The 1951 Refugee Convention and its 1967 Protocol serve to safeguard individuals fleeing persecution, a mission as pertinent today as in the post-World War II era. However, the lack of a unified approach to interpreting and applying the 1951 Refugee Convention leads to significant disparities among states in granting refugee protection, particularly in regard to complex provisions like Article 1F (also known as the exclusion provision). The exclusion provision's vague standard of proof – 'serious reasons for considering' – and the unique assessment of individual criminal responsibility within an administrative procedure creates challenges, in particular when dealing with exclusion based on crimes lacking universal binding definitions, such as terrorism.

This study emphasises that interpreting the exclusion provision in line with international human rights and criminal law standards offers normative solutions to reconcile discrepancies within the framework of exclusion from refugee protection. Ultimately, this study aims to propose interpretation methods rooted in international law, to foster a coherent understanding of exclusion based on terrorist crimes within the broader spectrum of international law.
Terrorism and Exclusion from Refugee Protection
Hevi Dawody

Academic dissertation for the Degree of Doctor of Laws in Legal Science, specialisation Public International Law at Stockholm University to be publicly defended on Friday 12 April 2024 at 10.00 in hörsal 6, hus C, Universitetsvägen 10 C.

Abstract
The aim of this study is to provide further contributions to the field of international refugee law and exclusion from refugee protection, particularly concerning exclusion cases involving terrorism. The study establishes a framework relevant for interpreting Article 1F of the 1951 Refugee Convention (also known as the exclusion provision) in accordance with international norms. The goal is to enable a clear and consistent approach to understanding the exclusion provision, especially in cases related to terrorism. The study delves into the evidentiary standard required for exclusion under Article 1F, discussing both the meaning of the standard ‘serious reasons for considering’ and its threshold. This examination aids an understanding of when exclusion from refugee protection is triggered, focusing in particular on cases involving membership of a terrorist organisation.

One of the central conclusions highlighted in this study is that the exclusion provision is contained within an international treaty and therefore should be interpreted and applied in accordance with international law standards. Here, the language of international human rights law and international criminal law should mainly be used, with an emphasis on interpreting the objectives of the 1951 Refugee Convention in good faith for the purpose of avoiding vague and arbitrary interpretation of the exclusion provision. In this regard, this dissertation underscores a position that argues against the notion that mere membership in a terrorist organisation should automatically warrant exclusion from refugee protection. Lastly, the study suggests that achieving a coherent and consistent interpretation of the exclusion provision is essential for promoting legal certainty in exclusion cases, as much as for enhancing predictability and fairness in the decision-making process.

Keywords: exclusion from refugee protection; terrorism, international crimes, serious crimes, membership of a terrorist organisation, standard of proof, individual criminal responsibility, regime interaction, international refugee law, international human rights law, international criminal law, treaty interpretation.

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TERRORISM AND EXCLUSION FROM REFUGEE PROTECTION
Hevi Dawody
Terrorism and Exclusion from Refugee Protection

Hevi Dawody
To my family
Till min familj
بّو خيّزاتكّم
إلى عائلتي
Acknowledgments

The day has finally come. The day when it’s my turn to write the preface to a dissertation that will soon be presented in a printed version, marking the end of an eventful, inspiring, challenging, enriching, and very special time in my life. My time as a doctoral student. But, as many of my wise loved ones have said and reminded me – while it may be the end of something significant, it is also the beginning of something new, waiting just around the corner. Until the transition to the ‘life after doctoral studies’ occurs, with all that it entails, we are here and now – in a moment that I want to seize, to express honest words from the heart about what this journey has meant and how incredibly grateful I am to so many people in my life who have made this adventure extraordinary.

As I sit here writing, reflecting back on the years gone by, and recalling the first call I received about being accepted as a doctoral student at Stockholm University, it’s hard to hold back the tears. These tears symbolize so much and serve as proof that we are all capable of much more than we believe. I am immensely glad that I took on the challenge – without the slightest idea of what this adventure would entail – and said yes to the most nerve-wracking and exhilarating rollercoaster ride I have ever experienced. And what a ride it has been, in the most positive sense. Equally, it could be described as a journey, a marathon, or an adventure. My ‘book as a doctoral student’ would have a very exciting structure, an intriguing introductory chapter, a deep and thought-provoking analysis – with perhaps more questions than answers – and a set conclusions that evoke a multitude of emotions, and speak of encouragement, anticipation, and drive. The common thread would be never to stop fighting for what you believe in, to take one step at a time and not be afraid of challenges, and, above all, to understand how much better off we are in environments that enrich us and with people who lift us up. And in my ‘book as a doctoral student’, there are countless individuals who I want to mention and to whom I wish to express my immense gratitude. Perhaps I should simply say ‘none mentioned, none forgotten’? No, I will take on the challenge of expressing my gratitude to all of you in just a few pages, knowing that you in fact deserve another full dissertation of gratitude.

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To all of you who have been mentioned (and if I have forgotten anyone, you know that I should have written ‘none mentioned, none forgotten’ – I am so grateful for each and every one of you) – the time has come to conclude this preface, as a symbolic step in closing this chapter of my life and beginning a new
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With all my love,
Hevi Dawody
Stockholm, March 2024
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Selected Abbreviations

ACHR    American Convention on Human Rights 1969
CAT    Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984
CEDAW    Convention on the Elimination of All Forms of Discrimination Against Women 1979
CJEU    European Court of Justice
CRC    Convention on the Rights of the Child 1989
EC    European Community
ECHPR    European Convention for the Protection of Human Rights and Fundamental Freedoms 1950
ECOSOC    Economic and Social Council of the United Nations
ECRE    European Council on Refugees and Exiles
ECHR    European Court of Human Rights
EHRR    European Human Rights Reports
EU    European Union
HRC    Human Rights Committee
IACrtHR    Inter-American Court of Human Rights
ICCPR    International Covenant on Civil and Political Rights 1966
ICERD    International Convention on the Elimination of All Forms of Racial Discrimination 1965
ICESCR    International Covenant on Economic, Social and Cultural Rights 1966
ICC    International Criminal Court
ICJ    International Court of Justice
ILC    International Law Commission
IMT    International Military Tribunal
IOM    International Organization for Migration
IRO    International Refugee Organization
ICTR    International Criminal Tribunal for Rwanda
ICTR Statute    Statute of the International Criminal Tribunal for Rwanda 1994
ICTY    International Criminal Tribunal for the Former Yugoslavia
ICTY Statute    Statute of the International Criminal Tribunal for the Former Yugoslavia 1993
<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
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<tr>
<td>OAU</td>
<td>Organisation of African Union</td>
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<td>OAU Refugee Convention</td>
<td>Convention Governing the Specific Aspects of Refugee Problems in Africa 1969</td>
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<tr>
<td>PCIJ</td>
<td>Permanent Court of International Justice</td>
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<td>The 1951 Refugee Convention/ The Refugee Convention</td>
<td>Convention Relating to the Status of Refugees 1951</td>
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<td>UDHR</td>
<td>Universal Declaration of Human Rights 1948</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UN Charter</td>
<td>Charter of the United Nations 1945</td>
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<td>UNDP</td>
<td>United Nations Development Programme</td>
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<td>UNGA</td>
<td>United Nations General Assembly</td>
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<td>UNSC</td>
<td>United Nations Security Council</td>
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<td>UNHCR</td>
<td>Office of the United Nations High Commissioner for Refugees</td>
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<td>UNRRA</td>
<td>United Nations Relief and Rehabilitation Administration</td>
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<td>UNRWA</td>
<td>United Nations Relief and Works Agency for Palestine Refugees in the Near East</td>
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<td>UNTS</td>
<td>United Nations Treaty Series</td>
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PART I: DEFINING THE WHAT, WHY AND HOW
1 Introducing the Pillars of the Study: The What, Why and How

I think that the problem of refugees does not only concern two countries — the country of origin and the country of refuge, but that it involves the responsibility of all countries.¹

This study of the legal situation of refugees contains three main contributions. First, I argue for the importance of using a coherent interpretation of the exclusion provision in accordance with international law and how such an interpretation can be made possible. Second, I delve into the analysis of the standard of proof for such assessments and how 'serious reasons for considering' stands in relation to other evidentiary standards. Third, I highlight the key issues regarding how to deal with membership of a terrorist organisation as a basis for exclusion from refugee protection. To aid an understanding of how and why this study makes the aforementioned contributions, this chapter focuses on the central themes of what, why and how. In other words: the research problem, aim, questions and methodological aspects.

1.1 The Research Problem

Millions of people worldwide are forcibly displaced. Individuals who are forced to flee their home country due to protracted war and conflict, human rights violations or serious persecution generally have a desire and hope of finding dignity and safety in a new place. However, imagine if a person who needs to flee their home country, let says due to taking part in an alleged violent rebellion action described as a serious terrorist attack, seeks asylum in another country. Would that person be deserving of international protection?

Efforts to prevent and sanction terrorism can occur in different contexts. Terrorism is usually explained as criminal violence composed of heinous crimes to spread fear among a population or to pressure national or international authorities to take certain action or refrain from doing so.² Within the framework of

¹ Morgenstern, Felice, 'The Right of Asylum', 26 British Year Book of International Law 327, 1949, p. 343 n 6 — statement presented by the Delegate of Panama in the Special Committee on Refugees and Displaced Persons.
² The main elements that are mentioned — to a lesser or greater extent in different documents — in describing what constitutes an act of terrorism usually include the following: i) causing harm, threat, intimidation, injury, death, serious injury, fear or public danger, ii) an intention of some sort, either to promote political change or conservatism by means of violent intimidation or some other objective, iii) that the intentional act, either by its
asylum, the political will to automatically exclude terrorists from the asylum system and ensure that they do not benefit from the protection of the 1951 Convention relating to the Status of Refugees (hereinafter the Refugee Convention or Convention)\(^3\) has increased since the late 1990s, often with an interest to protect national borders.\(^4\) The assumption is that a terrorist does not deserve international refugee protection, at least not according to Article 1F of the 1951 Refugee Convention, also referred to as the exclusion provision. In other words, the international refugee system contains a provision that excludes asylum seekers from universal humanitarian protection based on terrorism, despite the absence of an international unified and binding definition of terrorism.

While a recognised refugee gains access to a broad range of benefits, rights and protection in the asylum state due to his or her status under Article 1A(2),\(^5\) Article

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\(^3\) The 1951 Convention Relating to the Status of Refugees, entered into force 22 April 1954, 189 UNTS 137; The 1967 Protocol Relating to the Status of Refugees, entered into force 4 October 1967. With the adoption of the 1967 Protocol, the time restriction ‘before 1 January 1951’ mentioned in the refugee status provision – Article 1A(2) – and the geographical limitations to only consider refugees from Europe ceased to exist.


\(^5\) Article 1A(2) of the 1951 Refugee Convention: ‘As a result of events occurring before 1 January 1951 and owing to 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. In the case of a person who has more than one nationality, the term “the country of his nationality” shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national’.

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nature or context, e.g. causing serious harm, iv) is directed at a ‘target’, either the state, an international organisation or the civilian population – see for Saul, Ben, *Defining Terrorism in International Law*, Oxford University Press, 2008; Simeon, James C., *Terrorism and Asylum*, Brill-Nijhoff, International Refugee Law Series (volume 17), 2020; Timmermann, Anina, Ambos, Kai, ‘Terrorism and customary international law’, in: Saul, Ben (2nd ed.), *Research Handbook on International Law and Terrorism*, Edward Elgar Publishing, 2020; Rikhof, Joseph, *Exclusion and Refoulement: Criminality in International and Domestic Refugee Law*, Irwin Law Inc., 2023, pp. 443–455; See also, UNGA, Measures to Eliminate International Terrorism: Working Group Report (56th Session) (6th Committee), 29 October 2001, UN Doc. A/C.6/56/L.9, annex I, p. 16; UNGA Official Reports, 30 November 2020, UN Doc. A/C.6/75/SR.17, pp. 3–4, and UNGA Official Reports, 21 February 2022, UN Doc. A/C.6/76/SR.27, pp. 8–10; Interestingly, the Special Tribunal for Lebanon is one of the tribunals that has recognised terrorism as a customary crime in times of peace. The Tribunal has described other elements, beyond those already mentioned, that fall within a definition of terrorism, which the Tribunal has drawn from adoption of national legislation, judgments of national courts, international and regional treaties and resolutions from the United Nations, see Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, STL-11-01/1, Special Tribunal for Lebanon, 16 February 2011, p. 85; However, in contrast, Saul concludes that terrorism has not reached the status as a customary international crime: ‘National definitions of terrorism, while gradually drifting towards generic definition, are still too divergent to support the existence of a customary international definition or crime of terrorism’, see Saul, 2008, p. 270.

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1F has the direct opposite effect. Pursuant to Article 1F, the refugee definition shall not apply to any person with respect to whom there are ‘serious reasons for considering’ that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

Thus, the consequence of Article 1F is to exclude those who otherwise would qualify as refugees from international refugee protection as there are ‘serious reasons for considering’ that they have committed a serious crime, which makes them undeserving of protection, yet still subject to fear of individual persecution in their state of residence.6

The issue of excluding terrorists from taking advantage of the Refugee Convention has been emphasised by several actors, such as United Nations General Assembly, Security Council, the United Nations High Commissioner for Refugees 6

6 The concept of exclusion can nowadays be found in several documents, such as Article 1 of the 1967 Declaration on Territorial Asylum, A/RES/2312(XXII), 14 December 1967; Article 14(2) of the 1948 Universal Declaration of Human Rights (UDHR), entered into force 10 December 1948; For more on Article 14(2) of the UDHR, see, for instance, Kapferer, Sibylle, ‘Article 14(2) of the Universal Declaration of Human Rights and Exclusion from International Refugee Protection’, 27 Refugee Survey Quarterly 53, 2008, pp. 53-75; Article 7 of the UNGA, Statute of the Office of the United Nations High Commissioner for Refugees, A/RES/428(V), 14 December 1950; Articles 12(2) and 17(1) EU Directive 2011/95/, 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’, 13 December 2011, L337/9, (EU Qualification Directive). Article 12(2) regulates exclusion from refugee status and refugee protection, while Article 17(1) regulates exclusion from subsidiary protection; Article 1(5) of the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention), entered into force 20 June 1974. The exclusion provision in the OAU Refugee Convention implemented the full wording of Article 1F in the 1951 Refugee Convention. The only difference is the dual reference that Article 1(5) OAU Refugee Convention makes to ‘acts contrary to the purposes and principles …’ where the provision in section (c) refers to ‘contrary to the purposes and principles of the Organisation of African Unity’ and section (d) adds a reference to the actual wording of Article 1F(c) – ‘acts contrary to the purposes and principles of the United Nations’; On the note about the exclusion provision in the OAU Refugee Convention see, UNHCR, Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, 4 September 2003, para. 7.
(UNHCR), regional organisations and various states. Although the international community was aware of the potential security concern this could cause the states after the Second World War and the International Refugee Organization (IRO) had already excluded individuals who had ‘participated in any terrorist organisation’ after the conflict from IRO’s mandate, the drafters of the Refugee Convention decided that the exclusion provision as it was formulated and established was sufficient. Therefore, it was not considered necessary to add any further references to explicitly exclude terrorists from refugee protection. Thus, terrorism is not mentioned in the wording of the exclusion provision, nor is it defined as an excludable crime within the scope of Article 1F. Still, it is recognised as an exclusion crime under Article 1F. Terrorist offences must, however, reach a level of gravity that would justify denial of international protection. As stated by a UK


8 Those who were excluded from IRO’s mandate were ‘war criminals, quislings and traitors’ and those who had, since the end of hostilities, ‘participated in any organisation hostile to the government of a member of the United Nations or had participated in any terrorist organisation’, see United Nations, Constitution of the International Refugee Organization (IRO Constitution), 15 December 1946, 18 UNTS 3, Annex I Part II. Annex to UNGA Resolutions 62 (I) UN Doc A/PV.67.


10 Singer, 2015, p. 3.

tribunal in the *Thayabaran* case: ‘The question is not whether the appellant can be characterized as a terrorist, but rather whether the words of the exemption clause apply to him’.\(^\text{12}\)

Nonetheless, as the exclusion provision is, in general, indistinct and difficult to fully grasp – recognising terrorism within Article 1F imposes additional issues. First, it is unclear what the concept of terrorism encompasses and who is a terrorist. Second, matters related to terrorism are highly debated and politically sensitive. For instance, where should one draw the line in justifying an oppositional movement against a regime? When is it defensible to define a non-state actor or a leader against a regime as a terrorist? The ‘mere membership’ doctrine is a similarly controversial subject in relation to the exclusion provision. The doctrine entails that membership in a violent organisation can, in and of itself, potentially be sufficient for exclusion under Article 1F.\(^\text{13}\) This issue has been raised increasingly often in the analysis of exclusion based on terrorist crimes.\(^\text{14}\) Thus, Article 1F’s integration with terrorism is challenging not only due to the lack of a uniform binding definition, but also due to the question of if mere membership of a terrorist organisation can be sufficient for exclusion under the scope of the article. Indeed, there is no consistent approach regarding what sorts of association with a terrorist organisation that could amount to a criminalised terrorist activity. Not only is the concept of terrorism vague, but the matter of association with a terrorist organisation is equally ambiguous. However, even if we lack an international binding definition of terrorism, the international community has adopted certain international conventions focusing on categories of acts that are so heinous that no actor can justify their commission.\(^\text{15}\) Still, in light of the lack of a definition of terrorism, and the increased interest in defeating terrorism and excluding terrorists from asylum, the assessment and interpretation of who is ‘deserving’ of refugee protection is in jeopardy. A potential outcome could be that terrorism will open exclusions for extensive interpretation, and thus make the exclusion clauses easier for state authorities to use as a resort.

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\(^{13}\) For more on the ‘mere membership’ doctrine, see Chapter 3.


Clearly, the exclusion clauses function as an exception within the refugee legal system. However, the overall aim is to uphold the humanitarian objective of the Refugee Convention and to ensure protection to refugees rather than to deny them rights.\(^\text{16}\) This highlights the dual approach of the exclusion provision. On the one hand, the protective element of the Refugee Convention is to guard the humanitarian purpose and the provision should be interpreted accordingly. On the other hand, the objective here is to exclude from refugee protection individuals who are to be considered criminals. The two perspectives also highlight the balance of two interests: the state on the one side, the individual on the other. It is within the state’s interest to protect national security and its borders. Due to the territorial supremacy and the principle of state sovereignty, it falls within the national state’s ‘right’ to determine who may remain within its territorial borders. Though the Refugee Convention describes who can be a refugee and who is excluded from refugee protection – the decision on who is deserving or not deserving of refugee protection ultimately falls within the discretion of the host state. In addition, as the international community has not agreed upon a unified definition of terrorism, the task to determine what constitutes terrorism and who is a terrorist is left to the states.\(^\text{17}\) In alignment with what has been mentioned above, several commentators have expressed concern about the negative consequences that might result from this. It leaves the exclusion clauses open to be abused by states seeking to exclude genuine asylum seekers from refugee status, which would have dramatic consequences for applicants, and threaten the legal certainty of the entire international refugee system.\(^\text{18}\) With this in mind, it is crucial that the exclusion provision is examined carefully by immigration authorities.

In conclusion, the Refugee Convention creates many interpretation challenges in terms of the criteria for both refugee status and exclusion from refugee status. The complexity is increased by the fact that the Refugee Convention lacks a single authoritative entity responsible for resolving the interpretive issues that may occur.\(^\text{19}\) Even though the UNHCR has the ‘duty of supervising the application

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\(^\text{17}\) Still, it is important that the criminalisation of terrorist acts follows the fundamental principles within criminal and human rights standards (e.g., the legality principle pursuant to Article 15 The 1966 International Covenant on Civil and Political Rights (ICCPR), entered into force 23 March 1976). In order to avoid ambiguous definitions of terrorism, the criminalisation of terrorist activities in domestic criminal proceedings should follow the criteria of precision, availability and foreseeability; Singer, 2015, p. 2.


\(^\text{19}\) According to Article 38 of the 1951 Refugee Convention; ‘[a]ny dispute between parties to this Convention relating to its interpretation or application, which cannot be settled by other means, shall be referred to the International Court of Justice at the request of any one of the parties to the dispute.’ However, this provision
of the provisions of [the Refugee] Convention,\textsuperscript{20} and is entitled to guide interpretation issues and assessment procedures, the agency lacks an authoritative capacity to address interpretation and definitions of key issues in the Convention.\textsuperscript{21} Instead, the duty to find the ‘autonomous and international meaning’ falls under the authorities of the state parties and their domestic decision-makers, national courts or tribunals. Due to the many different domestic jurisdictions with distinct legal systems, distinct authoritative bodies and distinct customs and administrative systems, the Convention is interpreted in many different ways. Having different interpretations of the Refugee Convention provision increases the risk of fragmentation.\textsuperscript{23} Differing interpretations of the Convention could establish an asylum country shopping system.\textsuperscript{24} The UNHCR has clearly stated that ‘Article 1F is not to be equated with a simple anti-terrorism provision’.\textsuperscript{25} Further, it stated that an offence ‘will not lead to exclusion merely because of its qualifications as “terrorist”’, but only if such act falls within the scope of Article 1F.\textsuperscript{26} However, regardless of the UNHCR’s clarification, the problems remain. The questions of what constitutes a terrorist crime, who is a terrorist, and which organisations should be labelled as terrorist organisations are yet to be answered in international law. In the meantime, the international community must deal with the distinct definitions of terrorist crimes and terrorist organisations used within the framework of the exclusion provision.

Following this identification of the main issues in this subject matter, the next section dives into what this dissertation is intended to examine. It is time to focus on the aim and research question of this thesis.

