenges of Prosecuting the Perpetrators of Serious Criminality***

The prosecution and conviction of those responsible for serious criminality is difficult by design. The intention is as much to protect the innocent from a miscarriage of justice as it is to ensure that the person who is actually responsible for the crime, to a very high degree of certainty, is held

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<sup>24</sup> *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1937/index.do>. (accessed April 22, 2022)

<sup>25</sup> Article 1F, *1951 Convention relating to the Status of Refugees*, Geneva, 28 July 1951. In force 22 April 1954, 1989, UNTS 137.

<sup>26</sup> Jennifer Bond, “Excluding Justice: The Dangerous Intersection between Refugee Claims, Criminal Law, and ‘Guilty’ Asylum Seekers,” *International Journal of Refugee Law*, Volume 24, Issue 1, February 2012, Pages 37–59, <https://doi.org/10.1093/ijrl/ee039>. (accessed April 22, 2022)

accountable for their criminal liability and that the guilty person pays their debts to society, at large, as well as to the person or to those persons who have been so victimized.

Mohammed makes the observation that in the intervening years since the *1951 Convention* came into force the experience of States in the prosecution of those who were charged with serious international crimes has proved to be costly, time consuming, and often, ineffective with few people actually being convicted. These are clearly some of the downsides of pursuing the prosecution of individuals suspected of serious international crimes. However, it is also important to be mindful of the fact that overcoming the novelty of doing so and given the necessity of developing the appropriate investigative and prosecutorial methods and procedures necessary for gathering credible and trustworthy evidence for the commission of serious international crimes, takes time and effort to develop before its effectiveness can come into its own and have its desired impact in terms of the number of successful prosecutions and convictions. Sadly, many countries' efforts in this regard, including Canada's, have been wanting.<sup>27</sup>

Mohammed further posits that "universal jurisdiction" allows States to prosecute refugee claimants if they are allegedly liable for the commission of serious international crimes. Nevertheless, he also points out that it is important to note that given the high cost of investigating and prosecuting such cases, along with the high standard of proof needed to obtain a criminal conviction, States prefer to use immigration measures to remove refugee claimants suspected of criminality rather than to prosecute them for their serious international crimes. While this may be a cost-effective and a politically more satisfying method, at least for some politicians, for dealing with those refugee claimants suspected of criminality it does not deal with the serious international crimes that were committed.<sup>28</sup> Nonetheless, the fight against impunity and the necessity of achieving international justice rightly demands it.

### ***Advancing of International Justice***

The establishment of the International Criminal Court (ICC) in 1998 was a highly significant step forward in the fight to end impunity through international criminal justice. The ICC aims to prosecute those who are responsible for the world's most serious international crimes: genocide; war crimes, crimes against humanity; and the crime of aggression.<sup>29</sup>

No one can have impunity for the commission of these most heinous and serious international crimes. Moreover, the ICC has a broader role to uphold international justice and to contribute to

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<sup>27</sup> Amnesty International, "No Safe Haven: New Report Highlights Canada's Failure to Prosecute Individuals Accused of War Crimes and Crimes Against Humanity," September 8, 2020, <https://www.amnestyusa.org/reports/no-safe-haven-new-report-highlights-canadas-failure-to-prosecute-individuals-accused-of-war-crimes-and-crimes-against-humanity/>. (accessed April 22, 2022)

<sup>28</sup> Elies van Sliedregt, "Universal Jurisdiction: 'Each to Their Own Jurisdiction'?" McLaughlin College Lunch Time Talks Series, Wednesday, November 3, 2021, <https://www.yorku.ca/colleges/mclaughlin/2021/10/26/universal-jurisdiction-each-to-their-own-jurisdiction-november-3-2021/>. See the YouTube presentation at <https://www.youtube.com/watch?v=vqNBjTRbAjA>. (accessed April 22, 2022)

<sup>29</sup> *The Rome Statute of the International Criminal Court*, Done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, vol. 2187, No. 38544, Depository: Secretary-General of the United Nations, <http://treaties.un.org>, Article 5, Crimes within the Jurisdiction of the Court, and Articles 6 to 8 *bis*. ICC, About the Court, <https://www.icc-cpi.int/about>. (accessed April 22, 2022)

the achievement and maintenance of long-term peace and security. Indeed, the ICC states on its website that, “Justice is a key prerequisite for lasting peace.”<sup>30</sup>

International justice has been defined simply as States treating people in a “right and fair way.” By prosecuting those who are responsible for the commission of the world’s most serious international crimes, whether by national or international courts, and holding the perpetrators accountable for their criminal actions, international justice is being upheld and served.

States have an obligation to either extradite or to prosecute, the *aut dedere aut judicare* principle in International Criminal Law, those who have committed serious international crimes. Indeed, there is a positive duty on States to investigate, prosecute, and punish all those who have committed serious international crimes.<sup>31</sup>

The international courts that deal with the most serious international crimes play a key role in supporting peace and security through holding those who commit *atrocities crimes* accountable for the harm that they have inflicted on their victims – people – but also the harm that they have inflicted on the international community as a whole.<sup>32</sup>

To advance international justice, those who are responsible for serious international crimes must be prosecuted and held accountable for their criminal liability. This includes, of course, those who are seeking refugee protection. One way of ensuring this is to prosecute all those who have allegedly committed serious international crimes and who are found not to fall within the amended definition of who is a Convention refugee. However, there must, of course, be sufficient reliable and trustworthy evidence to prosecute such persons and where it is reasonable to expect that such persons would be likely convicted for their crimes. It is anticipated that the numbers of those who will be prosecuted for their alleged serious international crimes will likely not be high. But these prosecutions must proceed.

### ***Serious Criminality as a Bar to Refugee Protection***

While the “Exclusion Clauses,” Article 1F, could be set aside, it would still be important to specify in the definition of who is a refugee, Article 1A(2), that only those who are not liable for serious international criminality can be determined to be refugees. This is an obvious, but no less crucial point.

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<sup>30</sup> ICC, About the Court, <https://www.icc-cpi.int/about>. See also the Preamble of the Rome Statute of the International Criminal Court, “**Recognizing** that such grave crimes threaten the peace, security and well-being of the world,” *Rome Statute of the International Criminal Court*, 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, vol. 2187, No. 38544, Depository: Secretary-General of the United Nations, <http://treaties.un.org>, (accessed April 22, 2022)

<sup>31</sup> See among other international instruments, The Preamble of the *Rome Statute of the International Criminal Court*, 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, vol. 2187, No. 38544, Depository: Secretary-General of the United Nations, <http://treaties.un.org>, wherein it states, “**Recalling** that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,” and “**Emphasizing** that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.” (accessed April 22, 2022)

<sup>32</sup> James C. Simeon, “Violations of fundamental human rights, serious international crimes, and the prosecution of those who have been excluded from refugee protection,” in *Serious International Crimes, Human Rights, and Forced Migration*, ed. James C. Simeon (Abingdon, Oxon: Routledge, 2022), pp. 95-119.

Those who are responsible for the commission of serious international crimes simply cannot be Convention refugees or persons in need of protection, by definition. Hence, this provision ought to be included within Article 1A(2), the inclusionary provisions of the Refugee Convention, and not remain as a separate Exclusion Clause. This would be a more effective means of dealing with those who apply for asylum but are responsible for the commission of serious international crimes. And such persons should be prosecuted and, if they are not convicted, then they can proceed with their application for refugee protection.

Significantly, whenever there is sufficient reliable and trustworthy evidence to prosecute those who are responsible for serious international crimes then it is clear that there is a positive obligation on the part of States to do so. Hence, international justice would not only be served through the prosecution of those who are responsible for serious criminality, but they would also be held accountable for their crimes through their criminal prosecution and possible conviction. This would help to ensure that there is no impunity for serious international criminality. At the same time, those who are found guilty of such crimes would be paying their debts to not only their victims but the international community as a whole.