\textsuperscript{20} Article 35(1) of the 1951 Refugee Convention.
\textsuperscript{22} Secretary of State For The Home Department, Ex Parte Adan R v. Secretary of State For The Home Department Ex Parte Aitseguer, R v. [2000] UKHL 67; [2001] 2 WLR 143; [2001] 1 All ER 593, p. 20 (Lord Steyn).
\textsuperscript{24} See, for instance, Hathaway and Foster, 2014, p. 4.
\textsuperscript{26} Ibid., p. 7.
1.2 Aim and Research Question

The 1951 Refugee Convention and its 1967 Protocol aim to protect those who are fleeing persecution and danger in their home country – a goal that is as important and necessary today as it was in the aftermath of World War II. Through global developments, the instruments have been proven to be ‘living instruments’, able to adapt and provide protection to different groups of refugees, including European refugees from the Second World War, refugees during the Cold War period, and today’s refugees fleeing from various conflicts and repressive regime violence.27

The Refugee Convention is an instrument within the refugee regime that allows domestic and regional asylum systems to adopt their own implementation of its provisions. At the same time, the Refugee Convention is recognised as ‘the cornerstone of the international legal regime for the protection of refugees’.28 As for the EU Qualification Directive29 in relation to Article 1F of the Convention, the European Court of Justice (CJEU) stated that the ‘directive for determining who qualifies for refugee status and the content of that status was adopted to guide the competent authorities of the Member States in the application of that convention [the Refugee Convention] on the basis of common concepts and criteria’.30 Hence, the Refugee Convention represents the international standard for the fundamental object and purposes of the entire refugee system, meaning that the interpretation of the granting of refugee status and protection must be interpreted in alignment therewith.31 Article 1F is the international basis permitting exclusion and serves as a reference for other exclusion clauses (enshrined in regional and domestic refugee instruments).

In the absence of a convergent approach with a coherent interpretation and application of the Refugee Convention, states differ greatly in who is provided refugee protection and who falls outside its scope. Not only does the interpretation of the Refugee Convention vary between different jurisdiction, but it also differs


28 CJEU: Case C-573/14 Commissaire général aux réfugiés et aux apatrides v Mostafa Lounani, Judgment, 31 January 2017, para. 41; See also Minister for Immigration and Multicultural Affairs v Haji Ibrahim [2000] HCA 204 CLR 1, para. 136 (Gummow J) stating that “[t]he Convention definition of “refugee”, as imported into Australian statute law, is to be construed by first giving the terms thereof their ordinary meaning but bearing in mind the Convention as a whole, including its context, object and purpose. That in turn requires some appreciation of the place taken by the Convention in the body of international law respecting refugees and territorial asylum’. (emphasis added).

29 EU Directive 2011/95/, 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’, 13 December 2011, L337/9, (EU Qualification Directive).

30 Lounani (CJEU 2017), para. 41.

31 Lounani (CJEU 2017), paras. 41–42.
within countries.\textsuperscript{32} This is particularly the case for complex provisions. One example is Article 1F, which has not only a vague and unusual standard of proof but also a peculiar design of assessing individual responsibility within an administrative procedure. Further, associating the provision with a non-uniform concept like terrorism only increases the existing challenges. Exclusion under Article 1F should not be arbitrary. It is an important decision for the asylum seeker – determining whether or not he or she is deserving of refugee protection. Therefore, it is essential to keep a consistent and coherent interpretation and application of exclusion, regardless of which exclusion crime or national decision-making is at hand. A goal that was mentioned already at the Lisbon Expert Roundtable, where it was stated that:

Refugee law, extradition, international criminal law, and international human rights law provide complementary principles and mechanisms to bridge the tension between the need to avoid impunity and the need for protection. […] Where appropriate, States should prosecute excludable persons who are not returned in accordance with international and national law. The goal should be towards developing a normative system that integrates the different applicable legal regimes in a coherent and consistent manner.\textsuperscript{33}

It is evident, as Holvoet argues, that the Refugee Convention is intended to provide universal protection. It is therefore necessary to advocate for certainty and predictability in exclusion decisions.\textsuperscript{34} Plain interpretation of the provision will often not be enough to justify exclusion, especially as the procedures are often lacking in details. I argue that interpreting the exclusion clauses through the merits of international standards would be one step closer to the aim of establishing universal protection and finding the ‘international interpretation’ of the provision through international law.\textsuperscript{35} As North and Chia contributed with the idea of creating an International Commission for refugees to move towards convergence in


the interpretation of the Refugee Convention—this project aims to offer some normative suggestions that would make interpretation of the exclusion provision more coherent within the international community. This study is unlikely to solve all the interpretation problems, but one step towards some sort of coherency could be to study the exclusion provision in light of international standards. Thus, the analysis and conclusions presented in this study will aim to describe how we can reach coherency and consistency in the interpretation of Article 1F, with respect to its standard of proof, terrorism as an exclusion offence, and the provision’s interaction with related bodies of law (e.g., criminal standards).

The exclusion clauses have garnered much interest in the research field and many authors have studied various details and objectives of exclusion and the existing jurisprudence. Here, a recurring observation has been that Article 1F is subject to varying interpretations and applications, which attracts criticism. This threatens the legal certainty of exclusion proceedings and the integrity of the international refugee system. This is particularly relevant in the context of exclusion based on terrorism—given the enduring issue of its definition and the controversies around other aspects related to terrorism and exclusion (e.g., association with a terrorist organisation). Tempting though it would be, this study cannot cover all the matters concerning terrorism and exclusion from refugee protection (such as providing a unified definition of terrorism). Instead, this study aims to

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37 One potential reason for the increased interest could perhaps be the United Nations’ resolutions on terrorism, see, for example, UNSC Res. 1373 (2001); UNSC Res. 1377 (2001); UNSC Res. 1624 (2005); UNSC Res. 2322 (2016); UNGA Res. 56/160 (2002); UNGA Res. 59/195 (2005); UNGA Res. 60/288 (2006); Also, recent academic work and development in several legal fields indicates the growing attention of the exclusion clauses, see, for example, Boccardi stated that a potential reason why Article 1F had been more frequently used could be the expansion of the purposes and principles of the UN through UN measures adopted in the fields of human rights, drug trafficking and international crimes, see Boccardi, Ingrid, Europe and Refugees: Towards an EU Asylum Policy, Kluwer Law International, 2002; Brouwer in her work ‘Immigration, Asylum and Terrorism: A Changing Dynamic, Legal and Practical Developments in the EU in Response to the Terrorist Attacks of 11.09’ presents the observation that UNSC Res 1373 was the main reason and justification of the measures taken at the EU level in the fight against terrorism and the proposals to establish a relation between EU and national measures relating to exclusion from refugee status, see Brouwer, Evelien, ‘Immigration, Asylum and Terrorism: A Changing Dynamic, Legal and Practical Developments in the EU in Response to the Terrorist Attacks of 11.09’, 4 European Journal of Migration and Law 399, 2003, pp. 399–424; Singer, 2015; Gilbert, Geoff, ‘Exclusion under Article 1F Since 2001: Two Steps Backwards, One Step Forward’, 2014, pp. 519–540, in: Chetail, Vincent and Bauloz, Céline (eds.), Research Handbook on International Law and Migration, Edward Elgar Publishing, 2014; Li, 2017, p. 6 n 33; Rikhof, 2023.

38 See Linderfalk, Ulf, The International Legal System as a System of Knowledge, Edward Elgar Publishing, 2022, p. 29, referring to Gustav Radbruch’s theory of law, where Radbruch describes justice as a basis to which three main components are related, namely equality, purposiveness and legal certainty.

39 This topic has been presented in previous research and published literature: for instance, Saul, Ben ‘Defining Terrorism: A Conceptual Minefield’, Legal Studies Research Paper No. 15/84, 2015, in: Kalyvas, N. Stathis, Gofas, Andreas, English, Richard, Chenoweth, Erica, The Oxford Handbook of Terrorism, Oxford University Press,
focus on a certain aspect that associates terrorism with exclusion, namely the controversial matter of membership of a terrorist organisation and whether membership *per se* would be sufficient for exclusion under Article 1F. This is complicated by the fact that membership of terrorist groups is criminalised in some jurisdictions and not in others. Thus, with an interest in refining the understanding of exclusion based on terrorist acts, this dissertation considers membership of a terrorist organisation as a placeholder for the main research question. As the aim of this study is to present an in-depth analysis of the interpretation of exclusion related to terrorism from an international law perspective – the dissertation is based on the following research question:

- How can exclusion from refugee protection based on terrorist crimes be understood in light of international human rights and criminal law standards?

Studying the interpretation from an international law perspective could, broadly speaking, cover several standards and issues. However, to keep the research question concise and clear, the purpose is to focus on how the exclusion provision can interact with international standards of human rights law and criminal law to gain a coherent and consistent interpretation within the international community. How and why international refugee law can and should interact with international human rights law and criminal law is developed further in the sections below. At this stage, I want to emphasise that the choice of considering human rights law and criminal law standards is based on the fact that these two fields of law represent the two central aspects of Article 1F. On the one hand, we have the aspect of protection (or, accurately speaking, exclusion from humanitarian protection). On the other hand, we have the aspect of committing a crime that can potentially lead to exclusion.

The study also involves other steps that are relevant for answering the research question. The aim behind the sub-questions is to support the main research question with further substance and analytical depth. Thus, in order to identify the international understanding of Article 1F related to terrorism, the thesis will also examine the following sub-questions:

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1. How can the exclusion standard of proof – ‘serious reasons for considering’ – be interpreted in accordance with general evidentiary and procedural standards?

2. How and to what extent does the ‘mere membership doctrine’ influence the interpretation and application of the exclusion provision?

Having discussed the ‘what and why’ in terms of the research problem, purpose and research question, my next step is to shed light on the ‘how’ (by which I mean the method that this dissertation is based on). The following section includes an analysis of the methodological approaches, in terms of both why they were chosen and considered important and how they have been used.

1.3 Methodological Aspects

1.3.1 The Method Used in this Study

In general, one could discuss what the law is and what the law ought to be.\(^ {40}\) This study sheds light on the understanding of the exclusion provision enshrined in the 1951 Refugee Convention. Not only will I examine the elements necessary to understand and interpret the exclusion clauses from an international law perspective, but also how to unpack the significant elements concerning exclusion of refugee protection based on terrorism. The focus of this study is on the interpretation of Article 1F (an international norm) and providing the basis necessary to understand what the law is. Nonetheless, the legal analysis will also include a normative analysis drawing conclusion on what the law ought to be. I believe this normative reasoning needs to be covered because this study examines a legal norm in the context of a non-unified concept – and where the norm itself is complex. Furthermore, though Article 38 of the 1951 Refugee Convention allows state parties to the Convention to refer a case regarding interpretative issues to the International Court of Justice, no state has thus far done so.\(^ {41}\) This means that issues on the interpretation and potential dispute resolution regarding the Refugee Convention are left to national courts and scholarly expertise. In this respect, the conclusions of this study move, to a certain extent, between what the law is and what the law ought to be.

In order to answer the research question presented herein, the study relies on legal positivism as a theory about the nature of a norm. Given my interest in

\(^ {40}\) The classical de lege lata and de lege ferenda perspectives.

\(^ {41}\) North, M, Anthony, Chia, Joyce, ‘Towards Convergence in the Interpretation of the Refugee Convention: A Proposal for the Establishment of an International Judicial Commission for Refugees’, p. 240: ‘[…] the ICJ would be the preferred forum for resolving disputes about the interpretation of the Convention because of its truly international character, its institutional competence as the court of the United Nations and its judicial expertise. However, this jurisdiction of the ICJ has never been invoked, and the prospects of it being used are remote’, in: McAdam, Forced Migration, Human Rights, and Security, 2008; Li, 2017, p. 113.
providing compelling ways of interpreting and understanding the exclusion provision pursuant to sources of international law, to achieve predictability, legal certainty, coherency and consistency, legal positivism is an appropriate theory to consider. As I will elaborate further, the interpretive methods used in this thesis, such as systemic integration, enable analysis of the research question in light of the theoretical language of legal positivism.

The different methodological aspects used in this study are discussed more thoroughly in the section below. In addition, I also present the materials selected for use in this dissertation and why they are of importance.

1.3.2 Legal Positivism

According to legal positivism, the law is supposed to be understood as a set of norms (including, for instance, rules, principles and standards), which have been framed and established by human beings in a legal process. Norms should be seen as statements demonstrating how something ought to be, or ought to be done, which simply means that the law is something related to ought (i.e., norms) rather than is (i.e., pure facts). The outcome of this is that the law, based on ‘ought’ norms, can neither be verified nor falsified by reference to ‘is’ statements (i.e., empirical facts).

Legal positivism, legal idealism and legal realism have usually been described as school of thoughts. International lawyers can follow any one of them, depending on which conception of law they advocate. In this dissertation, legal positivism is useful as a general foundation for the common approach to law and what the

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43 The view to restrict ‘ought’ statements to originate from ‘is’ statements, meaning that moral conclusions cannot be reasoned from factual inferences, was once recognised as Hume’s law, see Ratcovich, 2019, p. 7; For more on legal positivism, see Morgenthau, J. Hans, ‘Positivism, Functionalism, and International Law’, 34 The American Journal of International Law 260, 1940, pp. 260–284; See also Linderfalk, 2022, p. 38: ‘For legal positivists, international law functions as a logical framework, which remains to be furnished with substantial contents drawn from social facts. These facts are not themselves included in the concept of international law. This is why the legal positivists insist that international law be organized according to the pedigree and logical form of legal norms’.
44 Legal idealism expresses the understanding of law ‘as a form of social practice’. In contrast to legal positivism, idealism ‘dismisses the idea that law can exist independently of its moral or other merits.’, see Linderfalk, 2022, p. 26; Legal realism as a theory of law focuses on what courts are doing in practice when determining cases, and, thus, has an largely empirical evidence-based approach. According to a realist, ‘[l]aw is a prediction of how judges will decide’, the law ‘consists of legal decisions’ and legal norms do not exist, see Linderfalk, 2022, pp. 32–33; Interestingly, one could argue that legal positivism, legal realism and legal idealism are not mutually exclusive. However, it is worth emphasising that the three school of thoughts each has their own distinctive framework and represents a variety of theories, see, for example, Linderfalk, 2022, p. 19.
findings of this study are supported by. The work of Kelsen and Hart, representing the most well-recognised theories within the scope of legal positivism, are not intended to be studied within the scope of this research as a comprehensive theoretical framework of legal positivism as such. In other words, I will not study the exclusion clauses in terms of what is morally right or wrong or how the law ought to be established. Instead, the focus of this study is to use legal positivism as a way to analyse the research questions in accordance with relevant norms and legal values – separate from arguments relating to morality, fairness or political views.

Though many aspects within this study could be discussed from moral, political or sociological perspectives, the focal point of this dissertation is to delve into the understanding of a legal norm by studying the sources of international law. This is another reason why legal positivism is important to consider within the scope of this study. It brings the discussion of the exclusion provision into the realm of law and provides the necessary ‘tools’ to achieve predictability, coherency, consistency and legal certainty regarding both the reading of Article 1F and the intersection between refugee law and other fields of international law.

Furthermore, as this dissertation focuses on treaty interpretation, legal positivist understanding of the practice of interpretation and the rules of treaty interpretation aligns with how the interpretative method is recognised in this study. In short, it is seen as a set of rules guiding interpreters in the process of interpreting a norm. Simply speaking, the engagement with treaty interpretation becomes

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45 Kelsen viewed the law ‘as a normative science, that is, consisting of rules which lay down pattern of behaviour’. The legal validity of a rule or norm depends on a prior norm (see for instance, Kelsen, Hans, *General Theory of Law and State*, published first time in 1945). This pattern repeats until the final goal is reached – namely, finding the basic norm for the whole system. The basic norm becomes vital and the central foundation of the entire legal structure as the rules that can be related to the basic norm carry legal weight. In order for a norm to be considered a legal rule, it needs to follow a logical structure – it needs to follow from a previous and higher rule. Simply put, the basic norm is the foundation with layers building upon it. Through H.L.A Hart’s book *The Concept of Law*, published in 1961, the school of positivism gained more sociological terms. This seems to have marked the end for Kelsen’s pure theory of law. According to Hart, the law is considered to be a system of rules, with the interaction of primary and secondary rules as the main foundation. The differences between the two are simply that a primary rule specifies standards of behaviour, while a secondary rule focuses on the means to define and develop them. Through that process, the constitutional procedures for further advances become specified. For more analysis, see Shaw, Malcolm N., *International Law*, 2017, p. 38.

46 Interestingly, see Linderfalk, 2022, p. 23 with reference to a statement by Nigel Simmonds explaining: ‘Having established what the relevant legal rules are, the judge may discover that these rules do not give an answer in the case he is dealing with. Since the pre-existing law does not give an answer, the judge must decide the case on the basis of extra-legal considerations. In doing so he will establish a new legal rule. But what makes the rule a legal rule is the fact that it has been laid down by a judge, not the fact that it was based on moral considerations’.

47 Interestingly, Djefal builds this on Hart’s division between primary and secondary norms (analysed in Hart, *The Concept of Law*, 81), though some of these rules have developed into norms about treaty interpretation, see
evident when there is a need to seek clarification of the meaning of a treaty. Legal positivists enlighten the norms laid down in Articles 31–32 of the Vienna Convention on the Law of Treaties (VCLT) as the basis for justifying a certain meaning of a treaty provision.\textsuperscript{48} In other words, positivists seek to find the clear meaning of a treaty provision through justification.\textsuperscript{49} Thus, according to positivists, the process of finding the clear (or plain) meaning of a treaty provision can be achieved through the elements of Articles 31–32 of the VCLT.

However, one can challenge the legal positivistic perspective, as there are some limitations inherent to legal positivism. For instance, legal positivism does not have one clear path of understanding. It contains many branches and can be justified from different angles, and from both an exclusive and an inclusive point of view. Among some international lawyers, legal positivism might result in a more inclusive framework and allow a flexible approach on matters concerning moral constraints to the concept of law.\textsuperscript{50} Additionally, legal positivism is constrained in providing further clarification as to why a particular norm, for instance reflecting a source of international law in Article 38(1) of the International Court of Justice (ICJ) Statute, has its place in international law.\textsuperscript{51} The perception that law is merely a collection of legal norms obviously has a close affiliation to concepts like legal validity and legal obligation.\textsuperscript{52} This highlights another limitation of legal positivism. Though the two concepts ‘legal validity’ and ‘legal obligation’ correlate with legal positivism, they also lack a clear meaning. There is a general understanding of legal validity emphasising a ‘valid norm’ as a norm that one should comply with and a ‘legal obligation’ as ‘one that ought to be performed’\textsuperscript{53} – though these two concepts remain ambiguous.\textsuperscript{54}

Irrespective of its limitations, the legal positivistic position on the law, its role in the international legal system and the positivist view on the sources of international law are those upon which the research questions are based in the search for normative conclusions.

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\textsuperscript{48} Legal positivists and legal idealists share this perspective, see Linderfalk, 2022, pp. 127–135.

\textsuperscript{49} To clarify, Article 33 of the 1969 Vienna Convention on the Law of Treaties (VCLT), entered into force 27 January 1980, is also relevant in conjunction with Article 31 and Article 32. However, I am mainly addressing the treaty interpretation rules that are relevant in this study; See further, Linderfalk, 2022, pp. 120–130.

\textsuperscript{50} Linderfalk, 2022, p. 20.

\textsuperscript{51} Ibid., pp. 21–23: ‘By “the source of international legal norms”, positivism means something more than just the formal sources of international law as described in Article 38, paragraph 1(a), (b) and (c) of [the ICJ statute] […] legal positivist will only relocate the issue of the source of international law to a different level’.

\textsuperscript{52} Ibid., p. 24: ‘What legal positivism is offering is only a theory about the systemic validity of law’.

\textsuperscript{53} Ibid.

\textsuperscript{54} Ibid., pp. 23–25 and 31.
The next section analyses the relevant research materials by addressing what, why and how materials are used in this study.

1.3.3 Research Materials

1.3.3.1 Sources of International Law: Article 38(1) of the ICJ Statute

The study takes its point of departure in international law. Sources of international law are therefore most relevant.

International law is a legal system generally understood as a body of norms that ‘governs relations between independent states’. As stated once in a landmark case – the SS ‘Lotus’ case – ‘the rules of law binding upon states … emanate from their own free will’, emphasising the legal positivist approach to what international law consists of, namely norms which states have consented to apply. Article 38(1) of the ICJ Statute specifies the sources of international law that the ICJ shall apply when settling disputes in accordance with international law. The sources mentioned in Article 38(1) of the ICJ Statute are the following:

i) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
ii) international custom, as evidence of a general practice accepted as law;
iii) the general principles of law recognized by civilized nations;
iv) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

In general, the decisions of the ICJ do not have ‘a binding force except between the parties’. Nevertheless, Article 38(1) of the Statute has been reaffirmed as an exhaustive list of the main sources of international law. Some writers have been interested in making a distinction between the sources of international law. The

56 SS ‘Lotus’ (France v. Turkey, P.C.I.J., para. 44.
57 The 1946 Statute of the International Court of Justice, 18 April 1946 (ICJ Statute) is an integral part of the 1945 Charter of the United Nations (UN Charter), 1 UNTS XVI, entered into force 24 October 1945.
58 Article 59 of the ICJ Statute.
ambition has been to categorise the sources in a certain order, where international conventions, customs, and general principles of law are sources representing the executive law-creating process, whereas judicial decisions and academic writings, on the other hand, are approached as law-determining sources, focusing on the confirmation of alleged rules. However, this clear division is not always easy to translate into practice, because of the interaction between the international sources. International conventions can repeat what is already considered to be a verified rule of customary international law. A similar notion of overlapping settings can be found in the assessments of the ICJ. It may be possible for the ICJ to create law in the interpretation process of existing law, much as municipal judges can when formulating new laws in judicial proceedings. Thus, international law is not supposed to contemplate a hierarchical order of its sources. Rather, the sources should overlap and complement each other. Nevertheless, in a situation of a potential normative conflict, international law faces more challenges than domestic law in listing the sources with most constitutional authority.