### ***Final Reflections***

A utopic vision of international refugee protection would ensure that all those in need of refugee protection would receive it, and all those who are responsible for the commission of serious criminality, and most assuredly serious international crimes or the *atrocities crimes*, would be prosecuted for the harm they have inflicted on persons as well as their society and the international community as a whole. The present configuration of exclusion from refugee protection through Article 1F is dated and can result in injustices and the denial of Convention refugee status for those who ought to receive international protection. The exclusion clauses are intended to exclude all those who are responsible for serious international crimes in order to maintain the legitimacy and the integrity of the international refugee protection regime while ensuring that those who are responsible for such serious crimes are brought to justice. However, there are more simple, straightforward, and effective ways to accomplish both of these utopic aspirations and, that is, to include a provision within Article 1A(2) of the *1951 Convention* that precludes anyone from Convention refugee status and refugee protection who is liable for serious criminality. Hence, only those refugee applicants who are not responsible for serious criminality would meet the legal definition of who is a refugee. Those persons who do not meet this legal definition of who is a refugee would, rather than being excluded from Convention refugee status *per se*, would be found not to be a Convention refugee. Furthermore, in those instances where there is sufficient evidence to charge and to prosecute the person for their serious international crimes then States are obligated to do so. This would not only advance international justice but contribute to ending impunity for those who are responsible for their criminal liability.

The arguments presented here that Article 1F of the *1951 Convention* is antiquated and that it no longer aligns with contemporary international law norms and principles and could potentially result in injustices are at least thought provoking, if not compelling. Equally important are the arguments that those failed refugee claimants who are responsible for serious international crimes do not meet the new refugee definition proposed here and where the criminality is serious ought

to be prosecuted, where the evidence warrants it, in an effort to end impunity and to advance international justice that, ultimately, will contribute, no matter how small, to helping to maintain global peace and security. And, an international refugee protection regime of this nature should, ultimately, contribute to ending the seemingly never-ending and escalating world refugee crises.

## **Ending Exclusion from Refugee Protection and Advancing International Justice; A Commentary**

Joseph Rikhof<sup>33</sup>

### ***Introduction***

The criticism by James C. Simeon of the exclusion clause 1F of the 1951 *Refugee Convention* deserves serious attention as do the issues raised by the others in his article, namely Ben Saul, Satvinder Singh Juss and Justin Mohammed. Especially their concerns with the efficacy of the exclusion clause in view of the expanded reach of international human rights since the establishment of the *Refugee Convention* and the quest for international criminal justice for the most serious crimes known to humankind, namely aggression, genocide, war crimes and crimes against humanity has merit. However, before adopting any radical solution with respect to the exclusion clause, it would be useful to provide a broader context to the issues raised by them. This commentary attempts to do that by raising some questions regarding the assumptions set out in their examination of the human rights and international criminal justice framework. These questions are on three levels, namely conceptual, legal, and practical. The commentary will conclude with some overarching observations in respect to the criticisms raised and the proposal submitted.

### ***Conceptual Issues***

While no explicit connection is made between exclusion and international criminal justice by the authors just mentioned, it is useful to ensure that there is no doubt that the purposes of exclusion are rather different from criminal justice, either international or domestic. The Supreme Court of Canada, which has provided its views on all three exclusion clauses between 1998 and 2014, has set out the purposes of the exclusion clause both in general terms as well as for each specific clause.

The most recent iteration of the purpose of the exclusion clause, as a whole, was given by this court in 2014 in the *Febles* case<sup>34</sup> where it said:

The *Refugee Convention* is not itself an abstract principle, but an agreement among sovereign states in certain specified terms, negotiated by them in consideration of the entirety of their interests. In *R. (European Roma Rights Centre) v. Immigration Officer at Prague Airport*, [2004] UKHL 55, [2005] 2 A.C. 1, the U.K. House of Lords stated that the *Refugee Convention* “represent[s] a compromise between competing interests, in this case between the need to ensure humane treatment of the victims of oppression on the one hand and the wish of

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<sup>34</sup> *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68.

sovereign states to maintain control over those seeking entry to their territory on the other” (para. 15).<sup>35</sup>

With respect to exclusion clauses 1F(a) and 1F(c), the Supreme Court has ascribed similar purposes to them by saying for 1F(a) that:

As the Federal Court of Appeal recognized in *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433, at p. 445: “When the tables are turned on persecutors, who suddenly become the persecuted, they cannot claim refugee status. International criminals, on all sides of the conflicts, are rightly unable to claim refugee status.” In other words, those who create refugees are not refugees themselves: ... On the one hand then, if we approach art. 1F(a) too narrowly, we risk creating safe havens for perpetrators of international crimes — the very scenario the exclusion clause was designed to prevent. On the other hand, a strict reading of art. 1F(a) arguably best promotes the humanitarian aim of the *Refugee Convention*. ...<sup>36</sup>

And for 1F(c)

What is crucial, in my opinion, is the manner in which the logic of the exclusion in Article 1F generally, and Article 1F(c) in particular, is related to the purpose of the Convention as a whole. The rationale is that those who are responsible for the persecution which creates refugees should not enjoy the benefits of a Convention designed to protect those refugees.<sup>37</sup>

For 1F(b) additional purposes were identified, namely:

Excluding people who have committed serious crimes may support a number of subsidiary rationales — it may prevent people fleeing from justice; it may prevent dangerous and particularly undeserving people from entering the host country. However, Article 1F(b) cannot be confined to any of these subsidiary purposes. Excluding people who have committed crimes in other countries prior to seeking refugee protection may serve other state interests. It may help preserve the integrity and legitimacy of the refugee protection system, and, hence, the necessary public support for its viability. It may deter states from exporting criminals by pardoning them or imposing disproportionately lenient sentences while supporting their departure elsewhere as refugees. Finally, it may allow states to reduce the danger to their society from all serious criminality cases taken together, given the difficult task and potential for error when attempting to determine whether criminals from abroad (on whom they have more limited sources of information than on domestic criminals) are no longer dangerous. Whatever rationales for Article 1F(b) may or may not exist, its purpose is clear in excluding persons from protection who previously committed serious crimes abroad.<sup>38</sup>

On the other hand, the purposes of criminal law and justice are different from the ones just stated. The criminal law purposes as expressed in its sentencing principles. These principles are expressed as follows in the Canadian *Criminal Code*:

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<sup>35</sup> *Idem*, paras 27-29.

<sup>36</sup> *Ezokola v. Canada (Citizenship and Immigration)*, 2013 SCC 40, paras 34-36.

<sup>37</sup> *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982, para 63.

<sup>38</sup> *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68, para 36.

The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.<sup>39</sup>

Internationally, some of these goals are reflected more recently in the preamble of the *Rome Statute*, which indicates that one of its goals is “to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.”<sup>40</sup> The only possible “punitive” area related to persons who have been excluded is the fact that because they are not considered refugees they do not have the benefits set out in the *Refugee Convention* for persons with such a status, such as the right of association (article 15), employment (articles 17-19), housing (article 21), education (article 22), social security (article 24), freedom of movement (article 26) and most importantly, *non-refoulement*, the right not be expelled if in the country lawfully (article 32) or even without status (article 33). While one aspect of both exclusion law and criminal law is to give a voice and to support the victims of crimes, all other purposes and methods of exclusion law and criminal justice are different, which should be taken into account when attempting a reform of exclusion in refugee law.

### ***Legal Issues***

One of the main issues raised by James C. Simeon and others is the fact that human rights law has expanded greatly since the drafting of the *Refugee Convention* in 1951 and as a result of this development the exclusion clause in that Convention should be re-examined as a tool for international criminal justice. While it is true that the field of human rights is now much broader than in 1951, this general statement needs clarification to provide more context. This clarification involves three separate but interconnected legal issues.