The role and purpose that the international sources of law have in this study is addressed in greater depth in the next section. The aim is to focus on the sources of international law that are of greatest relevance in relation to the research questions.

1.3.3.2 Sources of International Law: Treaties

Treaties can be framed in many different terms, from Convention, International Agreement, Charter, Pact and General Act to Statute, Declaration and Covenant. Regardless of which term is used, the same meaning is intended – a treaty is ‘an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation’. Within treaties, several conditions which the state parties have agreed upon are stated and which the state parties are obliged to observe and apply. The customary international law principle *pacta sunt servanda* (agreements are binding) upholds the fundamental nature of treaties. Despite the difficulty of establishing a constitutional order

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61 Shaw, 2017, p. 52.

62 Ibid; See also, Ratcovich, 2019, p. 11.

63 See Article 2(1)(a) of the VCLT.


65 A treaty can be formed into two ways: either as a ‘law-making’ treaty, with the intention to have a universal and general importance, or as a ‘treaty contract’ – a treaty that is intended to apply between a limited number
between treaties and customs as sources of international law, many writers consider treaties to be the most essential source of international law because of what they signify: the main consent among the contracting parties. In this study, conventions and treaties are considered to have the greatest significance. As the research focuses on interpreting a legal matter within a specific treaty provision and the impact of the concept ‘terrorism’ on the provision, relevant conventions regulating the substantive matter of refugee law and sources of interpretation methods are of most relevance and are the foundation for the analysis. According to the general rule of treaty interpretation, Article 31 of the VCLT, a ‘treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to term of the treaty in their context and in the light of its object and purpose’. This rule is the main standpoint underpinning the analytical result of the interpretation of exclusion in relation to terrorism. Regarding interpretation of a treaty provision, like Article 1F, supplementary means of interpretation can be useful to either confirm the meaning provided by the general rule of interpretation or to expand it when the interpretation according to Article 31 of the VCLT leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable.

That being said, treaties play a central role as research materials in this study. However, customary international law is also subtly present in the legal analysis of the research question, although not to the same extent as treaties. There are several reasons for this. Though the exclusion provision does not amount to a customary international norm, certain essential parts relating to customary international law are linked to the exclusion clauses. The study is mainly about legal treaty interpretation of Article 1F, which will be performed using the language of the VCLT. Further, it has been stated that the interpretation of treaties regulated of state parties. This distinction exists because of the need to know which treaties have general relevance and which are supposed to be applied locally. The scope of a treaty’s applicability and the number of states also indicates the level and number of conditions and obligations imposed upon the states, see Shaw, 2017, p. 70; See also Fogdestam Agius, Maria, *Interaction and Delimitation of International Legal Orders*, Brill-Nijhoff, Queen Mary Studies in International Law (volume 16), 2014, p. 43, emphasising that ‘pacta sunt servanda may still be the main rule to designate validity of international law, but it is not the sole driver of international law developments’.

66 Shaw, 2017, p. 70.
67 Article 31(1) of the VCLT.
68 Article 32 of the VCLT.
69 Customary international law is defined as ‘unwritten law deriving from practice accepted as law’, see International Law Commission (ILC), ‘Draft Conclusions on Identification of Customary International Law, with Commentaries’, 2018, UN Doc. A/73/10, p. 122; See further International Law Commission (ILC), *Report of the International Law Commission on the Work of Its Seventieth Session (30 April – 1 June and 2 July – 10 August 2018)*, 2018, UN Doc. A/73/10, on what constitutes state practice. This is mentioned in conclusion 5, at p. 132: ‘State practice consists of conduct of the state, whether in the exercise of its executive, legislative, judicial or other functions.’ It is also mentioned in conclusion 6.2, at p. 133: ‘Forms of state practice include, but are not limited to: diplomatic acts […]; conduct in connection with resolutions […]; conduct in connection with treaties; executive conduct […]; legislative and administrative acts; and decisions of national courts’.
in the VCLT is part of customary international law. Second, certain principles of international law, such as the non-refoulement principle, play an important role in the overall understanding of the assessment of exclusions. Even though the non-refoulement principle within the context of refugee law does not formally reflect customary international law, the principle is certainly affirmed as customary law under the umbrella of international human rights law. The principle of non-refoulement is relevant in the study as it shows the dynamic between two legal fields – refugee law and human rights law – and how international human rights law interacts within the scope of the exclusion clauses. Lastly, the question of whether certain principles or aspects relevant to the framework of the exclusion provision have achieved customary international law status is also discussed in some parts of the analysis.

Also, even if general principles of law can have a dual function relevant to the scope of the study (as I am focusing on the interpretation of Article 1F in relation to terrorism – creating a bridge between international and national standards), the relevance of such source is limited.

1.3.3.3 Other Relevant Sources and Materials

Though refugee law originates from the 1951 Refugee Convention and its 1967 Protocol – the application of its provisions is state-based. Hence, this field of law is state-governed, as it falls within the state sovereignty to determine who is permitted legitimate residency within national territories. Also, the definition of ‘terrorism’ is left to the discretion of the states. Currently, there is no international institution within the field of refugee law with legally binding authority over states. In studying the research question, other materials – such as state practices and practices of institutions/organisations – will be of interest to contemplate. Thus, domestic law and domestic and regional courts’ reasonings within the scope of the legal matter are studied as state practices. The dissertation focuses on the ten countries which have contributed most to the exclusion provision. By this, I mean simply that these jurisdictions have assessed the exclusion clauses to

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70 Interesting landmark cases on state practices amounting to customary international law, include North Sea Continental Shelf cases (Federal Republic of Germany v Denmark) [1969] ICJ Rep 3, para. 74 stating that the practice must be ‘extensive and virtually uniform’; In Asylum case (Colombia v Peru) [1950] ICJ Rep 266, pp. 276–277, the ICJ referred to ‘constant and uniform usage’; See also the Nicaragua v United States of America [1986] ICJ Rep 14, para. 207 where the Court clarified that ‘for a new customary rule to be formed, not only must the acts concerned “amount to a settled practice”, but they must be accompanied by the opinio juris sive necessitatis. Either the States taking such action or other States in a position to reach to it, must have behaved so that their conduct is evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitatis’. For more on opinio juris, see, for instance, ILC, ‘Draft Conclusions on Identification of Customary International Law, with Commentaries’ and Report of the International Law Commission on the Work of Its Seventieth Session (30 April – 1 June and 2 July – 10 August 2018), UN Doc A/73/10; Shaw, 2017, p. 62.
the greatest extent. These state practices show interesting similarities and differences in how Article 1F is interpreted and exclusion cases are assessed. Some of the referred jurisdictions (e.g., Canada and the United Kingdom) have presented landmark exclusion cases that have been viewed as inspiring case law in other jurisdictions examining the exclusion clauses. The ten countries include civil and common law countries, and are the following: Australia, Belgium, Canada, France, Germany, the Netherlands, New Zealand, Sweden, the United Kingdom and the United States.\(^{71}\)

The different domestic jurisdictions that I refer to and study are used as examples of state practices, not to perform a comprehensive comparative study. The references to state practices as examples are relevant for two reasons. First, they give an overview of the interpretation and application of Article 1F. Second, and perhaps most importantly, they enable a better understanding of the reasons why domestic authorities, courts and tribunals emphasise a particular approach to interpreting and applying the exclusion clauses. To gain a deeper understanding of how the states interpret the exclusion clauses and to further examine the purpose of better understanding the exclusion provision in accordance with international standards, assessment of exclusions under national legal systems and how states approach legal obligations under refugee law are important to consider. To clarify, examples of state practices are analysed to highlight current legal issues, challenges and matters relating to the interpretation of the exclusion clauses and how states deal with international refugee obligations.

1.3.3.4 The relevance of the UNHCR instruments

Despite the non-binding effect of the UNHCR documents, it has long been debated whether these documents can contribute to the legal reasoning and understanding of how a state should deal with the refugee exclusion problem. Although this question is difficult to give a clear answer to, it is relevant and worth developing further, in particular as UNCHR instruments are commonly referred to and used as research materials in this study.

There have been many debates and different positions on the legitimacy and value of the UNHCR’s instruments, but a common conclusion is that they fall under the umbrella of soft law. Soft law as such may be adequate and relevant to consider when interpreting a norm. In contrast, though UNCHR’s publications may be criticised for lacking timely and context-specific substance, the contents

of these instruments have an impact on the interpretation of the Convention ‘due to their institutional authority, [...] global nature and [...] wide dissemination’. Thus, using soft law could make the interpretation of the Refugee Convention more global than regional. Furthermore, it could be endorsed widely by decision-makers investigating asylum cases for the purpose of achieving a coherent and consistent interpretation.

There are further points worth mentioning regarding why UNHCR’s published Handbook, Guidelines and Conclusions can be considered relevant sources. I will start with Article 35 of the Refugee Convention. Signatory states to the Refugee Convention have the duty to cooperate with the UNHCR in its performance of its functions and to accept the Office’s functional role in a supervising position regarding the application of the Convention. Within the scope of Article 35 of the Refugee Convention, the UNHCR has been given a definite role with important tasks to pursue. Therefore, the documents published by the Office have been recognised as having certain value. The UNHCR’s Handbook on Procedures and Criteria for Determining Refugee Status has been one of the documents most often recognised by the international community. However, the statements from states regarding this Handbook have conveyed varying enthusiasm over time. For instance, the US has stated that ‘the Handbook provides significant guidance’ in aspects concerning the interpretation of refugee law. The UK has determined that the Handbook should be considered an ‘important source of guidance on matters to which it relates’. Interestingly, the UK had a more accepting approach to the Handbook in the R v. Secretary of State for the Home Department, ex parte Adan and Aitseguer case (a case settled two years before the aforementioned statement), where the House of Lords recognised the authority of UNHCR stating that ‘[i]t is not surprising [...] that the UNHCR Handbook, although not binding on states, has high persuasive authority, and is much relied on by domestic courts and tribunals’. According to the Swedish Migration Court, the instruments adopted by the UNHCR, such as the Handbook and Conclusions, can be recognised as relevant legal sources to consider in the assessment procedure of domestic asylum cases. Thus, the international community has

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73 See North, Chia, at ibid., p. 242 presenting further arguments as to why international soft law should be considered a valuable method of guidance.


75 Sepet and Another v. Secretary of State for the Home Department, [2003] UKHL 15, para. 12.

76 Ex Parte, Adan R v. Secretary of State For The Home Department, p. 25 (Lord Steyn) (emphasis added); However, see Hathaway, C. James, The Rights of Refugees under International Law, Cambridge University Press, 2005, p. 115 n 160, presenting the views of some courts stating that the Handbook should be considered more of ‘a practical guide [...] than [...] a document purporting to interpret the meaning of relevant parts of the Convention’.

77 See MIG 2006:1.
viewed the Handbook as having some value. A similar conclusion can be drawn regarding the UNHCR’s Executive Committee of the High Commissioner’s Programme (ExCom) ‘Conclusions on the International Protection of Refugees’. Although this is not seen as having a binding nature, it can contribute to significant outcomes. The Conclusions can be used as guidance for interpreting the provisions of the Refugee Convention and be seen as a formulation of opinio juris in aspects concerning refugee law obligations. Thus, they provide, at least to some extent, a universal approach on how states approach current issues related to refugees. The authority under Article 35 of the Convention and the fact that the UNHCR is allowed to ‘require state parties to explain treatment of refugees that does not conform to the Convention’ indicate that significant weight is given to the UNHCR’s instruments. In conclusion, although the UNHCR has the mandate to supervise the application of international refugee law, though its instruments lack a binding nature, the agency enjoys universal respect within the international community in matters concerning international refugee protection. For this reason, its recognised instruments, such as the UNHCR Handbooks, Guidelines or the ExCom Conclusions, should be relevant to consider in an interpretation procedure.

The next section dives into other important methodological aspects of treaty interpretation.

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79 The UNHCR Executive Committee (ExCom), ‘Conclusions Adopted by the Executive Committee on the International Protection of Refugees: 1975-2009 (Conclusion No. 1-109), 2009, cover several topics relevant within the field of international refugee law, such as the non-refoulement principle, limitations on expulsion and extradition, family unity, identification documents, right to education, prohibition against penalties for illegal entry, and so on. See Hathaway, 2005, p. 113 at n 135–148.
80 Hathaway, 2005, pp. 113–116, McAdam, Jane, and Goodwin-Gill, Guy S., The Refugee in International Law, Oxford University Press, 2007, p. 217; Ratcovich, 2019, pp. 111–112. However, the ExCom Conclusions are agreed upon by a limited number of states, including non-state parties, see Hathaway and Foster, 2014, p. 10, the adopted Conclusions do not apply to all state parties to the Refugee Convention. See the members of the Executive Committee of the High Commissioner’s Programme here https://www.unhcr.org/excom/announce/40112e984/excom-membership-date-admission-members.html. In contrast, there are ongoing debates on whether these materials can be valued as ‘subsequent agreement between the parties’ enshrined in Article 31(3)(a) VCLT, given that none of the documents adopted by the UNHCR are issued through a process of active negotiation and agreement between several state parties. Despite this, the UNHCR Handbook and the ExCom Conclusions have been recognised as evidence of ‘subsequent agreement between the parties’, see Hathaway, 2005, p. 54.
82 Regulated in Article 8(a) of the UNGA, Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, UN Doc. A/RES/428(V) (UNHCR Statute) and Article 35(1) of the 1951 Refugee Convention; The International Organization for Migration (IOM), with 157 member states, deals with migration in general, though it also deals with refugees, forced migration and internally displaced persons.
83 See, for instance, Hathaway, 2005, pp. 54, 113–118; Hathaway and Foster, 2014, p. 54; McAdam and Goodwin-Gill, 2007, p. 217. See also section ‘1.3.3.4 The relevance of the UNHCR instruments’ of this Chapter analysing further why the UNHCR instruments are relevant to take into account.
1.4 Treaty Interpretation and Methods to Find the ‘International Interpretation’

1.4.1 Analysing the Relevance of a Coherent Interpretation

In this thesis, I am not arguing that there is and will forever be one true interpretation method. The catalogue of the treaty interpretation norms pursuant to the 1969 VCLT gives examples of different interpretative techniques that one could apply depending on the legal issue at hand and the desired solution. As the general rule of treaty interpretation (Article 31) and supplementary means of interpretation (Article 32) are recognised as customary international norms, these two provisions are generally the most commonly recognised rules in the process of interpreting a treaty. The research question that this dissertation examines could be investigated through different forms of interpretation techniques. Thus, the interpretive steps that I am using in this study are not supposed to be seen as the ultimate interpretive method that presents the main understanding of the exclusion provision. Rather, the intention is to present some possible ways of interpretation that I consider could be most suitable and compelling to apply to pin down an international interpretation of Article 1F. By international interpretation, I mean a method that would result in a consistent and coherent interpretation of the exclusion clauses in accordance with international standards. I argue an international interpretation could decrease the discrepancies in the current interpretations between jurisdictions and strengthen the rule of law.84

Nonetheless, one might wonder what the purpose is behind finding an international interpretation of a particular provision in the 1951 Refugee Convention. Why is that important? Why should we not step back and let the states have their own discretion in interpreting the refugee-specific norms? Is it even possible to find one true interpretation of an international provision? While many of these questions fall outside the scope of this study, some aspects are worth discussing here.

84 North, M, Anthony, Chia, Joyce, ‘Towards Convergence in the Interpretation of the Refugee Convention: A Proposal for the Establishment of an International Judicial Commission for Refugees’, p. 228: ‘It is important, however, that in interpreting an international treaty designed to offer universal protection we do not lose sight of this fundamental, and easily overlooked, principle of justice.’ in: McAdam, Forced Migration, Human Rights and Security, 2008. Interestingly, Chia and North present a proposal to achieve convergent interpretation of the Refugee Convention. The idea is to encourage the UNHCR to establish an independent judicial commission with the task of providing ‘carefully reasoned opinions on major questions relating to construction of the Convention’. The instruments adopted by the UNHCR’s independent judicial commission would function as useful ‘soft law’ alongside the other documents presented by the UNHCR. Aware that the prospect of an international refugee court would be unrealistic, the authors advocate in favour of an authoritative interpreter of the Refugee Convention, see, in particular, pp. 226–227, 260–261.
It is often debated whether there can be one true interpretation of a treaty. This question is difficult to answer. The statement provided by Gardiner may provide some guidance: ‘The answer lies in the role and purpose of the Vienna rules.’ Given the absence of any mechanical method that can determine the ultimate meaning of a treaty or a certain provision, the rules and principles of the Vienna Convention can at least provide the guidance necessary to reach, in so far as possible, a proper interpretation of issues and rules that require assessment procedures, weighing of evidence, examining facts, etcetera. Further, thanks to the recognised customary nature of Articles 31 and 32 of the VCLT, the establishment of a set of uniform treaty rules and principles to follow becomes feasible. In contrast, the fact that states interpret international conventions differently does not mean that they interpret the provision in contravention of the treaty’s object and purpose. In fact, some conventions might allow states a broad discretion to implement different interpretation methods, all of which may comply with the overall objectives of the treaty.

Given the different policy trends and legitimate differences in the refugee determination process, framework and systems that states have at their discretion, variations are to be expected. A state’s own decision-making is a justifiable principle to adopt in the assessment of humanitarian protection. Likewise, having different opinions on the interpretation is essential and valuable, as interpretation is in general recognised as a dynamic process rather than a static one. Nevertheless, it is necessary that we do not ‘lose sight of this fundamental, and easily overlooked, principle of [humanitarian rights],’ as we are engaged in the interpretation of an international treaty designed to provide international protection. In this respect, the point I am underscoring (as other scholars have) is that these legitimate differences should not be used as argument to defend a continuous inconsistency.

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85 See Koskenniemi, Martti, ‘What is Critical Research in International Law? Celebrating Structuralism’, 29 Leiden Journal of International Law 727, 2016, pp. 727–735, emphasising the importance of using critical thinking regarding why a particular way of interpretation, rule or policy might be better than the other. We should try to answer questions such as ‘what does it take to believe that this rule or this policy is the better one?’. One perspective to consider, which Koskenniemi’s reasoning also illustrates, is that ‘[b]ecause we experience the world in contrasting ways, we project different meanings on the words we use to describe it’ (at p. 733). This might be an additional reason why it is difficult, perhaps even impossible, to reach one true interpretation.


87 See, for instance, Fogdestam Agius, 2014, at p. 313, shedding light on this by stating the following: ‘It may however be unrealistic to expect a treaty to have one single meaning and the very existence of consent to a judicial jurisdiction being given an independent right to construe the treaty where the parties diverge in their interpretation suggests that several meanings may be attached to a text’. See, further, Gardiner’s interesting and relevant discussions on whether there could be an ultimate correct interpretation of a treaty, see Gardiner, 2015, pp. 483–486.

in the interpretation of the Refugee Convention.\(^89\) This only increases the unpredictability and uncertainty of the interpretation procedure, particularly in relation to Article 1F, which includes criminal concepts that trigger the application of exclusion in an administrative context. Further, there are other issues concerning the exclusion of refugees, such as balancing the seriousness of the offence against the fear of persecution,\(^90\) the level of evidence required to reach the exclusion standard of proof, and the issue of whether membership of a violent organisation could be sufficient for ‘serious reasons for considering’.\(^91\) Not only do these matters add further complications within the Refugee Convention, but they also have, in the words of Chia and North: ‘very real ramifications for refugees and for States’.\(^92\) Hence, the diversity of interpretation and national asylum processes results in different treatment of asylum seekers, depending on which asylum state they happen to arrive in.

Given the humanitarian objectives of the Refugee Convention and the consequences the individual suffers from being excluded from refugee protection, it is important to ensure that the interpretation of Article 1F stands in consistency with the Convention’s object and purpose. As emphasised by a judge of the Full Federal Court of Australia:

> considered decisions of foreign courts, in particular appellate decisions, should be treated as persuasive in order to strive for uniformity of interpretation of international conventions […] It is desirable that obligations of the host states under an instrument such as the [Refugee] Convention be consistently interpreted in order that there be uniformity of approach not only as to host state rights and obligations, but also as to the derivative legal positions of refugees thereunder.\(^93\)


\(^92\) Ibid., p. 227.

\(^93\) *NBGM v. Minister for Immigration and Multicultural and Indigenous Affairs*, [2006] 150 FCR 522, para. 158, (per Allsop J.); A similar approach has been recognised in the United States, see *N-A-M v. Holder*, [2009] 587 F.3d 1052, p. 1062: ‘[a]lthough citing foreign law is at times controversial, the broad consensus, even among opponents of its use in constitutional law cases, supports its use when determining how other signatories on a treaty interpret that treaty’. For further relevant case law, see *Zrig v Canada (Minister of Citizenship and Immigration)* [2003] FCA 178; *Hj (Iran) v. Secretary of State for the Home Department*, [2011] 1 AC 596, para. 127 (per John Dyson S.C): ‘[…] the fact that it is desirable that, so far as possible, there should be international consensus on the meaning
The Refugee Convention is an instrument providing international protection to those fleeing from persecution, meaning that the different interpretations and perceptions made by state parties of their treaty obligations – which inevitably result in differing treatment depending on which asylum country an applicant ends up in – may seriously undermine the aim and context of the Refugee Convention.\(^\text{94}\) Thus, what we are currently dealing with is an international convention aiming to offer universal humanitarian protection, but that in practice is subject to inconsistent interpretation, leading to different determinations. Where the excluded refugee is spoken of as undesirable, yet unreturnable, the fragmented interpretation of the Convention could similarly be declared as undesirable and unjustifiable.\(^\text{95}\) Even if the host states through their immigration authorities could argue that the broad discrepancy and ambiguous methods of interpreting the exclusion provision are underpinned by political standards, the uncertain interpretation would not necessarily be justifiable in a legal sense as the inconsistent interpretation of Article 1F could have serious legal consequences. Thus, in the interest of contributing with a solution that could (in the best of worlds) resolve the issues of interpretation and legal and procedural unfairness, this dissertation aims to provide the systematic interpretive steps towards a coherent and consistent interpretation of exclusion cases based on terrorism. There are some factors that speak in favour of a willingness (at least a weak one) within the international community to reach a systematic and coherent practice in the refugee regime. An example is the mandate giving to the UNHCR and the position taken by several states to consider the UNHCR's instruments as a valuable and useful framework in the refugee determination procedure. The adoption of the EU Qualification Directive, and associated principles such as burden sharing and forum-shopping agreements, also point towards a shift from divergence to convergence.\(^\text{96}\)


\(^{95}\) Ibid., p. 261.