The first issue is the fact that the insertion of the exclusion clause into the *Refugee Convention* was seen as an insular event, which is not the case. Apart from the circumstance that there is a direct connection between the 1948 *Universal Declaration of Human Rights (UDHR)* and the 1951 *Refugee Convention*,<sup>41</sup> the concerns with respect to persons with a criminal background who are

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<sup>39</sup> Section 718; for further details and jurisprudence regarding sentencing in Canada, see Kent Roach, *Criminal Law, Seventh Edition* (Irwin Law, 2018) at 522-535.

<sup>40</sup> Preambular paragraph 5.

<sup>41</sup> Article 14 of the UDHR says:

1. “Everyone has the right to seek and to enjoy in other countries asylum from persecution.

2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

This is the only provision in the *UDHR* which has any limitation of the rights contained in it; as well, the wording of article 14(2) was the starting point of the deliberations for the drafting of the *Refugee Convention* in 1950. For a background of the negotiations of the *UDHR*, see Joseph Rikhof, *The Criminal Refugee: The Treatment of Asylum*

seeking asylum, goes back as far as the very first time that the issue of asylum was raised in international law, from important philosophers such as Grotius, Pufendorff and Vattel<sup>42</sup> to the first international treaties dealing with refugees between the first and second World Wars, as well as shortly after the Second World War.<sup>43</sup>

Secondly, while more recent human rights treaties emphasize and expand on human rights originally set out in the *UDHR*, like the *Refugee Convention*, they often contain a balance between those rights and the responsibility of individuals, including when they have been involved in criminal activities. For instance, the *1966 International Covenant on Civil and Political Rights* states the following:

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.<sup>44</sup>

Similarly, in two conventions dealing with statelessness, an area related to refugee law,<sup>45</sup> the first one repeats the exclusion clause from the *Refugee Convention* so that States have no obligation to resolve the statelessness status of persons in their country<sup>46</sup> while the second has the same effect for persons who have been convicted of an offence against national security or have been sentenced to imprisonment for a term of five years or more on a criminal charge.<sup>47</sup>

Lastly, the *Convention on the Rights of the Child*, which has specifically used as an example of the connection between human rights and exclusion, contains two articles where children do not have unqualified rights, namely, articles 22(1) and 40(1). The first one states:

States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

While the second says:

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*Seekers with a Criminal Background in International and Domestic Law* (Republic of Letters Publishers, 2012) at 45-50; for a discussion of the debates regarding the exclusion clause in the *Refugee Convention*, see *idem* at 51-61.

<sup>42</sup> *Idem* at 33-34.

<sup>43</sup> *Idem* at 35-45.

<sup>44</sup> Article 13.

<sup>45</sup> The first sentence of article 1(A)(2) of the *Refugee Convention* says: "As a result of events occurring before 1 January 1951 and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or **who, not having a nationality** and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

<sup>46</sup> Article 2(iii) of the *1954 Convention Relating to the Status of Stateless Persons*.

<sup>47</sup> Article 2(2)(c) of the *1961 Convention on the Reduction of Statelessness*.

States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

Thirdly, refugee law at the supra-national level (in the European Union) and national level have taken into account the developments of international human rights law in the area of *refoulement* by extending the prohibition from removing refugees from their countries from a fear that their life or freedom would be threatened<sup>48</sup> and also to torture<sup>49</sup> or cruel, inhuman or degrading treatment or punishment.<sup>50</sup>

### ***Practical Issues***

The possible exclusion and the obligation under international law to either extradite or to prosecute, the principle of *aut dedere aut judicare*, is not as straightforward as it seems for legal but especially practical issues.