\(^{96}\) See North and Chia at ibid., pp. 290 and 230–242 highlighting how the consequences of the differences have a profound impact on the interpretation of the Refugee Convention and how these difficulties can be resolved through convergence.
issues linked to the Refugee Convention, they would take us at least one step closer to reaching legal certainty in the practice of universal refugee protection.

In conclusion, even if it is impossible to provide the ultimate interpretation of the exclusion provision, this dissertation aims to at least provide the foundations necessary to achieve a better and deeper understanding of the exclusion clauses, both within the scope of this legal matter and in relation to a non-unified concept like terrorism. I consider the general rule of treaty interpretation, systemic integration, supplementary means of interpretation and the evolutionary approach to make up the most useful interpretive toolbox for this study. This is not to say that other suggestions would be inadequate. I merely want to shed light on the interpretation techniques that I argue are appropriate and justifiable in the process of examining the research question that this dissertation is addressing.

The next section describes how this will be done and in relation to which relevant interpretation methods. As the research question raises the aspect of interpreting the exclusion provision from an international law perspective, the first part of the section below addresses the analysis and my position on international law as a legal system. This is followed by a deeper examination of the relevant and applicable interpretation methods.

1.4.2 International Law as a System: Regime Interaction or Fragmentation?

An essential point worth highlighting in relation to this study is that the exclusion provision does not operate entirely on its own. Even with Article 1F being enshrined in an international refugee instrument and thus falling within the framework of administrative law, the provision stands in close correlation with several other bodies of law. This is necessary to examine for the purpose of fully understanding the exclusion clauses. This is the purpose of the analysis presented below, which focuses on the question of whether international law is a system of intersected fields of law or a fragmented system.

Presenting a holistic framework that explains what regime interaction is supposed to entail and what its objectives focus upon seems to be a challenging task. What aspects of fact patterns it highlights, what merits it covers and involves, and what perspective it takes (e.g., state-centric, court-centric or non-state actor-centric) are some examples of factors that can influence regime interaction to take on different forms and yield different essential outcomes. This is why regime interaction has garnered scholarly interest and has been approached from multiple angles and analytical standpoints.97

Traditionally, what most international legal scholarship have perceived as the essential fact pattern that explains situations of regime interaction is, for instance, when we encounter a situation when norms from different treaty regimes collide and interact, or when different international tribunals present differing reasonings or applications of a legal standard. Dunoff criticises the method of studying regime interaction based on judicial decisions as a unproductive approach. Seeing judicial decisions as the main setting for when and how regime interaction occurs means placing regime interaction as a phenomenon emerging out of fact patterns that can be located in time and space. Perceiving regime interaction through this lens, what Dunoff defines as the ‘transactional model’ of regime interaction, does not – in his view – provide a real picture of regime interaction. International regimes interact in a constant and continuous relationship. This is what Dunoff calls ‘relational interaction’. Such ongoing relationships, which inevitably create interactions between several international regimes, can include regulatory, administrative, operational and conceptual interactions.

The commonalities between the layers of international bodies of law that could sustain a harmonised general international law system compete with fragmentation, which might be overly common and could perhaps be proclaimed as the ‘new’ pattern of international law. Thus, the regimes in international law or regime interaction would likely present as two sides of the same coin. One is a unified and coherent system, the other a disintegration under the umbrella of fragmentation. As compellingly described by Fogdestam: ‘Two countervailing forces are present in international law today: one that pushes towards fragmentation and one that pulls towards interconnection and coherence’.

However, international law is not intended to create a system of hierarchy between international regimes. This applies even in relation to the international sources enshrined in Article 38 of the ICJ Statute. The consensus is that there is no hierarchy between the sources in international law. Indirectly, however, treaties and customary international law generally take the position as the primary sources of international law. A similar perception of an informal hierarchy within international law might exist due to the relationships between the international regimes. However, several interpretation methods and principles can function as

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99 Ibid., p. 137.
100 Also called ‘international litigation interaction’, see ibid.
102 Ibid., pp. 137 and 157–173. Dunoff argues that much of what regime interaction upholds is the relationships between actors and institutions originating from different regimes, where these relationships occur outside the international courthouses.
103 Fogdestam Agius, 2014, p. 4.
measures to resolve conflicts of norms, including systemic integration or *lex specialis* doctrine, which ‘may at least informally organize sources of law of equal weight’. What is more significant to highlight is that each regime has its own normative framework and objectives and serves as a unified context of international law. Each international regime has its own judicial body, which simultaneously makes up part of a broader judicial system – namely, the system of international law. Thus, each international body of law can operate on its own yet retain a bridge of interaction with other international legal frameworks. The two sides of the coin are the reason why international regimes need to be considered as parts of a broader spectrum of international law, rather than operating as strictly separate disciplines. Thus, the interactions of international regimes aiming to create a harmonised legal system without limiting their own structures, norms and values underline what Fogdestam emphasises. In his words: ‘[J]udicial bodies as being both unified and diverse can be understood as indicating that there are links between them, but that they nevertheless make up their own entities. That would render international law a system of systems’. This statement aligns with the focus of the present study: to examine the exclusion provision based on regime interaction between international law’s own ‘system of systems’, which moves towards coherence and intersection rather than fragmentation.

International law has been criticised for being a legal system lacking assessment and enforcement mechanisms. Given this criticism, why do independent states still obey international law and why is international law even important? According to Professor Franck, the reason seems to be related to the concept of legitimacy. Despite the undeveloped condition of the international legal structure, states accept to follow the rules because of the belief they have in what those rules and institutional framework can achieve. In other words, the rules have a higher degree of legitimacy. Also, worth bearing in mind is that no matter what challenges, new approaches, or developments international law is facing,

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105 Ibid., pp. 32, 38: ‘Each regime “represents a framework for systematically resolving a particular set of conflicting interests according to a particular hierarchy of norms and values”.’
107 Ibid., p. 38 (emphasis added).
109 Franck, 1990, p. 24; See also Shaw, 2017, at p. 45 analyses and citing further Frank’s position in *Legitimacy* (1990) by stating that the fact that international law is obeyed and the system is considered to work relates to the four verified criteria that legitimacy depends upon, namely determinacy, symbolic validation, coherence and adherence.; The concept of legitimacy is defined as ‘a property of a rule or rule-making institution which itself exerts a pull towards compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of rights process’.
it is a system that involves much more than adoption of a few simple rules. As described by Shaw, international law is ‘a method of communicating claims, counter-claims, expectations and anticipations as well as providing a framework for assessing and prioritising such demands’.\footnote{Shaw, 2017, p. 49.} It is important to acknowledge and recognise the dynamic of international law and the interaction between its different bodies of law in striving to coherently interpret, respect and follow the rules under the umbrella of international law as a unified legal system.\footnote{Fogdestam Agius, 2014, p. 28: ‘While still often based in classical international law processes, regimes are part of that move towards a more cooperative and integrationist world order […] They also “possess a structure that facilitates the regime’s potential for flexibility,” indeed through interaction, but also in so far as the law within the regime is envisaged to continuously develop through clarification of the law or through the adoption of more detailed regulations’.}

In the next section, I will further evaluate the regime interaction between refugee law and other relevant international bodies of law.

1.4.3 The Interaction Between International Refugee Law and Other International Bodies of Law

In this section, the regime interaction between international refugee law and other bodies of law will be discussed further. The aim is to highlight similarities and differences in terms of their objectives and principles, as well as how the interactions between different fields of law can promote an understanding of the exclusion provision. These questions are interesting, in particular as the refugee legal system, although it is arguably positioned closest to international human rights law, can still interact with other bodies of law that stand far from administrative law.

1.4.3.1 Refugee Law and Human Rights Law

Refugee law and human rights law are closely related in several aspects. First, refugee law falls within the paradigm of human rights law. The two legal fields have several principles and objectives in common and human rights law has inspired refugee law in many ways, perhaps foremost through the direct reference to human rights in the Preamble of the Refugee Convention. Further, both legal fields are built upon the interest to provide protection. Human rights law is an important legal field in relation to the exclusion clauses – not only as interpretative standards, but also in providing complementary protection to those who fall subject to the exclusion provision. Human rights law becomes essential also in situations concerning receiving host states which are not parties to the international refugee law instruments. An additional component that binds the two legal fields together is the principle of non-refoulement and its scope of application.
Though the principle is more limited and subject to an exception in the field of refugee law,112 it operates in the opposite manner in human rights law, with an absolute character and broader applicability.113

As regards the framework of international refugee law, as stated by Burson and Cantor: ‘[H]uman rights law is indeed capable of promoting a truly common and coherent understanding of Article 1A(2)’,114 ‘The human rights approach and the aim to enforce a closer regime interaction between international refugee law and human rights law would not only serve to create a unified understanding of the refugee definition. It would also promote a closer connection to human rights law, potentially preventing interpretations of the refugee definition which ‘[do] not reflect either international human rights law or an international consensus in refugee law’.115

The reference to international human rights standards in relation to the field of refugee law is important for several reasons. In particular, it affects the determination of who is ‘deserving’ and who is ‘undeserving’ of refugee protection.

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112 See Article 33(2) of the 1951 Refugee Convention, the exception to the non-refoulement principle: ‘The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country’.

113 In human rights law, the principle of non-refoulement is considered a non-derogable norm and hence absolute; Fogdestam Agius, 2014, p. 309: ‘Regimes “talking it out” may therefore not lead to compromise, but to promotion of one set of interests embedded in one regime at the expense of another set of embedded in another, which is silenced’.


Needless to say, both legal systems are important in the harmonisation within international law and for ensuring that the humanitarian purposes of refugee law are established, protected and guaranteed.

1.4.3.2 Refugee Law and Criminal Law

The exclusion clauses’ intersections with criminal law are also important, mainly because of the impact that criminal law has on the assessment and application of those clauses. The exclusion acts mentioned in Article 1F are criminal offences of serious nature (either international crimes or serious national crimes). Hence, the definitions of the crimes mentioned in the exclusion clauses derive from the normative scope of criminal law. Although the exclusion assessment proceeding is not intended to function as a criminal proceeding, the justification for excluding a refugee from refugee protection requires that the person can be held accountable for the exclusion crime. Thus, the decision-maker must examine individual criminal responsibility within an administrative process. The outcomes of both exclusion and criminal sanctions severely impact the individual concerned.

1.4.3.3 Refugee Law and Extradition Law

Extradition law is also valuable in interpretation of Article 1F. However, as stated in the sections above and in the research question itself, the study of the exclusion provision in relation to international standards will be conducted mainly through the language of international human rights law and criminal law. That being said, there are issues related to exclusion from refugee protection based on terrorist crimes. This means that extradition law may also be a relevant body of law to study. Even though refugee law and extradition law embody different objectives and methods, they share some terms and elements that are interesting to take into account in the interpretation of the exclusion clauses. The main reasons for this are the following: In general, both legal fields regulate the treatment of foreign nationals. Another shared element is criminal background, which serves as the basis for exclusion under Article 1F and for extradition under extradition law. One should not forget that the 1951 Refugee Convention per se does not hinder extradition of a refugee to a third country, as long as the third country respects the fundamental rights and freedoms of the refugee concerned. The interaction between international refugee law and extradition law is studied only to a limited

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116 In general, refugee law is a vertical level between the state and the individual whereas extradition law is related to the relationship between states (horizontal level).

extent here, mainly in the discussions about the exclusion clause on ‘serious non-political crimes’.

Here, I have covered the matters of international law as a system and the regime interactions between international refugee law and other bodies of law based on how the research question is phrased. The next element I will focus on is what treaty norms that are appropriate and relevant to cover in this dissertation, which will be discussed in the next section.

1.4.4 Rules of Treaty Interpretation: Which Interpretation Norm and Why?

1.4.4.1 The Value of Interpreting the Refugee Convention in ‘Good Faith’

The classical saying that interpretation can to some extent be viewed as ‘an art, not an exact science’ underlines that each approach to interpretation has its own conditions for solving cases and issues of interpretation. The rules of treaty interpretation are relevant to this study as the purpose is to examine the interpretation of Article 1F of the Refugee Convention, a provision regulated in a treaty. Furthermore, the rules of interpretation highlighted in Articles 31 and 32 of the VCLT have a customary nature, meaning that they can be applied to the Refugee Convention even though the Vienna Convention entered into force after the adoption of the 1951 Refugee Convention.

Article 31(1) of the VCLT includes the general rule of treaty interpretation in international law, stating the following:

118 Fogdestam Agius, 2014, p. 304: ‘Legal interpretation is more art than science. It is seldom a matter of determining what the rules as such means, but a matter of ascertaining the condition in which it reasonably applies.’; See also Djeffal, 2016, at p. 8, defining the qualitative practice of interpretation as the ‘art of interpretation’.
119 Both Articles 31 and 32 of the VCLT are of a customary nature; Case concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), [2002] ICJ Rep. 625, para. 37: ‘The Court notes that Indonesia is not a party to the Vienna Convention of 23 May 1969 on the Law of Treaties; the Court would nevertheless recall that, in accordance with customary international law, reflected in Articles 31 and 32 of that Convention […]’; See also Case concerning Kasikili/Sedudu Island (Botswana/Namibia), [1999] ICJ Rep. 1045, at para. 18 where the ICJ addressed the same statement; For scholarly analysis, see Klabbers, Jan, ‘International Legal Histories: The Declining Importance of Travaux Préparatoires in Treaty Interpretation?’, 50 Netherlands International Law Review 267, 2003, pp. 271–272; Anthony, 2013, p. 10, Klamberg, Mark, Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events, Brill-Nijhoff, 2013, p. 18.
120 For more scholarly analysis of treaty interpretation in international law, see Linderfalk, 2022, pp. 120–138.
121 Article 31 of the VCLT in its entirety: ‘1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) any subsequent agreement between
A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

This provision is referred to in relation to treaty interpretation and is has been said that there are three main elements that need to be considered: the text, context, and telos (i.e., the object and purpose of the treaty). These elements are important to consider when interpreting a treaty rule. This has also been supported by the International Law Commission (ILC), confirming that ‘the ordinary meaning of the terms, the context of the treaty, its object and purpose, and the general rule of the international law, together with authentic interpretations by the parties, [are] the primary criteria for interpreting a treaty’.

A well-known element of the general rule of treaty interpretation is that a treaty must be interpreted in ‘good faith’. However, the meaning of ‘good faith’ is not simple to understand fully, nor can one be sure that this has been accomplished. In general, ‘good faith’ means that those who interpret a treaty are obliged ‘to act in a way that honours the spirit as well as the letter of law’. Interpreting a treaty in ‘good faith’ is in line with the essential elements of treaty interpretation under Article 31(1) of the VCLT, as it would mean capturing the

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122 Context refers to materials related to the conclusion of the treaty, see Aust, 2013, p. 207.
124 International Law Commission (ILC), Yearbook of the International Law Commission (1966), Volume II, UN Doc A/CN.4/SER.A/1966/Add.1, 1967, at p. 233, para 18; International Law Commission (ILC), ‘Draft Articles on the Law of Treaties with Commentaries’, 1966, at pp. 219–220, para. 8, where it is stated that ‘all the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation. Thus [Art. 31] is entitled “General rule of interpretation” in the singular, not “General rules” in the plural, because the [International Law] Commission desired to emphasize that the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule.’; Anthony Aust also highlights that Article 31 is framed as a ‘General rule of interpretation’, which simply points towards a singular noun in paragraph 1 and there being one rule, not several rules, See Aust, 2013, p. 208; See further, Hathaway, 2005, pp. 49–51; Hathaway and Foster, 2014, p. 7.
125 Article 31(1) of the VCLT; Goodwin-Gill, Guy S., ‘The International Law of Refugee Protection’, p. 40: ‘Every state is obliged to implements its international obligations in good faith, which often means incorporating international treaties into domestic law, and setting up appropriate mechanisms so that those who should benefit are identified and treated accordingly.’, in: Sigona, Nando, Long, Katy, Loescher, Gil, and Fiddian-Qasmiyeh, Elena (eds.), The Oxford Handbook of Refugee and Forced Migration Studies, Oxford University Press, 2014.
126 Hathaway and Foster, 2014, p. 6; Fogdestam Agius, 2014, p. 88: ‘Good faith has been invoked as a general principle of law and principle of general international law that informs the provisions of the covered agreements’. 
treaty’s foundation and committing fully to the context, object and purpose and text of the treaty. If the interpretation of a treaty’s text is inconsistent and incompatible with the context, object and purpose, that interpretation has failed to be in ‘good faith’.  

In interpreting the Refugee Convention in good faith, there are two key elements. The first is the need to promote the Convention’s effectiveness during the interpretation process. This has been described further by the ILC: the requirement of effectiveness means that ‘[w]hen a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the object and purposes of the treaty demand that the former interpretation should be adopted’. In other words, the interpretation method that best ensures the Convention’s effectiveness is the one that should be used, as it also aligns with the interpretation elements of ‘good faith’ and ‘object and purpose’. The second element, ‘good faith’, requires that the treaty continues to be applicable and relevant within its present social reality and contemporary legal context. As highlighted by Lord Bingham:

The Convention must be seen as a living instrument in the sense that while its meaning does not change over time its application will [...] unless it [...] is seen as a living thing, adopted by civilized countries for a humanitarian end which is constant in motive but mutable in form, the Convention will eventually become an anachronism.

This supports a focus on the contemporary legal context of the Convention and inviting an intertemporal movement in the interpretation, particularly where definitions in the Refugee Convention are written in general terms. The duty to interpret within the ‘present social reality and contemporary legal context’ relates

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130 Legal Consequences for States of the Continued Presence of South Africa in Namibia, [1971], Advisory Opinion, ICJ Rep 6, para. 53, stating that ‘[A]n international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation’.
131 Sepet and Another v. Secretary of State for the Home Department, see para. 6 (Lord Bingham). The most striking part of Lord Bingham’s observation was the following statement: ‘the reach of an international human rights convention is not forever determined by the intentions of those who originally framed it. Thus [...] the House was appropriately asked to consider a mass of material illustrating the movement of international opinion among those concerned with human rights and refugees in the period, now a very significant period, since the major relevant conventions were adopted’ (at para. 11); See, further, R v. Asfaw [2008] UKHL 31, para. 54 (Lord Hope).
to an evolutionary approach and confirms what the Refugee Convention is supposed to be viewed as: a living instrument.132

1.4.4.2 The Importance of the Textual Method and the Teleological Method

There is no doubt that Article 31(1) of the VCLT is key when interpreting the exclusion clauses. To gain a deeper understanding of Article 1F of the Refugee Convention, one must study its text, context, and object and purpose. The question is then: what sort of interpretation method is the most accurate for the scope of this study? The methods mentioned in previous sections all serve their means and are relevant in different ways. In this study, the textual method and the teleological method would not be mutually exclusive – both could be useful. The textual method is necessary for reading and understanding what the ‘ordinary’ meaning of the exclusion provision is. It is through the textual method that the means of extensive and restrictive methods can be discussed.133 The teleological method is relevant to this study in terms of finding the object and purpose of the Refugee Convention in general, but also in relation to the exclusion clauses. The approach of using both textual and teleological methods was practiced by the European Court of Justice (CJEU) in the famous Diakité case.134 The Court, tasked with determining the issue of humanitarian protection in the context of an armed conflict, relied upon both textual and teleological considerations when applying Article 15(c) of the Qualification Directive from the perspective of Article 31 of the VCLT. Examining whether subsidiary protection could be an alternative form of humanitarian protection to the 1951 Refugee Convention in situations where this need is initiated by an armed conflict, the Court stressed in its reasoning that ‘since [the Qualification Directive] […] does not define “internal armed conflict”, the meaning and scope of that phrase must […] be determined by considering its usual meaning in everyday language, while also taking into account the context in which it occurs and the purposes of the rules of which it is part’.135 By contrast, scholars have argued that the teleological method may capture the authority of a legal text better. The teleological method may also provide guidance on how to distinguish between legal and political reasoning, i.e., what are de lege lata and de lege ferenda arguments, respectively.136

132 Viewing the Refugee Convention as a living instrument was also discussed in, for instance, the case of Ex Parte Adan R v. Secretary of State For The Home Department, see p. 34 (Lord Hutton): ‘[]In our view the Convention has to be regarded as a living instrument’; See also Hathaway and Foster, 2014, p. 6.

133 If, for instance, it is unclear if a case is covered by the wording of the rule, that rule can be interpreted extensively or restrictively, which can be done using the textual method, see Klamberg, 2013, p. 21.