Legally, the obligations to prosecute or extradite are all based on international treaties and only apply to a limited number of exclusion crimes, namely war crimes, torture, certain terrorist offences as well as drug and people trafficking. Even the reference to war crimes must be qualified as this obligation only applies to war crimes committed in international armed conflicts. As most 1F(a) crimes are the result of war crime in non-international armed conflicts or crimes against humanity, it means that for this exclusion ground the obligation is very limited.<sup>51</sup>

With respect the specific obligation to prosecute and the implicit assumption that all exclusion cases should be subject to the obligation if an excluded person cannot be extradited, the reality is that this is not possible and will likely never be possible due to the much larger number of cases produced based on exclusion in contrast to the ability of the international community to prosecute persons in general. Most of the attention has been given to 1F(a) excluded persons and when examining this aspect, the discrepancy between exclusion and prosecution is vast. At the international level in the last 25 years, the ICC has only finished seven trials with two more ongoing<sup>52</sup> and it is unlikely that this pace can be increased given the limitations in budget placed on the ICC. The two international criminal tribunals, the ICTY and ICTR have a better track record, namely 109 trials at the ICTY<sup>53</sup>

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<sup>48</sup> Article 33(1).

<sup>49</sup> Derived from article 3 of the 1984 *Torture Convention*.

<sup>50</sup> Indirectly derived from article 7 of the *ICCPR*; see also Rikhof, supra note 40 at 17-21.

<sup>51</sup> See Rikhof, supra note 40 at 461-462.

<sup>52</sup> See ICC, Situations and Cases ([Home \(icc-cpi.int\)](http://www.icc-cpi.int)). (accessed April 22, 2022)

<sup>53</sup> See [Key Figures of the Cases | International Criminal Tribunal for the former Yugoslavia \(icty.org\)](http://www.icty.org)). (accessed April 22, 2022)

and 76 at the ICTR<sup>54</sup> but these tribunals have ceased to operate except for handling the limited number of cases, which were already in litigation at the time that they closed, in 2017 and 2015 respectively, which are processed by the United Nations International Residual Mechanism for Criminal Tribunals.<sup>55</sup>

However, the situation at the international level is even worse with respect to 1F(b) and 1F(c) cases. There is no international institution dealing with 1F(b) criminality while for 1F(c), for which the vast majority involved cases of terrorism and for which at the international level there has only been one international tribunal, which has only convicted five persons (in absentia for one incident in Lebanon), namely the Special Tribunal for Lebanon.<sup>56</sup>

At the national level, cases involving international crime of terrorism committed outside the territory of the country initiating such investigations and prosecutions number less than one hundred in the last 25 years.<sup>57</sup> These involve situations akin to 1F(a) and 1F(c) crimes for which the national legislation in countries, which are the most active in such extra-territorial jurisdiction efforts, only allows in those limited circumstances; as such it is impossible to prosecute 1F(b) cases, which were committed outside the country where such persons reside and which is a prerequisite for 1F(b) exclusion. Taken together the number of prosecutions at the international and national level for 1F crimes (less than 300) and comparing the number of exclusion cases in the same time period and countries (for national prosecutions), which are over 1000,<sup>58</sup> it must be clear that there exists a vast discrepancy between the number of persons excluded who can also be prosecuted; this situation has become much more serious since 2017 when the ICTY closed.

The obligation to extradite also has a number of obstacles, which makes it even more difficult to deal with excluded persons in a meaningful manner. First of all, extradition is only possible between countries, which have an extradition arrangement between them and those arrangement are limited in number and usually not with countries, which have produced excludable persons.<sup>59</sup> Secondly, an extradition can only occur at the request from the country where the crime has been committed and an attempt to influence a country to issue such a request by a country where a person is present will raise the spectre of disguised extradition and can result in a finding of abuse of process. Apart from these procedural difficulties there is also the exact same substantive issue, which has caused problems when attempts were made to deport a person with a criminal background, namely, a violation of human rights

<sup>54</sup> See [The ICTR in Brief | United Nations International Criminal Tribunal for Rwanda \(irmct.org\)](#). (accessed April 22, 2022)

<sup>55</sup> See [About | UNITED NATIONS | International Residual Mechanism for Criminal Tribunals \(irmct.org\)](#). (accessed April 22, 2022)

<sup>56</sup> See [The Cases | Special Tribunal for Lebanon \(stl-tsl.org\)](#). (accessed April 22, 2022) The ICTR had a reference to the war crime of acts of terrorism in non-international armed conflicts (article 4(d) while the ICTY jurisprudence developed the war crime of causing terror (see Rob Currie and Joseph Rikhof, *International and Transnational Criminal Law, Third Edition*, (2020 Irwin Law) at 169, footnote 336) but neither is similar to the definition used in 1F(c) instruments and jurisprudence.

<sup>57</sup> See Terje Einarsen and Joseph Rikhof, *A Theory of Punishable Participation in Universal Crimes* (TOAEP Publisher, 2018) at 425-498; for the problems involving prosecutions based on extra-territorial jurisdiction, see Rikhof, *supra* note 9 at 460-

<sup>58</sup> See Rikhof, *supra* note 40 at 210-263.

<sup>59</sup> For instance, Canada has extradition treaties with 31 countries, see the schedule to the *Extradition Act*.

upon arrival in the country which issued the extradition request. Given the fact that in the context of extradition a criminal trial is often contemplated, not only human rights associated with torture, or cruel, inhumane or degrading treatment or punishment come into play but in addition also the right to a fair trial.<sup>60</sup>

### *Conclusion*

The proposal of bringing the use of exclusion closer to achieving criminal justice is worthy of consideration. However, in order to do so a number of issues need to be examined. First of all, any such proposal needs to adhere to underlying purposes of exclusion and refugee law and ensure that they are not mixed in order to make changes in either area of law, which is not part of its essential core. Secondly, it is important to take note of the practicalities of any alternatives considered in this context; especially the fact that the obligation to prosecute or extradite have a number of legal and practical difficulties, which will be difficult to overcome in the present political international and national climates. This, in turn, leads to the related question which is the best solution to deal with the large number of excluded persons who cannot be prosecuted or extradited and whether the proposal adequately addresses that phenomenon.<sup>61</sup> Lastly, any proposal needs to take into account the potential high cost of changing an existing workable system versus the low number of exclusion cases in the present system (a dozen a year in Canada).<sup>62</sup>

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<sup>60</sup> See Rikhof, *supra* note 40 at 469-470.

<sup>61</sup> For possible partial solutions, see *idem* at 481-484 and Refugee Law Initiative, School of Advanced Study, University of London (UK) and Center for International Criminal Justice, VU University Amsterdam (Netherlands), *Undesirable and Unreturnable? Policy challenges around excluded asylum seekers and other migrants suspected of serious criminality who cannot be removed*, 2016 at 32 (online: [ubu.indd\(cicj.org\)](http://ubu.indd(cicj.org)))

<sup>62</sup> For instance in Canada, only a dozen persons per year are subject to exclusion, see Joseph Rikhof, “Update on Exclusion and Inadmissibility Jurisprudence: New Developments since the Decisions of the Supreme Court of Canada in *Ezokola* and *Febles*”, CARFMS/ACERMF Working Paper No: 2017/2 (on-line: [Update on Exclusion and Inadmissibility Jurisprudence: New Developments Since the Decisions of the Supreme Court of Canada in \*Ezokola\* and \*Febles\*\(carfms.org\)](http://Update on Exclusion and Inadmissibility Jurisprudence: New Developments Since the Decisions of the Supreme Court of Canada in Ezokola and Febles(carfms.org))) at 9-14 and 16-17 as well as Government of Canada, “Canada's Program on Crimes Against Humanity and War Crimes - 2011–2015: 13<sup>th</sup> Report” at 8 (on-line: [Canada's Program on Crimes Against Humanity and War Crimes - 2011–2015: 13th Report\(justice.gc.ca\)](http://Canada's Program on Crimes Against Humanity and War Crimes - 2011–2015: 13th Report(justice.gc.ca)))