134 CJEU: Case C-285/12 Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides, Judgment, 30 January 2014.

135 Diakité (CJEU 2014), para. 27.

136 Klamberg, 2013, p. 22.
Even if both textual and teleological approaches are necessary for this study, the teleological perspective is referenced more often in the overall analysis, for several reasons. First, the object and purpose need to be at the heart of the interpretation, to ensure that the exclusion provision is not altered with a reading that does not exist within it. The object and purpose of a provision can derive from and be defined in applicable law, including the provision’s legal sources, such as statutory framework, treaties and customs. The teleological method makes it possible to identify the legal matter as enshrined in law, rather than that at the discretion of decision-makers or judges.\textsuperscript{137}

Further, the teleological method is important in examining if the objectives are maintained or if they have been changed due to the development of the global legal order and its impact on the substantive matter of Article 1F. The initial objectives of the exclusion clauses were to define the ‘undeserving refugee’ and protect the integrity of the international refugee system.\textsuperscript{138} As this study is not only focusing on understanding the exclusion clause in general terms and from a wider context, but also concerning exclusion due to terrorist crimes, the teleological method is used to find if the interpretation of the provision is consistent with the initial object and purpose of the exclusion clauses or if the recognition of ‘terrorism’ within the context of exclusion has created new objectives. Given that the Refugee Convention is a living instrument and new developments in the global legal order create new challenges – it is vital to examine the legal matters of this study considering its object and purpose. To interpret a norm contrary to its object and purpose would impact its legal significance. Hence, the object and purpose set the foundation for the meaning of the provision and for what purpose it is aimed to be applied.\textsuperscript{139}

\textsuperscript{137} Klamberg, 2013, p. 23.

\textsuperscript{138} Zimmermann, Andreas and Wennholz, Philipp, ‘Part Two General Provisions, Article 1 F (Definition of the Term ‘Refugee’/Définition du Terme ‘Réfugié’), para. 1: ‘serves the purpose of preventing the benefits of refugee status from applying to fugitives from justice, while it also protects the populations of the respective receiving country against crimes which might be committed by dangerous criminals, i.e. protects national security’, in: Zimmermann, Machts, and Dörschner, The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary, 2011; Fitzpatrick, Joan, ‘The Post-Exclusion Phase: Extradition, Prosecution and Expulsion’, 12 International Journal of Refugee Law 272, 2000, p. 275: ‘[...] it is plausible that insulting the new refugee regime from official and popular discontent by denying its benefits to the unworthy was the predominant objective of Article 1F.’; Gilbert, Geoff, ‘Current Issues in the application of the exclusion clause’, pp. 427–428, in: Türk, Nicholson, and Feller, Refugee Protection in International Law – UNHCR’s Global Consultations on International Protection, UNHCR, Executive Committee Meetings, ‘Note on the Exclusion Clauses’, EC/47/SC/CRP.29, 30 May 1997, para. 3; Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: summary record of the 24th meeting, UN Doc. A./CONF.2/SR.24, 17 July 1951, statements of Herment (Belgium) and Hoare (UK); UNHCR, Handbook, para. 148; UNHCR, Background Note on the Application of Article 1F, para. 3; 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, para. 2. See, further, Chapter 2, Section ‘2.3.3 The Objectives of Article 1F’.

\textsuperscript{139} Interestingly, the teleological method is one of the most criticised means of interpretation as it may create the risk of amending a text rather than interpreting it. That might result in ‘spilling over’ of the amended text.
1.4.4.3 Why Supplementary Means of Interpretation are Important
In most cases, the interpretation methods are linked to the ‘general rule of interpretation’ in Article 31(1) of the VCLT, as it has the greatest scope of application. However, not all relevant interpretation methods can be found in Article 31. When the ‘general rule of interpretation’ fails to provide guidance, Article 32,\(^{140}\) focusing on supplementary means of interpretation, becomes necessary to consider. Nevertheless, Article 31(1) would still be crucial, as it provides the primary and mandatory rule for interpretation methods. Article 32 is to be applied in a discretionary way, and only after Article 31 of the VCLT has been fully applied.\(^{141}\)

Supplementary elements include, for instance, the preparatory work behind the treaty, which is not covered by the general rule of interpretation in Article 31. As Article 31 focuses on the primary purpose of interpreting a treaty, it centres on interpreting the text, not examining the supposed intentions of the drafting parties. Though preparatory works have been criticised for being less authentic, incomplete, or even misleading, Article 32 suggests that supplementary elements can be useful to consider when the meaning derived from the application of Article 31 needs to be ‘confirmed’.\(^{142}\)

\(^{140}\) Article 32 of the VCLT reads as follow: ‘Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable’.

\(^{141}\) Li, 2017, p. 129; However, in some legal frameworks, preparatory works can prevail over the general rules of treaty interpretation, see, for instance, Fogdelem Agius, 2014, pp. 83–85.

\(^{142}\) Aust, 2013, p. 217; Carnahan, Burus M., ‘Treaty Review Conferences’, 81 The American Journal of International Law 226, 1987, pp. 229–230, where it is stated that subsequent agreements and practices have a greater weight than travaux; as the former means provide evidence of what the parties have agreed; also Schwebel, Stephen, M., ‘May Preparatory Work be Used to Correct Rather than Confirm the “Clear” Meaning of a Treaty Provision?’, published in SjT 1997 and can be read online here https://svjt.se/svjt/1997/797 [last accessed 18 September 2023]], pp. 797–804. The paper authored by Schwebel highlights that preparatory works are relevant for the interpretation process as they have a dual function – they may be used to both correcting and confirming the ‘clear’ meaning of a treaty provision. Towards the end of the paper, Schwebel discusses how state practices and judicial precedent build the foundation for customary international law. Such practices and precedent ‘demonstrate that preparatory work is often brought to bear in the interpretation of treaties, by the parties to those treaties and by their interpreters, and this whether the travaux préparatoires confirm or correct an interpretation otherwise arrived at’ (at p. 804) (emphasis added). Schwebel’s article has also been published in, Makarczyk, Jerzy (ed.), Theory of International Law at the Threshold of the 21st Century, Brill, 1996.
In contrast, what is supposed to be included in the *travaux préparatoires* (abbreviated as *travaux*) has never been defined by the ILC. Generally, it is understood to include written materials, such as successive drafts of the treaty, conference records, explanatory statements by expert consultants, uncontested interpretative statements by the chairman of the drafting committee and ILC Commentaries. Whether or not a certain material can be considered part of the *travaux* hinges on several aspects. Most importantly, the material must have a level of authenticity, completeness and availability.\(^{143}\)

For the present study, the drafting history (*i.e.*, the *travaux*) is important to consider in confirming or determining meaning in the event of ambiguity.\(^{144}\) *Travaux* are relevant in this study for many reasons. The *travaux* as a source of supplementary nature highlight that the drafting history of a treaty ‘is not a free-standing interpretive source, but rather a privileged source of evidence on the true meaning of a treaty’s text construed purposively, in context, and with a view to ensuring its effectiveness’.\(^{145}\) Thus, focusing on the drafting history of a Convention makes it possible to interpret the Convention in a broader context and to find what the original purpose was, according to the legislators. The fact that Article 31(1) of the VCLT also mentions the ‘ordinary meaning’ of the terms of a treaty also argues for limiting a linguistic approach when interpreting a treaty. Though the literal meaning of the wordings framed in the instrument is of relevance, and probably initially where to start, ‘the words must be construed in context, and an instrument such as the Refugee Convention must be given a purposive construction consistent with its humanitarian aims’.\(^{146}\) Studying the original intention can clarify the Refugee Convention’s true meaning and ensure that the interpretation aligns with the text, context, object and purpose. This would be an interpretation

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\(^{143}\) Aust, 2013, p. 218.

\(^{144}\) Article 32(a) of the VCLT: Supplementary means of interpretation may be an option to consider when reliance on the primary means presents an interpretation that (a) leaves the meaning ‘ambiguous or obscure’ or (b) leads to a result that is ‘manifestly absurd or unreasonable’. In those circumstances, the main purpose is to determine the meaning, not to confirm it. Further, if the ordinary meaning appears to be unclear and the preparatory works can show that the ordinary meaning does not represent the intention of the parties, the requirement to interpret a treaty in good faith, as defined in Article 31(1), demands that the court ‘corrects’ the ordinary meaning, see Schwebel, Stephen, M., ‘May Preparatory Work be Used to Correct Rather than Confirm the “Clear” Meaning of a Treaty Provision?’, pp. 541–547, in Makarczyk, Theory of International Law at the Threshold of the 21st Century, 1996. Also Schwebel’s paper in *SJT* 1997, in particular pp. 799–800.

\(^{145}\) Hathaway and Foster, 2014, p. 7; The impact of the drafting history as a source of evidence has been further elaborated by the House of Lords, ‘one is more likely to arrive at the true construction of Article 1A(2) by seeking a meaning which make sense in the light of the Convention as a whole, and the purposes which the framers of the Convention were seeking to achieve, rather than by concentrating exclusively on the language. A broad approach is what is needed, rather than a narrow linguistic approach.’, see *Ex Parte, Adam R v. Secretary of State For The Home Department*, at p. 24 (Lord Steyn); More on finding the interpretation of a treaty in the *travaux*, see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, [2004], Advisory Opinion, ICJ Rep 136, para. 95.

in good faith. For this reason, the _travaux_ are relevant sources in interpreting the meaning of the exclusion clauses and studying the merits of the provision as a whole.\[^{147}\]

### 1.4.4.4 Systemic integration

In addition to the general paragraph repeated in Article 31(1) of the VCLT, a provision relevant in this study is Article 31(3), which reads as follows:

Article 31

[...]

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which established the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

The importance of integrating Article 31(3), ‘subsequent agreement between the parties’, with the ‘general rule of interpretation’ relates to the duty to consider the Refugee Convention’s context in the interpretation process. Looking into the necessary means of the interpretative method of ‘subsequent interpretative agreement among the parties’, the first point of departure is the text of the Refugee Convention. This requires dedicated attention to the context, which will expand the depth of understanding regarding the object and purpose of the Convention.

\[^{147}\]The main settings that provided the most developing merits of the Conventions were the contribution made by the Ad Hoc Committee on Statelessness and Related Problems (meeting conducted at Lake Success, New York, January – February 1950); Ad Hoc Committee on Refugees and Stateless Persons (meeting conducted at Lake Success, New York, August 1950), see for instance, UN Economic and Social Council, _Ad Hoc Committee on Statelessness and Related Problems, First Session: Summary Record of the Fifth Meeting, E/AC.32/SR.5_, UN Ad Hoc Committee on Refugees and Stateless Persons, 30 January 1950; Economic and Social Council (ECOSOC) Social Committee, UN Doc. E/AC.7/SR.160, 1950; Ad Hoc Committee on Statelessness and Related Problems, France: Proposal for a Draft Convention Preamble, UN Doc. E/AC.32/L.3, 1950; Ad Hoc Committee on Statelessness and Related Problems, 4th Meeting, UN Doc. E/AC.32/SR.4, 26 January 1950; Ad Hoc Committee on Statelessness and Related Problems, 5th Meeting, UN Doc. E/AC.32/SR.5, 30 January 1950; Ad Hoc Committee on Statelessness and Related Problems, 17th Meeting, UN Doc. E/AC.32/SR.17, 6 February 1950; Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: summary record of the 24th meeting, UN Doc. A./CONF.2/SR.24, 17 July 1951; Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: summary record of the 29th meeting, UN Doc. A.CONF.2/SR.29, 19 July 1951; See also Weis, Paul, et.al., _The Refugee convention 1951: the travaux preparatoires analysed with a commentary by the late Dr Paul Weis_, Cambridge University Press, 1995.
To understand the Convention’s object and purpose, focusing merely on the literal aspect would not be enough.\(^{148}\) The context – in terms of ‘subsequent interpretative agreement among the parties’ – would include, for instance, the ‘Conclusions on International Protection’ adopted by ExCom. The context aids the analysis of understanding the object and purpose of the Refugee Convention, beyond its historical and contemporary framework. Further, the travaux are vital in considering the original intention of the drafters and in testing the understanding of the historical construction against the modern-day legal challenges shaping the arena of international refugee law. Applying ‘the general rule of interpretation’ supplemented by Article 31(3) requires taking account of the treaty’s Preambles and Annexes as much as agreements between the parties adopted during the process of the treaty’s conclusion.\(^{149}\) However, even if ‘subsequent agreement’ and ‘subsequent practice’ are necessary to consider in the interpretation process and thus relevant to this study, they are not similarly applied in systemic integration. Here, systemic integration is the interpretation method pursuant to Article 31(3) of the VCLT and is applied with respect to examining the aforementioned research questions. The elements of systemic integration and why and how this method is useful are elaborated further in the following.

Article 31(3)(c), often recognised as ‘systemic integration’, seeks for rules of international law applicable to a relation between parties when performing interpretation.\(^{150}\) In the wording of the provision, the intention is to, ‘with deceptive simplicity’\(^{151}\) as McLachlan phrased it, consider the wider context of international law.\(^{152}\) The objectives behind the wording of systemic integration are to support ‘interpretation as integration in the system’ and that ‘treaties are a creation of the international legal system and their operation is predicated upon that fact’.\(^{153}\) The function of systemic integration is to resolve the issue of fragmentation of international law and make it possible to have rules of international law that uphold strong, clear and coherent interactions.\(^{154}\)

\(^{148}\) As once framed by Judge Kirby J in the Chen Shi Hai v The Minister for Immigration and Multicultural Affairs [2000] HCA 19, para. 46: ‘[O]nly a broad approach to the text, and to the legal rights which the Convention affords, will fulfil its objectives’.

\(^{149}\) Hathaway and Foster, 2014 p. 9.


\(^{152}\) Ratcovich, 2019, p. 12.


\(^{154}\) The fear regarding fragmentation of international law is that it would create ‘the rise of specialized rules and rule-systems that have no clear relationship to each other’. The reality at an institutional level would be the
Systemic integration has therefore been defined as an interpretation method providing several functions, such as:

a) ‘resolve time issues, including the application of intertemporal law’
b) ‘complete the legal picture by filling gaps by reference to general international law’
c) ‘provide guidance to interpretation by reference to parallel treaty provisions and the intentions of the parties on a grand scale’
d) ‘resolve conflicts between treaty commitments’, and
e) ‘account for international law developments generally.’

Though systemic integration is related to an ‘expression of the principles of harmonious interpretation’ and contributes with a gap-filling function in matters where a treaty is silent, there are some aspects of systemic integration that are not entirely clear-cut. For instance, it is unclear whether systemic integration is an obligatory or optional interpretation method for decision-makers. Furthermore, the element of applying ‘the relevant’ rules of international law is also vague.

The intention here is not to deliver an analytic inventory of different interpretation methods applicable to Article 1F. Instead, the aim is to focus on the interpretation method that is arguably most appropriate for the research questions and objectives of the dissertation – in this case, systemic integration – and apply it coherently with the already mentioned interpretative rules. As mentioned above, in comparison to subsequent agreements and practices, defined in subparagraphs (a) and (b), systemic integration is applied most often in this thesis. The reasons are the following.

Systemic integration is important to the study as the purpose here is to gain a deeper understanding of the exclusion clauses in accordance with international law. Further, the interest in finding coherence between the different legal fields that inevitably interact because of the exclusion clauses increases the importance of using systemic integration as an interpretive method. The purpose of systemic integration goes beyond the obligation to refer to relevant rules of international law when interpreting a treaty provision. It should be perceived as an ‘obligation of process that in doctrine has been held forward as a principle to strive towards existence of a plurality of courts and implementation organs and emerging jurisprudence of conflicting nature, see ‘Fragmentation Report of the Study Group of the ILC’, A/CN.4/L.682/Add.1, para. 438; See also Fogdestam Agius, 2014, pp. 289–348; Ratcovich, 2019, p. 12.

156 Ibid., p. 292: ‘The principle of harmonious interpretation requires that whenever possible, and unless the parties apparently intended a deviation through the application of the maxim of lex specialis, all applicable treaty provisions must be read as leading to compatible practical results’.
157 Ibid., p. 418.
158 Ibid., p. 417.
normative, substantive unity of international law’. I argue that this paragraph could be used as a stepping stone towards a coherent system of international law where the interpretation and application of the exclusion clauses could be placed into a wider context of international law. This study aims to uphold the essence of international law as a system, in which multiple legal fields interact and stand in harmony with one another, but also on their own.

As the study leans heavily on systemic integration, this interpretative rule deserves to be explained further, with a deeper analysis of its framework and relevance. The following sections do precisely this.

1.4.4.4.1 The interplay between the ‘general rule of interpretation’ and ‘systemic integration’

There is rarely general recognition of hierarchical order in the international rules on treaty interpretation. Not even the ‘general rule of interpretation’ enshrined in Article 31(1) of the VCLT describes a hierarchical order placing the other subsections of the provision as alternative rules of interpretation. Looking at systemic integration’s different subparagraphs, the same situation can be seen. This is obvious in particular in the wording of Article 31(3)(c), which ‘refers to the international legal system as a whole as part of the context’. Not only does this reference underline the contextual elements between the ‘general rule of interpretation’ and ‘systemic integration’, but it also clarifies the value of ‘systemic integration’ as not being seen as an alternative interpretation method to the general rule of interpretation. As systemic integration relies on the applicable norms of ‘any relevant rules’, the connection between the two interpretation methods is strengthened even further. Of course, the application of ‘any relevant rules’ of international law cannot be addressed without considering the principle of good faith – one of the cornerstones of Article 31(1), requiring state parties to treaties to observe and respect their obligations under international law. Thus, there are many indications that Article 31 of the VCLT should be understood holistically.

159 Ibid., 2014, p. 304 (emphasis added), see also p. 321; See further, ‘Fragmentation Report of the Study Group of the ILC’, A/CN.4/L.682/Add.1, paras 413 and 419: ‘None of this predetermines what it means to “confront” a norm with another or how they might enter into “competition”. These matters must be left to the interpreter to decide in view of the situation. The point—but it is a key point—is simply that the normative environment cannot be ignored and that, when interpreting treaties, the principle of integration should be borne in mind’. (emphasis added).


1.4.4.4.2 The elements of 'systemic integration'

Analysing the meaning of the main terms of systemic integration – ‘rules’, ‘relevant’, ‘applicable in the relations between the parties’ and, lastly, ‘taken into account’ – they define how integration is supposed to be used as an interpretation method.

The reference to ‘rules’ is perhaps not confusing, as one immediately thinks of Article 38 of the ICJ, which stipulates the main sources of international law (treaty law, customary international law and general principles of international law). However, in the scope of systemic integration it is not clear whether the term encompasses only rules of international law, i.e., binding rules, or non-binding rules as well. This relates to the vague meaning of ‘rules’, on the one hand, and ‘applicable’, on the other hand. Thus, it is unclear whether the term ‘rules’ as mentioned in Article 31(3)(c) of the VCLT can include non-authoritative norms. Considering non-binding norms that derive from the legal regimes and practices of international organs would certainly extend the normative spectrum. This could perhaps call the efficiency and legitimacy of systemic integration into question. However, even though the ‘rules’ should be of a binding character, such ‘binding rules’ need not be written provisions. The rules can arise from ‘binding systemic rules inherent in other relevant legal regimes’.

162 As emphasised by Li regarding how the extraneous rules of international criminal law can be integrated into the context of Article 1F, the following needs to be considered:

In order to establish an overall consistent system of International Law, this elaboration seeks to include general objectives or established principles of legal regimes that are not traceable to one concrete provision of International Law, but are nevertheless compelling. For instance, it is nowhere explicitly stated that Criminal Law is implemented as a binary system involving the determination and a subsequent sentencing. Nevertheless, this systemic circumstance is possibly to be regarded for the interpretation of the exclusion clause.163

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163 Li, 2017, pp. 147–148 (emphasis added).
Thus, the understanding of the concept of ‘rules’ within ‘systemic integration’ is that they must be binding and part of international law. The framework of systemic integration recognises the normative system in which the ‘rules’ are embedded as international, not domestic, law.\textsuperscript{164}

The reference to ‘relevant’ rules means that the rules must pertain to the same subject matter and provide help in the interpretation process. Determining which rules are ‘applicable between the relations of the parties’ is more complex. Although ‘any relevant rules of international law’ clearly points to any sources of international law, including treaties, customary international law and general principles of international law, challenges arise in determining which rules are to be considered applicable and relevant. Some approaches suggest finding rules that refer to similar ‘subject-matter, object, or situation’\textsuperscript{165} as a way of navigating this issue. Other voices argue that systemic integration ‘does not define which group of subjects must be bound by a norm that influences interpretation, but that “relevant” should be understood in a broader sense, as \textit{contextually defined relevance}.’\textsuperscript{166}

Both approaches extend the scope to encompass elements that go beyond any one particular matter. The focus on finding ‘\textit{the relevant}’ rules is an invitation to consider various factors, such as subject, object and situation, which also relates to the notion of contextualising the rules. In other words, they have the same outcome, though through different terms. Furthermore, both approaches allow for a broader scope in finding the applicable and relevant rules of international law, with the goal of decreasing potential fragmentation.\textsuperscript{167} Thus, instead of forcibly deciding on one ultimate approach, both are considered to be ‘relevance-oriented approaches’\textsuperscript{168} that can be used in systemic integration.

Here, it is difficult to understand whether this part of systemic integration requires that the rules ‘applicable between the relations of the parties’ must be identical between all parties, or rules that can create a ‘normative environment’ or rules that can be recognised as related to the common intentions of the parties. These three scenarios reveal a scale from a restrictive perspective to a broader approach. While a restrictive method would most likely guarantee legal certainty,

\begin{flushright}
\textsuperscript{164} Li, 2017, p. 148.
\textsuperscript{165} Fogdestam Fogdestam Agius, 2014, p. 311.
\textsuperscript{166} Ibid., p. 325, see also, pp. 324, 327 and 329.
\textsuperscript{168} The concept of a ‘relevance-oriented approach’ is addressed by Fogdestam in Fogdestam Agius, 2014, p. 325 n 136.
\end{flushright}
the broader approach would be more likely to promote a harmonised international legal system.\textsuperscript{169}

As previously mentioned, systemic integration focuses on the means of interpretation rather than on incorporating the rules of international law. This aligns with evolutionary interpretations and serves the idea of having different norms that complement each other, rather than creating a hierarchy of norms. This relates to the general notion of recognising that systemic integration shall prevail over any norm conflict resolutions that fall within the scope of the \textit{lex specialis derogat legi generali} principle. As the exclusion provision retains its relevance to other bodies of law, such as international human rights law and international criminal law, none of these bodies of law creates a norm conflict \textit{per se}. They stand in harmony with international refugee law, to support and complement refugee assessment procedures, rather than affecting the applicability of the rules in the refugee law instruments. Hence, systemic integration as an interpretation rule invites the exclusion clauses to be interpreted under the rules and principles of other international bodies of law.\textsuperscript{170} It provides the possibility to build bridges between interrelated international bodies of law and ensures that international law as a system stands in consistency and coherency.

\subsection*{1.4.4.4.3 Systemic integration: convergent and divergent views}

The model illustrated below demonstrates that systemic integration contains both convergent and divergent views.\textsuperscript{171} How this is possible and the argument for this conclusion are addressed in the following analysis.

\begin{center}
\textbf{Systemic integration}
\end{center}

\begin{center}
\begin{tikzpicture}
\node at (0,0) {Convergent view};
\node at (1,0) {X};
\node at (2,0) {Divergent view};
\end{tikzpicture}
\end{center}

Systemic integration can be applied in any context where two or more rules are subject to interpretation. Thus, the underpinnings of systemic integration do not require a specific setting. It can fit into different circumstances where the norms of international law refer to either similar terms, the same legal regime, or even different legal frameworks. This sheds light on how common different rules can coincide and spark the need for integration. That could indicate that the broader scope of systemic integration creates a space for subjective interpretation of meaning. However, this is not the case. The fact that the prerequisite of systemic integration opens for interpretation does not necessarily mean that the interpret-

\begin{center}
\begin{tikzpicture}
\node at (0,0) {Convergent view};
\node at (1,0) {X};
\node at (2,0) {Divergent view};
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\end{center}

\begin{center}
\begin{tikzpicture}
\node at (0,0) {Convergent view};
\node at (1,0) {X};
\node at (2,0) {Divergent view};
\end{tikzpicture}
\end{center}

\textsuperscript{169} Li, 2017, pp. 148–149.
\textsuperscript{170} Li, 2017, pp. 150–151.
\textsuperscript{171} The model is inspired by the illustration presented in Ratcovich, 2019, p. 229.
tation rule is subjective. This line of reasoning would have serious legal consequences and cause uncertainty in the interpretation of a treaty. The flexibility of including subjective evaluation would result in different meanings of systemic integration and shape the interpreted meanings of treaties. Not only would the normative meaning of the treaties and the understanding of systemic integration be threatened by such arbitrary forces, but international law could lose in legitimacy.\textsuperscript{172} The fact that systemic integration can be considered in several distinct circumstances means that this a degree of clarification is required as to what, how, and when systemic integration can be applicable. What systemic integration usually involves is an analysis of the interpretation rule’s relation to two separate views – the convergent and the divergent.

Whereas the convergent view ‘understands all norms, regimes and other units of international law as intrinsically linked’,\textsuperscript{173} the divergent view focuses on ‘the independence or singularity of treaties by separating them from other treaties and norms of international law’.\textsuperscript{174} Thus, it is obvious that the two views are contrary in terms of what they represent. The convergent view emphasises international law as a ‘single convergent unity where no norm, regime or other part is separable from any or all other parts of international law’,\textsuperscript{175} whereas the divergent view recognises the detachment between norms and bodies of international law and describes international law as something other than a single legal system. According to the divergent view, the adopted treaties are documents with multiple norms that having different meanings and outcomes irrespective of the similar or dissimilar meanings attained in other bodies or norms of international law.\textsuperscript{176} Meanwhile, the convergent view recognises international law as a single system that cannot be understood without studying its intersections with other norms and frameworks of international law. In other words, the convergent view does not welcome the definition of international law as a structure where rules and regimes are separated from each other. Nonetheless, from a divergent view, the structure of international law does contain multiple legal frameworks that can be used, independently of external elements, to determine the meaning of the treaties to which they apply. Thus, the divergent view narrows the focus on the regime, treaty, or principle of international law as the sole element which can provide its meaning. The ultimate element that pulls the two views in opposite directions is the context that needs to be considered.\textsuperscript{177}

\textsuperscript{172} Ratcovich, 2019, p. 228.
\textsuperscript{173} Ibid., p. 218.
\textsuperscript{174} Ibid., p. 221. For a theoretical analysis of the convergent and divergent views, see ibid., pp. 218–229.
\textsuperscript{175} Ibid., p. 218.
\textsuperscript{176} Ibid., p. 221.
\textsuperscript{177} Ratcovich, 2019, p. 226.
So, on which side of the scale can we find systemic integration? Can integration as an interpretation rule highlight one of the views exclusively or is it possible to rely on them both? The answer can be found in the wording of the general rule of interpretation, which guides the interpreter to find the meaning of a treaty from both the text and ‘the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’. Combining the wordings of the general rule of interpretation and of systemic integration clarifies the picture further. Systemic integration, which merely ‘refers to the international legal system as a whole as part of the context’, moves between the convergent and divergent views. By way of explanation, it should be stated that international law inevitably develops over time. Many treaties, not least the 1951 Refugee Convention, are living instruments and their standards may evolve and change. As a consequence of the unavoidable normative development, the meanings and standards of systemic integration may also change accordingly. It is no surprise that systemic integration is a solid ground for evolutionary interpretation and open to integration with other international bodies of law, taking the evolving nature of the norms and regimes of international law into account. As systemic integration is an integral part of the general rule of interpretation, the process of interpreting rules of international law will indeed encompass many different factors. The importance of observing the development in international law can help explain the existence of both the convergent and divergent views. As stated by Ratcovich: ‘[T]he meaning of systemic integration may be understood as an existing but evolving standard that is continuously moving along a scale between convergence and divergence’. Speaking of evolving, the evolutionary approach is another interpretation method focusing on the aspect of development and how to interpret a treaty as the living instrument it is in relation to other international norms. This form of interpretation is explained further below.

1.4.4.5 The Evolutionary Approach

The notion of interpreting treaties as living instruments is not unfamiliar – rather, it is generally recognised nowadays. As the legal order is a system of complexity, challenges and developments, treaties regulating the legal matters of each legal

178 Article 31(1) of the VCLT (emphasis added).
179 Li, 2017, p. 142.
180 Ratcovich, 2019, p. 229.
181 Interpreting treaties as living instruments functioning as part of a developing legal environment is recognised within the scope of international human rights law. However, the phenomenon have also been recognised in European economic law and international trade law. See ECtHR, Tyrer v. United Kingdom, Application No. 5856/72, Judgment, 25 April 1978, para. 31: ‘[T]he Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present day conditions. In the case now before it, the court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member states of the Council of Europe in this field;’; The term ‘evolutionary’ has also been used by the ICJ
system must be in coherence with the modern view of legal problems. Essentially, considering a treaty as a living instrument means that the treaty is seen to have a dynamic, not a static meaning. In this respect, there are some interpretation methods that are more suitable when discussing the interpretation of a treaty from the perspective of developing legal orders. One common approach, which is used in this study, is the evolutionary one. This focuses primarily on the ‘developments which have taken place after the conclusion of a treaty’.

As a result of the requirement to interpret treaties as living instruments, the importance of reconciling different legal fields within their contemporary international legal context becomes even greater. Given that the Refugee Convention was the second binding human rights treaty declared by the United Nations, it is perceived as the legal instrument whereby refugees are entitled to claim the protection provided through general human rights treaties. In fact, many of the rights mentioned in the Refugee Convention overlap with some of those in the fundamental human rights treaties, including the 1966 Covenants of Civil and Political Rights and Economic, Social and Cultural Rights. As stated by the Supreme Court of Canada:

[The Refugee Convention itself expresses a ‘profound concern for refugees,’ and its principal purpose is to ‘assure refugees the widest possible exercise of . . . fundamental rights and freedoms.’ This negates the suggestion that the provisions of the Refugee Convention should be used to deny


Li, 2017, p. 131; On the link between ‘systemic integration’ and ‘evolutionary interpretation’, see also Fogdestam Agius, 2014, pp. 296–98.

See an analogous interpretation of this in the Case concerning Rights of Passage over Indian Territory (Portugal v. India), Preliminary Objections, [1957] ICJ Rep 125, at p. 142: ‘[I]t is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accord with existing law and not in violation of it’.

rights that other legal instruments make universally available to everyone.\footnote{Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 SCR 3.}

The idea of building conceptual framework based on intertwined treaties is one that members of the ICJ have argued for in several cases. For instance, in the \textit{North Sea Continental Shelf Cases}, judge Ammoun declared that it was ‘imperative in the present case to interpret [the treaty] in the light of the formula adopted in the other three [related] conventions, in accordance with the method of integrating the four conventions by co-ordination’.\footnote{North Sea Continental Shelf cases, (Separate Opinion of Judge Ammoun), p. 125.} In general terms, the ICJ has insisted that ‘an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation’.\footnote{See Legal Consequences for States of the Continued Presence of South Africa in Namibia, para. 53 (emphasis added); See also, Case concerning Gabčíkovo-Nagymaros Project (Hungary/Slovakia), [1997] ICJ Rep 7, (Separate Opinion of Vice-President Weeramantry), p. 114 where Vice-President Weeramantry states that ‘[t]reaties that affect human rights cannot be applied in such a manner as to constitute a denial of human rights as understood at the time of their application’.} The notion of interpreting and applying international instruments within the contemporary legal context \textit{prevailing at the time of the interpretation} underlines the need to view the treaty as a living instrument and to take account of ‘any relevant rules of international law applicable in the relations between the parties’.\footnote{See, for example, Bjorge, Erik, \textit{The Evolutionary Interpretation of Treaties}, Oxford University Press, 2014; Gardiner, 2015, pp. 467–497; Djeffal, 2016, see in particular p. 20ff, where the author highlights the many different synonyms to the ‘evolutionary interpretation’. Some examples of the mentioned synonyms are ‘reinterpretation’, ‘evolutive interpretation’, ‘dynamic interpretation’ and ‘progressive interpretation’; Pascual-Vives, 2019; Marquet, Marceau, Keith, Abi-Saab, 2019.}

Interestingly, there have been some insightful questions that have compelled several scholars within the field of treaty international rules to investigate this matter further. They have focused mainly on the matter of how to identify the framework of evolutionary interpretation.\footnote{Article 31(3) of the VCLT; See also Aust, 2013, at p. 216 stating that: ‘In certain cases, reaching an interpretation that is consistent with the intentions […] of the parties may require regard to be had not only to international law at the time the treaty was concluded (the ‘inter-temporal rule’), but also to contemporary law.’} Is it accurate to define it as an interpretation method? Is it a separate interpretation method or a part of the general treaty interpretation rule? What does evolutionary interpretation encompass and under what circumstances can or should evolutionary interpretation be applicable? In general, what does evolutionary interpretation contribute with? All these matters are relevant to highlight and comment upon.

The meaning of ‘evolutionary’ interpretation is not uniformly defined. While some describe the ‘evolutionary’ interpretation as the obvious pathway ‘in the process of applying a normative framework to changing factual circumstances’, others consider ‘evolutionary interpretation’ to be a ‘normative framework itself
in order to meet what the adjudicator deems to be the demand of the contemporary world’. Gardiner describes evolutionary interpretation as ‘terms which have been put into circulation mainly through case law and, in particular, through analysis of pronouncements of courts and tribunals, most notably ICJ and ECtHR’. In the absence of a standard definition, the main basis of this method is the recognition that ‘the meaning of a treaty may change over time’. Another statement is made by Bjorge, stressing that evolutionary interpretation is a method that helps us properly understand the intention of the parties. Thus, Bjorge links evolution with intention, as he finds this to be the most accurate way to explain the meaning of evolutionary interpretation. Comparing the viewpoints, the way in which Gardiner explains evolutionary interpretation and its substance is the one I believe captures the fundamental elements of what evolutionary interpretation is supposed to contribute with. This is supported by the fact that courts also use this approach. Thus, the question is not how to define the terms of evolutionary interpretation, but rather what evolutionary interpretation can tell us – that the meaning of a treaty is supposed to evolve. Although the different underlying ideas of evolutionary interpretation are not mutually exclusive, there is reason to clarify the meaning and how this interpretation method is used within this dissertation. Though there are different scholarly positions on how to identify evolutionary interpretation and what its interpretive function is, evolutionary interpretation is generally recognised as part of the general rule of interpretation, ‘harnessing the results of proper interpretation in accordance with the Vienna rules’. Likewise, the evolutionary interpretation method does not provide an interpretation framework that extends beyond the

192 See, for instance, Djeffal, 2016, in particular pp. 18–27; See also the ICJ presenting the underlying meaning of evolutionary interpretation in the case of Dispute regarding Navigational etc (Costa Rica v Nicaragua), para. 66: ‘[…] where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is “of continuing duration”, the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning’; Gardiner, 2015, pp. 468–471.

193 Gardiner, 2015, p. 467.

194 Gardiner, 2015, p. 467; See further, Djeffal, 2016, p. 19: ‘The notion of “evolutive” also indicates that the change occurs after a lapse of time, although this might be marginal. This general phenomenon in the context of treaty interpretation is what we call evolutive interpretation: *The words in the treaty stay the same, their meaning is altered*. (emphasis added); In contrast, see Minister for Immigration and Multicultural Affairs v Haji Ibrahim, at paras 132–155 (Gummow J) and 185–189 (Kirby J) sharing their dissenting opinions on whether the interpretation of the 1951 Refugee Convention should be limited to its historical meaning or consider an evolutionary approach; See also North, M, Anthony, Chia, Joyce, ‘Towards Convergence in the Interpretation of the Refugee Convention: A Proposal for the Establishment of an International Judicial Commission for Refugees’, p. 230 in: McAdam, Forced Migration, Human Rights and Security, 2008.

195 For further scholarly analysis, see Bjorge, 2014.

196 Gardiner, 2015, p. 468.
scope of Article 31 of the VCLT.\textsuperscript{197} According to Hathaway, the evolutionary interpretation of a treaty is important because:

\begin{quote}
[a] treaty's object and purpose cannot reasonably be forever locked in time. To the contrary, because treaties are living instruments, evidence of historical intent should be balanced against more contemporary evidence of the social and legal context within which original intentions are now to be implemented.\textsuperscript{198}
\end{quote}

Thus, it is not aimed to be perceived and applied as an additional interpretation rule separate from Articles 31(1) and (3) of the VCLT, which are also applied in this study. In line with the application of the general rule of interpretation as a holistic norm, the purpose of using the evolutionary interpretation method is to enhance the interpretation of the treaty norm. It can also contribute with interpretive support, to strengthen and make the interpretation process more legitimate, certain and consistent.\textsuperscript{199} Thus, it is appropriate and justifiable to apply the ‘evolutionary’ interpretation in conjunction with the ‘general rule of interpretation’ and ‘systemic integration’. In general, these interpretation techniques can reveal both the ‘why’ and the ‘what’ related to the practice of interpreting exclusion from refugee status based on terrorist crimes from an international perspective.\textsuperscript{200}

Terrorism has grown into a modern-day challenge and has been included in various legal regimes. This increases the need for examining the research question using an evolutionary approach, in studying both the interaction between international refugee law and other bodies of law in the interpretation of the exclusion provision\textsuperscript{201} and the consequences that ‘terrorism’ has on the framework of Article 1F. Thus, the evolutionary approach is used in correlation with the general rule of interpretation and systemic integration to present ways to interpret the exclusion provision in relation to terrorist crimes so it can be more coherent,

\begin{flushright}
\textsuperscript{197} Gardiner, 2015, pp. 467 ff; Li, 2017, pp. 131–133.
\textsuperscript{198} Hathaway, 2005, p. 62; See further Singer, 2015, pp. 43–45.
\textsuperscript{199} See, for instance, the ICTY applying an evolutionary approach when examining whether rape was included in ‘the laws or customs of war’ in ICTY, \textit{Prosecutor v. Anto 
Furundžija (Judgement)}, IT-95-17/1-A, 10 December 1998, at para. 168 where the the Trial chamber found reason to include sources from other bodies of law, such as international humanitarian law, international human rights law and domestic standards. Ultimately, it stated that ‘rape and serious assault in armed conflict has […] evolved in “customary international law”’ and was a violation of ‘the laws or customs of war’.
\textsuperscript{200} On this notion, see, for instance, Djeffal, 2016, pp. 3–27, presenting an interesting analysis of the interpretation process recognised as both a method and a practice: ‘Interpretative practice is the use of method in real life. Practice is a source but at the same time an application of method’ (at p. 4).
\textsuperscript{201} See also Li, 2017, p. 166; In general, also Rikhof 2023, pp. 577–587.
\end{flushright}
consistent and justifiable. One statement is worth highlighting yet again: the Refugee Convention is a *living instrument*, which means that ‘while its meaning does not change over time its application will’.\(^{202}\)

Having devoted attention to all the critical building blocks for the foundation that this study is based upon, the next essential aspect is the blocks that fall outside the scope of this study. This next section sheds light on the limitations of this thesis.

### 1.5 Limitations

The focus of this study is exclusion from refugee status and refugee protection according to Article 1F of the Refugee Convention. I will therefore not study the other provisions of the Refugee Convention that regulate when the Refugee Convention is not applicable, *i.e.*, Articles 1C, 1D and 1E. The exclusion provision should not be confused with the other provisions dealing with exclusion matters, but which focus on other issues of ‘exclusion’. For instance, in the case of voluntary return, acquisition of a new nationality, or changes of circumstances in the country of origin would lead to the cession of refugee status (Article 1C). The Refugee Convention, under Article 1D, puts Palestinian refugees outside its scope for political reasons, at least while they continue to receive protection or assistance from other United Nations agencies. Article 1E focuses on excluding those who are treated as nationals in their state of refuge.\(^{203}\) As those articles are not relevant to the research questions, they are not of importance within the scope of the study.

As mentioned previously, this dissertation will not examine the terrorism definition in depth. Although an overall analysis and brief discussion of the terrorism definition will be presented, the purpose of this study is not to present a universal


\(^{203}\) UNHCR Handbook, paras. 142 and 144.
definition of terrorism. Nor do I aim to add any further clarification of the concept or present solutions to the current challenges surrounding the criminalisation of terrorism. Further, the thesis is not intended to clarify the meanings of the separate exclusion clauses and any of the vague notions included therein. Instead, this thesis highlights the substance of the exclusion clauses to the extent relevant for the scope of this study, to provide a presentation of the framework of the exclusion provision as a whole.

The issue of exclusion of minors will also not be examined within the context of research questions. I will not examine the right to family life and reunification more than simply stating that those rights may be limited by the exclusion clauses. Furthermore, I will not consider the exclusion clauses regarding subsidiary protection more than necessary. The focus will be mainly on the exclusion clauses in the Refugee Convention and the EU Qualification Directive concerning refugee status and protection.

One could argue for the need to consider a regime interaction with international humanitarian law. However, international humanitarian law is addressed in a limited manner and its normative scope in this study is very small. The reason is the following. The aim of the study is not to examine the exclusion clauses in light of the *jus in bello* rules. An asylum seeker can be excluded from refugee status and protection if there are ‘serious reasons for considering’ that the individual is responsible for a war crime. Acts of terrorism can constitute part of a war crime. However, the purpose of the study is not to examine whether certain offences amount to *war crimes* or not. Nor will I study when and how an act of terrorism can constitute a part of a war crime. The focus is not to examine the criminal definition as such or whether a particular act is to be declared a war crime according to international humanitarian law and international criminal law instruments. Instead, this study focuses on the question of how to deal with situations when there is a ‘serious reasons for considering’ that an individual is subject to exclusion based on a terrorist crime.

Furthermore, there are clear divergencies between refugee law and international humanitarian law in terms of concepts like ‘internal armed conflict’. As stated by the CJEU in relation to the EU Qualification Directive, the wording ‘internal armed conflict’ has another meaning than what can be found in 1949 Geneva Convention. Thus, the term ‘internal armed conflict’ has distinct meanings in regard to refugee matters pursuant to the EU Qualification Directive and the international humanitarian law instruments, respectively. Whereas the normative framework of international humanitarian law focuses on limiting the effects of war for the purpose of protecting civilians and property and interlinks this with

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204 Regulated in Article 17(1) of the EU Qualification Directive.
205 Article 12(2) of the EU Qualification Directive.
matters of criminal liability for violence, international refugee law, by contrast, seeks to grant protection to people outside the territory of an armed conflict. While both bodies of law may share a common position to protect humanitarian principles, the approach to doing so differs greatly.206

This dissertation will not include any in-depth analysis of which norms within international criminal law have gained customary international law recognition. In other words, the ongoing discussions on what international criminal standards may apply as customary norms fall outside the scope of this study. This marks a delimitation in relation to the research question. The analysis presented in this work will address the relevant provisions enshrined in international criminal law as stepping stones to answer the research questions. Therefore, the analysis focuses on the relevant norms (either criminal treaty norms or customary norms) applicable to the interpretation procedure according to the VCLT, without any extended discussion of if and how any of the mentioned norms have attained a customary status.

Although the study argues in favour of integration between different bodies of law, one should be sensitive to the distinctive purposes of international refugee law and the other legal regimes this study sheds light on (such as international human rights law and criminal law). Therefore, I will not refer to more bodies of law than are necessary for the material scope of the study.

The study was completed in January 2024, meaning that materials published after this date are not included.

The final section of the chapter provides an outline of the remainder of this dissertation and how its main themes are addressed and structured.

1.6 Outline
This study contains four parts and seven chapters in total. Chapter 1 serves to give an introduction and describe the main notions and elements of the study. This chapter describes and defines the why of the study, and identifies the main problem, purpose and research questions that I aim to examine. Therefore, this chapter has served to clarify three keystones: what, why and how. The what refers to my description of the research problem and delimitations. The why covers the background, the purpose and the research questions of the study. Lastly, the how relates to the methodological framework, interpretive approaches, research materials and outline of the study.

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To examine the question of how to better understand exclusion based on terrorist crimes in accordance with international standards, this dissertation encompasses both substantive and procedural elements. The reason why this study emphasises both substance and procedural matters is to provide a complete picture and in-depth analysis of the exclusion provision, in terms of the meaning of the provision itself. It is also relevant in relation to the developing connotation of the concept of terrorism. In order to present a proper investigation of the research question, attention needs to be pointed towards the substantive and procedural elements and issues. These pillars are equally important to analyse and uncover for the purpose of presenting insights into the meaning, objective and contextual matters that are relevant when an asylum seeker is subject to exclusion from refugee protection. The substantive aspects are addressed in Chapters 2, 3 and 4. Furthermore, a perspective applied in this dissertation is analysing the interpretation of the exclusion provision in light of international criminal standards. This links to the need for a procedural discussion. The procedural analyses of specific questions are found in Chapters 5 and 6.

Below, I describe the coming chapters and their main contributions in detail.

Chapter 2 presents the exclusion provision in international refugee law. This chapter includes an analysis of the drafting process and highlights the fundamental substantive matters of Article 1F. It addresses the objectives of the exclusion provision and the framework and consequences of exclusion. Many of these elements are analysed in light of regime interaction with human rights standards. The aim behind this chapter is to give an insight into the main pillars of the exclusion provision. This is important in order to understand its interaction with other distinct bodies of law, such as international criminal law and extradition law. It is also relevant in recognising terrorism as a basis of exclusion. The conclusions highlight the exceptional nature of the exclusion provision. Though its purpose is to protect the integrity of refugee law, the exclusion provision is still an integral part of the Refugee Convention. It should, therefore, apply its restrictive interpretation approach, to maintain the object and purpose of the international refugee instruments.

Chapter 3 presents the background on how and why terrorism became an issue in the context of exclusion. Given the various issues that already exist concerning the exclusion provision, including a non-universal concept like terrorism does not shift either the interpretation of exclusion or asylum seekers to a ‘safer’ spot. Thus, as Chapter 3 highlights, it is important to bear in mind the object and purpose of the refugee legal system and the exclusion provision, respectively. Even if the international community is obliged to combat terrorism – the exclusion provision is not supposed to be perceived as an anti-terrorism measure. The purpose of Chapter 3 is to invite the reader to better understand the interaction between exclusion and terrorism and how complex this issue is, in particular in
relation to membership of a terrorist organisation. The ‘mere membership doctrine’ has endured for a long time. However, it is still a dubious issue within the context of exclusion based on terrorist crimes. Generally, Chapter 3 underlines the position of maintaining the fundamental principles and purposes of international refugee law and the exclusion clauses, regardless of if it is terrorism or another excludable crime that brings an individual under the scope of Article 1F.

Chapter 4 focuses on the interaction between international refugee law and human rights law. It builds a bridge between these bodies of law as a foundation to stand upon in discussing and highlighting some vital elements within the exclusion provision. To clarify further, Chapter 4 underlines some of the critical parts of an exclusion decision, the danger of considering the framework of human rights law as a safety net (despite the absolute nature of the non-refoulement principle), and the oft-debated balancing test. This chapter is essential, as it illustrates how the human rights approach is linked to the exclusion provision and how this serves the humanitarian objective of the refugee legal system. An intention behind Chapter 4 is to create a transition between the substantive and procedural frameworks of this dissertation. Having settled and clarified the intersection between international refugee law and human rights law, the idea is to take the human rights approach analysis into the reading of the procedural safeguards and principles emphasised in Chapter 5.

Moving on to Chapter 5, it highlights the procedural matters of exclusion from refugee protection. This chapter addresses the assessment procedure of Article 1F and dives into a contextual analysis of the rights and principles that are necessary to consider when assessing the exclusion provision. Among several aspects mentioned in this chapter, a main theme is the recognition of procedural fairness in relation to Article 1F. Like the preceding chapters, Chapter 5 addresses the importance of the interaction between human rights law standards and criminal law standards for the purpose of strengthening the procedural framework of Article 1F.

Chapter 6 includes a deeper analysis of the relationship between international refugee law and international criminal law. The main theme of this chapter is the question of whether the exclusion standard ‘serious reasons for considering’ can be interpreted in accordance with international law. It examines this issue by comparing the threshold of Article 1F with relevant evidentiary standards in international criminal law. In respect to this, Chapter 6 also casts light on challenging aspects such as the issue of criminal responsibility in the framework of Article 1F. This chapter uses an overall integrated analysis based on the language of criminal law. In particular, it focuses on how to approach this matter in relation to criminal responsibility for association with a terrorist organisation. By studying the language of international criminal doctrine, Chapter 6 aims to clarify how different, yet also similar, the bodies of refugee law and criminal law are, based
on the context of Article 1F. The essential contribution of this chapter is underlining the importance of establishing a consistent interpretation of ‘serious reasons for considering’. This could ideally be done by transferring the language of criminal evidentiary standards into ‘serious reasons for considering’ and recognising the application of international criminal standards in the assessment and understanding of the exclusion clauses.

Chapter 7 presents the main findings and conclusions of this study. The overall purpose of this chapter is to clarify the main contributions with respect to the research questions upon which this study is based.
PART II: THE OBJECTIVES - THE OUTCOME OF EXCLUSION - AND TERRORISM AS AN EXCLUSION CRIME
2. Exclusion from International Refugee Law Protection

The aim of this chapter is to introduce the main pillars of the exclusion provision and to provide in-depth analysis of its purpose and influence. Therefore, this chapter highlights the central elements of Article 1F in terms of its drafting history, its object and purpose, the definitional scope of the exclusion crimes and the relationship of Article 1F with relevant provisions in the Refugee Convention and other regional instruments.

2.1 Introduction

The exclusion provision contains a conflict between two distinct issues. On the one hand, the excluded person will face deportation (if other grounds for a residence permit are at hand) and may be subject to persecution or ill treatment in their home country. On the other hand, the person may be perceived as undesirable by the asylum state as there are ‘serious reasons for considering’ that the person has engaged in one or more of the exclusion crimes listed in Article 1F. Consequently, Article 1F creates a limitation to the applicability of the Refugee Convention ratione personae and ratione materiae. Highlighting this limitation is important, as it relates to the intention behind the exclusion provision, namely creating a safeguarding measure to protect the integrity of the refugee system from ‘undeserving refugees’ and fugitives from justice. However, the adoption of the exclusion provision does not except the norm from the overall aim of being interpreted in alignment with the object and purpose of the entire Convention. This means that, regardless of the separate purpose of Article 1F, the norm is still an integral part of the Refugee Convention, and envisioned to be interpreted in the spirit of the humanitarian objectives of international refugee law.

207 Note that the asylum seeker must have been involved in criminal activities in order to be excluded from refugee protection. However, there is no requirement on the asylum seeker being held responsible under criminal law. This means that a person could be held excluded from refugee protection due to criminal offences, without being held responsible under criminal law. For more on this, see Chapters 5 and 6.


In this chapter, several exclusion-specific matters are presented. The intention is to cover some central areas for the exclusion provision, to provide a comprehensive analysis of its framework and purpose. The ambition is to clarify the relevant foundation of Article 1F, to ease the understanding of subsequent chapters. Thus, the following sections provide a brief history of the drafting process of Article 1F and an analysis of the objectives of the Refugee Convention and the exclusion provision. The interrelation between the inclusion and the exclusion aspects is also described, and lastly the meanings of the three exclusion clauses are presented in depth.

2.2 Drafting Process of the Exclusion Clauses

2.2.1 The Historical Context

When negotiation of the 1951 Convention was ongoing, criminal proceedings against the war criminals of the Second World War were also taking place. While protecting those who were subject to persecution, the international community also had an intention not shelter to war criminals – those who were seen as posing a danger to security and public order. The original aim behind the Convention was thus to deny refugee status and protection to those who had been involved in serious international crimes. The goal presented by the international community was clear: those persons would not be able to take advantage of the asylum system.

Humanitarian protection represents the foundation for the 1951 Refugee Convention and is a clear reason why the Convention and its Protocol are mainly recognised for their protective element. The Refugee Convention is also straightforward on the issue of exclusion from protection. With the adoption of the exclusion provision, the Refugee Convention highlights the question of not providing international refugee protection to perpetrators who have committed grave crimes. The refugee framework is simply not supposed to function as a safe haven for those who must face justice. Criminals who have conducted serious crimes must face their consequences also within the context of the refugee dimension and not utilise the benefits from the 1951 Refugee Convention or the

1967 Protocol. Through the adoption of the exclusion clauses, the provision functions as a guardian of the entire asylum system and its credibility.²¹¹

2.2.2 The Drafting Text of the Exclusion Provision

Several of the international instruments relating to refugees in existence prior to World War II served as sources of inspiration in the work with what was to become the instrument with the ultimate international refugee definition. However, the process behind the exclusion provision was not identical. The reason was the specific groups or categories of refugees that the pre-World War II agreements addressed. Due to the limited scope of _ratione personae_, the matters of exclusion from refugee protection were less relevant in relation to these instruments.²¹² Few international provisions have been found to contain any elements of the exclusion provision. These few instruments have been viewed as potential sources that foreshadowed the desire to adopt the exclusion provision put forward in Article 1F.

As an illustrative example, the United Nations Relief and Rehabilitation Administration (UNRRA) presented provisions in its instruments implying notions of exclusion. The first was adopted in 1945 (Resolution 71), the second in 1946 (Resolution 92), with a revision including exclusion from any assistance by the UNRRA.²¹³ The amended version from 1946 stated the following:

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²¹¹ Türk, Volker, and Nicholson, Frances, ‘Refugee Protection in international law: an overall perspective’, p. 29, in: Türk, Volker, Nicholson, Frances, and Feller, Erika, _Refugee Protection in International Law – UNHCR's Global Consultations on International Protection_, Cambridge University Press, 2003; Rikhof, Joseph, _The Criminal Refugee: The Treatment of Asylum Seekers with a Criminal Background in International and Domestic Law_, Republic Letters of Publishing, 2012, p. 485: ‘The first instruments after the Second World War were less concerned with criminality as an exception to refoulement but more with ensuring that certain criminal elements would not be entitled to any benefit normally associated with refugees in the first place. The drafting of the Refugee Convention brought these two strands of criminality together for the first time by having both an exclusion ground and an exception to the non-refoulement provision’; See also UNHCR, ‘Addressing Security Concerns Without Undermining Refugee Protection – UNHCR’s Perspective’, 29 November 2001, Rev.1, highlighting the issue of security concerns and exclusion due to terrorism, see in particular paras 3 and 7 at p. 1 and 7.


²¹³ Woodbridge, George (ed.), _UNRRA, Resolution 71 ‘Functions of the Administration with Respect to Displaced Persons’ and Resolution 92 ‘Displaced Persons Operations’_, reprinted in _UNRRA: The History of the United Nations Relief and Rehabilitation Administration_, Columbia University Press, 1950, pp. 142–143, 156. The first exclusion-related provision was adopted in August 1945 in para 2 (a) of Resolution 71, on the ‘Functions of the Administration with Respect to Displaced Persons’. Resolution 71 was adopted at the third session of the Council of the UNRRA, stating that ‘[…] the Administration will not assist displaced persons who may be detained in the custody of the military or civilian authorities of any of the United Nations on charges of having collaborated with the enemy or having committed other crimes against the interests or nationals of the United Nations’, see UNRRA Council, Resolution 71 and 92 cited in Grahl-Madsen, Atle, _The Status of Refugees in International Law: Refugee character_, A. W. Sijthoff, 1966, p. 271; See further Zimmermann and Wennholz, ‘Article 1F’,
[...] those displaced persons who have been determined by the military authorities to have collaborated with the enemy or to have committed crimes against the interests or nationals of the United Nations, whether or not such persons are detained in custody.214

The wordings of the exclusion elements in the version presented by the UNRRA certainly contain several points worth contemplating. From a general perspective, it is difficult to detect whether the term of exclusion relates to domestic or international crimes or both. The only reference to criminal offences made in the provision above is ‘committed crimes against the interest or nationals of the United Nations’. This phrasing can be argued to be the ‘forerunner’ to Article 1F(c) – ‘acts contrary to the purposes and principles of the United Nations’. However, the part stating that the persons must ‘have been determined by the military authorities to have collaborated with the enemy’ is more unclear. What sorts of action are supposed to be included in this context? Who is the ‘enemy’? As the primary focus was to provide protection to the victims of World War II, a possible presumption is that this formulation of exclusion targeted entities associated with World War II Nazi-Germany. Certainly, the message of not providing any protection to someone collaborating with the enemy (whoever the enemy may be) sheds light not only on the broad spectrum of exclusion, but also on what perception the international community has of the ‘enemy’. In the current version of the exclusion provision – Article 1F – the term ‘enemy’ is not explicitly used. However, if one analyses the meaning and impact of the exclusion provision, its purpose is to refuse serious criminals and terrorists any safe haven and protection.215 These could be labelled modern-day versions of the excluded subjects under Article 1F and, perhaps, what the UNRRA’s exclusion provision would identify as the enemy.

The IRO Constitution approached a clearer provision identifying particular categories of person that would fall outside the authority of the organisation. The provision encompassed:

1. War criminals, quislings and traitors.


2. Any other persons who can be shown:
(a) to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations; or
(b) to have voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations.

3. Ordinary criminals who are extraditable by treaty.216

Although the exclusion provision in the IRO Constitution highlights specific actors considered as undeserving of the assistance of the IRO, the reference to the ‘enemy’ occurs here too. This ‘enemy’ could be interpreted as a potential war criminal or perpetrator defeating the interest and purposes of the United Nations, which could involve, *inter alia*, core international crimes or terrorist crimes.

These instruments introducing the elements of exclusion did have the outcome to exclude a person from the assistance of the organisations behind the respective instruments. Similar outcomes exist in today’s Article 1F, which leads to exclusion from the entire international refugee framework, including assistance from the UNHCR, the main organisation with the authority to protect the international refugee system.217 Though the previous instruments relied upon ‘exclusion’ from the sphere of international organisations, the purposes of enforcing these provisions were still similar to the objective behind Article 1F of the Refugee Convention: not granting the advantages of the international refugee legal system to those who are not considered deserving of this protection. This objective was highlighted already by the General Assembly in the resolution of 1946, stressing the importance of recognising ‘the necessity of clearly distinguishing between genuine refugees and displaced persons on the one hand, and the war criminals, quislings and traitors … on the other’.218 And furthermore, that ‘no action taken … shall be of such a character as to interfere in any way with the surrender and punishment

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of war criminals, quislings and traitors, in conformity with present or future international arrangements and agreements’.  

Ultimately, the drafting process of Article 1F began in the first session organised by the Ad Hoc Committee on Statelessness and Related Problems, presenting a draft provision stating that:

No contracting State should apply the benefits of this Convention to any person who in its opinion has committed a crime specified in Article VI of the London Charter of the International Military Tribunal or any other act contrary to the purposes and principles of the Charter of the United Nations.

The first draft of the exclusion provision, which at that time was referred to as Article 1C, was phrased differently than in the previous international instruments. It contained a specific reference to the crimes which would result in exclusion from the Convention. Further, it underlined the consequences of the exclusion provision more clearly – i.e., the person cannot enjoy the benefits of the Convention. Through the wording of the draft exclusion provision, the Ad Hoc Committee paved the way for linking international crimes to refugee protection and planted the seed for what was yet to come – Article 1F.

Although delegates could agree on the matter of providing the benefits of the Refugee Convention to ‘genuine refugees’, the question of what sort of excludable crimes or perpetrators should be subject to exclusion could not be given an entirely unanimous answer. For instance, the French proposal mentioned the need to include Article 14(2) of the UDHR, and thus connect the matter of exclusion to a denied right to asylum ‘in case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the UN’. According to the French representative, perpetrators committing war crimes ‘would naturally be excluded from the protection of the Convention’.

However, this position was rejected by other delegates. The Israeli representative,
for instance, opposed the French standpoint, criticising the lack of presenting justified grounds to link ‘the definition of the term refugee to the yet unclarified concept of the right of asylum via reference to Art. 14 UDHR’. The United States did not share the view on a need to mention war criminals as ‘there were no longer any war criminals that had not been punished and that there was therefore no need to except them’. In fact, the United States held an opposite opinion regarding reference to the London Charter and obliging Contracting States to exclude people from the Refugee Convention. The position favoured by the United States was to include a wording on exclusion of war criminals at the discretion of each receiving nation to ‘forestall accusations which might be directed against the receiving country on the grounds that it was sheltering war criminals’. This suggestion was critically opposed by the French delegate, arguing that such discretion could mean that ‘some signatories of the Convention might in fact consider a notorious war criminal to be a refugee and protect him as such’. According to the French delegate, there was therefore a confirmed need to adopt an ‘obligation to not apply the draft 1951 Convention to war criminals’.

2.2.3 The Importance of the Exclusion Provision in the Views of the Drafters

With the interest of humanitarian protection of the international refugee framework in mind, one might wonder how an exclusion provision could be considered important within such a body of law. Is not everyone fleeing what amounts to persecution for reasons linked to civil or political circumstances deserving of protection? Well, as already presented above – not everyone is ‘deserving’ of the benefits of a refugee protection framework. The seeds were already planted in the Universal Declaration of Human Rights, including a prohibition on seeking asylum ‘in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations’, followed by the precedent adopted within the framework of the IRO Constitution. Thus, any person who crossed an international border for the purpose of

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225 Ad Hoc Committee on Statelessness and Related Problems, 5th Meeting, UN Doc. E/AC.32/SR.5, 30 January 1950, para. 36.
226 Ibid, para. 16.
227 Ad Hoc Committee on Statelessness and Related Problems, 17th Meeting, UN Doc. E/AC.32/SR.17, 6 February 1950, para. 37.
229 Article 14(2) of the 1948 Universal Declaration of Human Rights (UDHR), entered into force 10 December 1948.
230 IRO Constitution, Part II of Annex I; See also section 2.2.2 ‘The Drafting Text of the Exclusion Provision’ of this Chapter.
seeking asylum but simultaneously escaped legitimate prosecution or punishment for serious allegedly crimes could not be considered deserving of international protection in the field of international refugee law.²³¹

In principle, a significant condition for States to be willing to ratify the 1951 Refugee Convention was the adoption of Article 1F. Thus, many states were persuaded that fugitive criminals preventing legitimate prosecution by seeking a safe haven had to be excluded from the framework of the Refugee Convention.²³² For that reason, a provision preventing fugitive criminals from taking advantage of host states’ ability to provide international protection had to be included in the Refugee Convention. If not, many of the states engaged in the drafting process would have found it difficult to support and comply with the wording of the Convention.²³³ The Israeli delegate stated the following: ‘[I]t was premature to say that the category [of persons who should be prosecuted for war crimes committed during the Second World War] no longer existed. Not all of those criminals had as yet been punished, as recent events had shown.’²³⁴ According to France, one of the delegates advocating most strongly for such a provision, the


²³³ See relevant statements from several delegates presented during the drafting process discussing the importance of adopting the exclusion provision. The French representative to the Ad Hoc Committee called the approval of war criminals within the refugee legal system ‘intolerable’, see UN Economic and Social Council, Ad Hoc Committee on Statelessness and Related Problems, First Session: Summary Record of the Fifth Meeting, E/AC.32/SR.5, UN Ad Hoc Committee on Refugees and Stateless Persons, 30 January 1950, Statement of Mr. Rain of France, para. 73; The French delegate to the Conference of Plenipotentiaries, on the other hand, underscored the substantial notion to not ‘allow any confusion between [refugees] and ordinary common-law criminals’, see Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: summary record of the 24th meeting, UN Doc. A./CONF.2/SR.24, 17 July 1951, Statement of Mr. Rochefort of France, p. 5 and, further, that ‘[u]nless such provision was made, entry would be permitted to refugees whose actions might bring discredit on that status’, see Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: summary record of the 29th meeting, UN Doc. A.CONF.2/SR.29, 19 July 1951, Statement of Mr. Rochefort of France, p. 19; The delegate representing Germany, Mr. von Trützschler, highlighted those criminals ‘should not be placed on an equal footing with bona fide refugees’, see Statement of Mr. von Trützschler of Germany, UN Doc. A./CONF.2/SR.24, 17 of July 1951, p. 6; Belgium argued that ‘[t]here were certainly objections to granting the status of refugee to a person who was not worthy of it’, see Statement of Mr. Herment of Belgium, UN Doc. A./CONF.2/SR.29, 19 July 1951, p. 14.

²³⁴ Ad Hoc Committee on Refugees and Stateless Persons, E/AC.32/SR.5, 30 January 1950, Statement of Mr. Robinson of Israel, para. 45.
exclusion of serious criminals from refugee protection was ‘a prime factor in determining France’s attitude towards the Convention as a whole’.235 This line of reasoning was echoed by several delegates. For instance, the Yugoslav drafter concurred with France and stated that ‘there would be a good chance that [his government] would be unable to sign the Convention’.236 Two delegates who initially were in opposition and had a opposite approach toward adopting an exclusion provision eventually agreed with the positions presented. They argued that the exclusion provision was essential ‘to promote maximum adherence to the Convention’237 and ‘to make the Convention acceptable to as large a number of governments as possible’.238 Accordingly, the UNHCR proposed an additional goal of Article 1F, to address the need to ‘ensure that such persons do not misuse the institution of asylum in order to avoid being held legally accountable for their acts’.239

What can be analysed from the drafters’ statements is that there was indeed a willingness to provide refugee protection to persons in need. However, they must be ‘deserving’ of the sort of protection given by host state jurisdictions. To persuade states to become bound to the 1951 Refugee Convention and establish an efficient instrument with a large number of parties signatory, the national delegates made certain things clear. First, states were allowed to have full discretion over the asylum procedure system. Second, the refugee instrument had to include a specific norm allowing state authorities to decide on exclusion from refugee protection in cases concerning serious perpetrators who were seen as ‘undeserving’ refugees. Thus, the substantial effect of Article 1F was mainly instrumental, to uphold a balance between ‘the humanitarian goals of the Convention’,240

235 Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.24, 17 of July 1951, p. 6. Mr. Rochefort also observed that ‘Article 14 of the Universal Declaration of Human Rights dealt with the right of asylum. The United Nations had no hesitation in refusing that right to common-law criminals. In the case of the Convention, article 1 provided a similar means of sorting out bona fide refugees. It was necessary to retain that article as it stood, for it was not always possible to screen the influx or refugees properly at the frontier […] If those persons had no right to asylum under the Universal Declaration, they had even less right to enjoy the benefits provided under the Convention.’, p. 10.
238 Statement of Mr. Herment of Belgium, UN Doc. A/CONF.2/SR.29 19 July 1951, p. 16.
239 UNHCR, Statement on Article 1F of the 1951 Refugee Convention – Issued in the context of the preliminary ruling references to the Court of Justice of the European Communities from the German Federal Administrative Court regarding the interpretation of Articles 12(2)(b) and (c) of the Qualification Directive, July 2009, p. 6, see also p. 8; See, further, UNHCR, Guidelines on International Protection No. 5, para. 2; See, further, Hathaway and Foster, 2014, p. 525, analysis presented in n. 10. See, further, Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.29, 19 July 1951, at p. 13, stating in the drafting process that exclusion ‘might have certain drawbacks which it was unfortunately not possible to remedy, since, in the present state of affairs, there was no international court of justice competent to try war criminals or violations of common law already dealt with by national legislation’.
240 Ezokola v. Canada (Minister of Citizenship and Immigration), [2013] SCC 40, para. 36.
protecting ‘the integrity of international refugee protection’, and maintaining ‘the credibility of the protection system.’ The next section will describe the identified objectives of the Refugee Convention versus Article 1F and the relationships between their objects and purposes.

2.3 The Objectives of the Refugee Convention and the Exclusion Provision

The purpose behind analysing the objectives of the Refugee Convention and the exclusion provision as such is highlighting the different interests upheld by the Convention and the provision, respectively. The aim behind this section is to shed light on the fundamental humanitarian objectives and the human rights approach they encompass, so as to capture what once formed the entire refugee legal system. This strengthens the argument as to why exclusion from universal humanitarian protection should be restrictive. This section shows that the overall objectives of the Refugee Convention, on the one hand, and those of Article 1F, on the other, need not be mutually exclusive.

2.3.1 The Humanitarian Purpose of International Refugee Law and the Value of the Preamble

Though the Refugee Convention may have an embedded balance between offering universal protection and safeguarding the security of the host state, the humanitarian objectives is the most central purpose of the international refugee system. It is through the lens of ‘its object and purpose’ that the ordinary meaning of a treaty can be observed.

The most common source addressing a treaty’s

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241 Ezokola v. Canada (Minister of Citizenship and Immigration), para. 36; See also Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 SCR 3, para. 102, where the Supreme Court of Canada stated that Article 1F emerged out of a ‘natural desire of states to reject unsuitable persons who by their conduct have put themselves “beyond the pale”’; See also Attorney General (Minister of Immigration) v. Tamil X, [2011] I NZLR 721, para. 33 where the Supreme Court of New Zealand presented a similar reasoning, stating that ‘[t]he purpose of the exclusionary provision was to ensure that the Convention was accepted by state parties and to maintain its integrity over time’.

242 CJEU: Joined Cases C-57/09 and C-101/09 Bundesrepublik Deutschland v B and D, Judgment, 9 November 2010, para. 115.

243 McAdam, Goodwin-Gill, and Dunlop, 2021, p. 219: ‘In appropriate circumstances, the fundamental goal of the 1951 Convention – protection and security for the refugee with a view to a durable solution – may be better achieved by accommodating the potentially excludable, than by a blanket ban’. (emphasis added).


object and purpose is the Preamble. Even though a Preamble has only a declarative function and thus is not formed as a legal instrument that establishes rights or obligations, it is still considered to be an important source of interpretative relevance.246 As Judge Weeramantry once stated:

An obvious internal source of relevance is the preamble to the treaty. The preamble is a principal and natural source from which indications can be gathered of a treaty’s object and purposes even though the preamble does not contain substantive provisions.247

Moreover, some scholars also argue that a Preamble can have an interpretive value. In terms of general treaty interpretation, Fitzmaurice states, for instance, that:

Although the objects of a treaty may be gathered from its operative clauses taken as a whole, the preamble is the normal place in which to embody, and the natural place in which to look for, any express or explicit general statement of the treaty’s objects and purposes. Where these are stated in the preamble, the latter will, to that extent, govern the whole treaty.248

In other words, a text within a treaty does not need to add substantive matters to the legal instrument to have interpretive value. Despite being unable to create obligations or rights, and not being part of the core text of a Convention, a Preamble is recognised as a source of international and principal purpose guiding the search for a treaty’s object and purpose. This position is supported within the context of Article 31(2) of the Vienna Convention, stating that ‘[t]he context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes […]’. Thus, the Preamble of the Refugee Convention holds importance in finding the context for both the operative parts and the object and purpose of said Convention.249

246 Alleweldt, ‘Preamble’, paras. 1–6, in Zimmermann, Machts, and Dörschner, The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary, 2011; See also Li, Yao, Exclusion from Protection as a Refugee, An Approach to a Harmonizing Interpretation in International Law, Brill-Nijhoff, International Refugee Law Series (volume 9), 2017, p. 10. Note that the Preamble is not a part of either the Convention’s core text or the operative element.
2.3.2 The Humanitarian Aim and the Influence of International Human Rights Law

In the case of the Refugee Convention, one of the fundamental purposes contained in the Preamble is addressed to states, to solve an international problem through state cooperation which holds ‘the widest possible exercise of […] fundamental rights and freedoms’. Looking more deeply into the two operative paragraphs of the Preamble, the presence of human rights purposes is clearly recognised:

*Considering* that the Charter of the United Nations and the Universal Declaration of Human Rights [...] have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,

*Considering* that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms [...]

The humanitarian aim of the international refugee system is made clear through reference to the need for ensuring that ‘all human beings shall enjoy fundamental rights and freedoms without discrimination’ and the duty ‘to assure refugees the widest possible exercise of these fundamental rights and freedoms’ as well as reference to the Charter of the United Nations and the Universal Declaration of Human Rights. This aim is to guarantee and provide international refugee protection to individuals qualifying as refugees and to deliver a catalogue of binding universal rights.

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251 Foster, 2007, p. 42; See also Li, 2017, p. 12.

252 The included rights are a variety of civil rights, socio-economic rights and rights that provide solutions to refugeehood, see the 1951 Refugee Convention, Articles 2–34; See also Article 5 of the 1951 Refugee Convention, stating that ‘[n]othing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention’. The wording and reference to ‘rights and benefits granted […] apart from this Convention’ strengthen the position that the Refugee Convention is of purpose to provide rights; Article 33(2) of the Refugee Convention, as the exception rule to the principle of non-refoulement enshrined in Article 33(1), stating that ‘[t]he benefit of the present provision may not […] be claimed by a refugee’, see Li, 2017, pp. 28–29; See also, Alleweldt, ‘Preamble’, para. 8 in: Zimmermann, Machits, and Dörschner, The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary, 2011; Hathaway,
The reference to the Charter of the United Nations and the Universal Declaration of Human Rights is significant as it sets a standard for refugee law as an international legal field promoting the benefits of international human rights law. As described by UNHCR, the presence of human rights in the Preamble affirms that ‘the aim of the drafters [was] to incorporate human rights values in the identification and treatment of refugees, thereby providing helpful guidance for the interpretation, in harmony with the Vienna Convention, of the provisions of the 1951 Convention’. Considering the Convention’s mandate to create binding rights and obligations upon states, strengthens the argument that there is a human rights approach within the Convention. The purpose of the Refugee Convention is to provide rights to individuals qualified as refugees and preventing refugees from being treated as ‘legal non-persons’.

253 Li, 2017, p. 12.
255 More specifically, Articles 3–34 of the 1951 Refugee Convention contains State obligations. However, there are some exceptions. See for instance Article 16(1) of the 1951 Refugee Convention stating that ‘a refugee shall have free access to the courts of law on the territory of all Contracting States’. Interpreting this provision e contrario could mean that the rest of the articles within the Convention emphasise the purpose to uphold obligations rather than provide rights; See also Li, 2017, p. 28.
256 See for instance, Hathaway, C. James, The Rights of Refugees under International Law, Cambridge University Press, 2005, pp. 1–14; Also, Hathaway’s second edition of The Rights of Refugees under International Law published in 2021; Zimmermann Andrea and Mahler, Claudia, ‘Part Two General Provisions, Article 1 A, para. 2’, paras 1–6, in: Zimmermann, Machts, and Dörschner, The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary, 2011; UNHCR, Handbook, para. 28 – ‘He does not become a refugee because of recognition, but is recognized because he is a refugee’; Relevant domestic jurisprudence, see for example, Applicant A v. Minister for Immigration & Ethnic Affairs [1997] HCA 4, 24 February 1997, where it was stated that ‘the preamble places the Convention among the international instruments that have as their object and purpose the protection of the equal enjoyment by every person of fundamental rights and freedoms’, p. 3; Chen Shi Hai v. The Minister for Immigration and Multicultural Affairs, [2000] HCA 19, 13 April 2000, p. 15, para. 47 (Kirby J) – ‘Whilst courts of law, tribunals and officials must uphold the law, they must approach the meaning of the law relating to refugees with its humanitarian purpose in mind’; Németh v. Canada (Minister of Justice), [2010] SCC 56, para. 50 with reference to Hathaway, 2005, pp. 158 and 278.
257 Li, 2017, p. 12.
2.3.3 The Objectives of Article 1F

The refugee legal system embodies the interest of providing humanitarian protection to those who are subject to well-founded fear of persecution in their home country.258 However, within a legal system which aims to provide protection, there must be a provision that also ensures that its legitimate objectives are preserved, protected and not abused by private or state actors. Thus, the creation of Article 1F served to provide a protective shield over the entire refugee legal system for a purpose of ensuring that those who are qualified as refugees and deserve refugee protection are given that protection.259 As stated by UNHCR: ‘If the protection provided by refugee law were permitted to afford protection to perpetrators of grave offences, the practice of international protection would be in direct conflict with national and international law and would contradict the humanitarian and peaceful nature of the concept of asylum’.260 In other words, the rationale of the exclusion clauses is to protect the integrity of the asylum system and guarantee that ‘undeserving refugees’ committing serious crimes cannot utilise the institutions of asylum.261

As war criminals would not be able to hide behind the benefits of refugee protection, a rationale of exclusion was that the exclusion clause would be a legitimate

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258 UNHCR, Executive Committee Meetings, ‘Note on the Exclusion Clauses’, EC/47/SC/CRP.29, 30 May 1997, para 3: ‘[t]he idea of an individual “not deserving” protection as a refugee is related to the intrinsic links between ideas of humanity, equity, and the concept of refuge’.


ground to avoid impunity. Interpretation of the purpose of including ‘serious non-political crime’ as an exclusion crime would suggested that this was primarily ‘understood to be the only means available to ensure that refugee law did not provide shelter to fugitives from justice’. In addition, this highlights that ‘preventing impunity’ may be a hidden objective in excluding some asylum seekers from universal humanitarian protection. Thus far, this has been an interest raised in debates due to the reasoning and understanding of exclusion based on ‘serious non-political crimes’. However, the consequences of exclusion per se do not amount warrant impunity. This can only be achieved through a subsequent criminal trial. On the contrary, the embedded rationale of exclusion warranting prevention of impunity is why the exclusion clause has a close interaction with criminal law and cannot be invoked without considering the norms and principles of criminal law, despite the provision belonging within an administrative framework. However, given legal developments, the interest in ensuring that those who having committed heinous crimes are not using refugee protection as a shield to avoid justice might not be as great as in the past. This is mainly due to developments within extradition law and international criminal law, with the establishment of criminal tribunals and recognition of universal jurisdiction. Another purpose that might have grown into a main objective (which was not considered originally a purpose) is the national security element. This is discussed further in the following section.

2.3.3.1 The Purpose to Protect National Security
The notion of ‘protecting national security’ has been mentioned in the context of exclusion, in particular, in the discussions about the function of Article 1F. However, ‘protecting national security’ was not the initial issue discussed as an ultimate objective during the adoption of the exclusion provision. Nor was the

262 Hathaway, 2021, pp. 400–402: ‘Because ordinary crimes cannot normally be prosecuted in other than the country where they were committed, any response short of the exclusion of common law criminals from the refugee protection system […] was believed by the drafters to risk undermining international comity in the fight against crime, thereby bringing the refugee system into disrepute.’; See also Hathaway and Foster, 2014, pp. 543–544; Fitzpatrick, 2000, p. 275; Li, 2017, p. 51; UNHCR, Background note on the Application of Article 1F, para 4.

intention to protect the host state from dangerous refugees. The main objectives of Article 1F was to deny international refugee protection to the ‘undeserving refugee’ fleeing from criminal justice.\textsuperscript{264} As articulated by Gilbert: ‘The grounds listed in Article 1F are not grounds for cessation under Article 1C. Article 33(2) is the proper route where a refugee commits a particularly serious crime in the country of refuge and constitutes a danger to the community of that country.’\textsuperscript{265} Given this, even if the interest to protect national security might be used as a compelling ground to trigger the exclusion provision – it must be approached cautiously, as Article 33(2) is the provision that deals with protecting national security concerns.\textsuperscript{266} Not only do the objectives of Article 1F and 33(2) differ – central substantive and procedural matters also separate these two norms. Whereas Article 33(2) requires that the individual in question is a convicted refugee who ‘constitutes a danger to the community’, the exclusion provision does not require either a conviction through a final judgment or confirmation that the applicant constitutes a danger to the community in order to justify its applicability.\textsuperscript{267} As the Supreme Court of Canada accurately wrote in the Pushpanathan case:

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{264} Gilbert, Geoff, ‘Current Issues in the application of the exclusion clause’, p. 428, in: Türk, Nicholson, and Feller, Refugee Protection in International Law – UNHCR’s Global Consultations on International Protection, 2003; Fitzpatrick, 2000, p. 275: ‘[…] it is plausible that insulting the new refugee regime from official and popular discontent by denying its benefits to the unworthy was the predominant objective of Article 1F’; Salinas de Frías, Ana María, ‘States’ Obligations under International Refugee Law and Counter-Terrorism Responses’, pp. 111–115: ‘refugee laws have increasingly been utilized as a substitute for criminal justice responses to terrorism and, effectively, have become ‘soft options’ for any governments seeking to apply lower standards of protection, even though these are both contrary to and unjustifiable under applicable rule of law principles. However, despite such trends, no inherent link exists between national security and refugee law; indeed, it is often forgotten that refugee law is primarily a humanitarian instrument designed to regulate the exceptional situation of forced migration’, at p. 111 (emphasis added), in: White, Nigel D., Samuel, Katja, and Salinas de Frías, Ana María (eds.), Counter-Terrorism: International Law and Practice, Oxford University Press, 2012; UNHCR, Handbook on Procedures, para 148; UNHCR, Background Note on the Application of Article 1F, para 3; UNHCR, Guidelines on International Protection No. 5, para 2.
\item \textsuperscript{267} Pushpanathan v Canada (Minister of Citizenship and Immigration), [1998] 1 SCR 982, para, 58, the Supreme Court of Canada clarified that: ‘[t]he purpose of Article 33 of the Convention, by contrast, is not to define who is and who is not a refugee, but rather to allow for the refoulement of a bona fide refugee to his or her native country where he or she poses a danger to the security of the country of refuge, or to the safety of the community’. (emphasis added); See also Hathaway, 2021, pp. 402–403, in particular Hathaway’s interesting statement emphasising the distinction of ‘reasonably suspected’ (as sufficient under Article 1F) and ‘actually convicted’ (required under Article 33(2)), at p. 415: ‘while refugee status is to be withheld from persons reasonably suspected of justiciable criminal conduct under Art. 1(F)(b), the refoulement of refugees under Art. 33(2) is permissible only when there has actually been conviction by a final judgment. Appeal rights should therefore have expired or been exhausted’.
\end{itemize}
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The general purpose of Article 1F is not the protection of the society of refuge from dangerous refugees, whether because of acts committed before or after the presentation of a refugee claim; that purpose is served by Article 33(2) of the Convention.268

Following this, the UNHCR has also underlined the importance of differentiating between Article 1F and Article 33(2).269 The wording of the UNHCR emphasizes the factor of ‘threat’ – which is more related to the exception rule of the non-refoulement principle than the exclusion clause. The UNHCR states that:

Articles 1F and 33(2) are […] distinct legal provisions serving very different purposes. Article 33(2) applies to refugees who become an extremely serious threat to the country of asylum due to the severity of crimes perpetrated by them. It aims to protect the safety of the country of refuge and hinges on the assessment that the refugee in question poses a major actual or future threat. For this reason, Article 33(2) has always been considered as a measure of last resort, taking precedence over and above criminal law sanctions and justified by the exceptional threat posed by the individual – a threat such that it can only be countered by removing the person from the country of asylum.270

268 Pushpanathan v Canada (Minister of Citizenship and Immigration), para, 58; See also similar reasoning in the Zaoui decision, where the New Zealand Court of Appeal pointed on the past and future element that affect the differentiation between the provisions: ‘Art. 1(F) is concerned with past acts. Art. 33(2) is only concerned with past acts to the extent that they may serve as an indication of the behaviour one may expect from the refugee in the future. The danger that the refugee constitutes must be present or future danger.’, Attorney-General v. Zaoui and Others (No. 2), [2005] 1 NZLR 690, para 166.

269 Article 33(2) of the 1951 Refugee Convention states the following: ‘The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country’.

270 UNHCR, Background note on the Application of Article 1F, para 10. Critically, the UNCHR underlines that the two provisions should not be distinguished due only to their distinct purposes, but also from the fact that the applicable normative standards and procedural requirements are distinct. Specifically, Art. 33(2) requires evidence of ‘conviction by a final judgment’, not simply ‘serious reasons for considering that he has committed a serious non-political crime’. Article 33(2) relates only to a ‘particularly serious crime’, not just a ‘serious non-political crime’, and it requires an additional finding that the person concerned ‘constitutes a danger to the community of [the asylum] country’; The UNHCR has also observed that ‘[t]he aim of [Art. 1(F)(b)] is to protect the community of a receiving country from the danger of admitting a refugee who has committed a serious common crime’, see UNHCR Handbook, para 151; See also Zimmermann and Wennholz, ‘Article 1F’, paras. 29–38, and in particular para. 33, whereas the commentators state the following: ‘[i]t has been contended in this context that the two provisions each follow a different Rationale, insofar as Art. 1 F aims at depriving persons undeserving of international protection of their refugee status, while Art. 33, para. 2 merely serves the purpose of the respective country of residence’. (emphasis added), in: Zimmermann, Machts, and Dörschner, The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary, 2011; Indra Gurng v Secretary of State for the Home Department, [2002] UKIAT 4870, para 27: ‘additionally, albeit not an exclusion clause, Article 33(2) provides that the
The exclusion provision and the exception rule of the *non-refoulement* principle should be read in the context of the entire Refugee Convention. The exclusion provision does not ‘target’ the issue of the host state’s national security, but rather the ‘right to the moral authority and political viability of the refugee regime as a whole’.271 Those cases encompass persons who are excluded from the entire scope of the Refugee Convention and who would not benefit from any of the rights and protection enshrined in Articles 3–34 of the Convention, including the prohibition on *non-refoulement*.272

Furthermore, it is essential to bear in mind that these two provisions have different thresholds and procedural requirements. It is one thing to assess the issue of excluding a fugitive perpetrator from refugee protection and quite another to justify expulsion of an already recognised refugee convicted of serious crimes whom a host state considers is an imminent threat to the community.273 As clarified by the UNHCR:

> While Article 1F is aimed at preserving the integrity of the refugee protection regime, Article 33(2) concerns protection of the national security of the host country […] A decision to exclude an applicant based on a finding that s/he constitutes a risk to the security of the host country would be contrary to the object and purpose of Article 1F and the conceptual framework of the 1951 Convention.274

However, analysing UNHCR’s statement from a critical perspective, there is a contradictory element in Article 1F that might imply an interest in protecting the national security of the host state. Exclusion based on ‘serious non-political crimes’ does in fact include a link to national security grounds, namely through the outcome of being ‘associated with legitimate national security interests of the respective country of refuge’. This aspect within the application of the exclusion category of ‘serious non-political crimes’ is undoubtedly associated with several similar wordings related to the exception rule of the *non-refoulement* principle. It is

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272 Ibid., pp. 529–530; UNHCR, Background note on the Application of Article 1F, para. 21; Zimmermann and Wennholz, ‘Article 1F’, para. 44, in: Zimmermann, Machts, and Dörschner, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, 2011: ‘Any applicant fulfilling one or more of the alternatively listed conditions is therefore ipso facto excluded from refugee status and thus from all guarantees provided therein, including the protection against *refoulement*’.
274 UNHCR, ‘Statement on Article 1F’, p. 8 (emphasis added); See, further, UNHCR, Guidelines on International Protection No. 5, para. 4.
therefore no surprise that ‘the notion of serious non-political crime has increasingly come to be associated with many offences against the laws of war, and with the emerging concept of terrorism’. 275

Thus, one can understand why these two provisions might be compatible – how could a person causing threat to the integrity of the refugee legal system not also pose a risk to the host state? 276 As remarked by Goodwin-Gill and McAdam, this highlights how the ‘concept of security now also occupies a more dominant place in controlling the movement of people between States, whether refugees or not’, 277 ‘[P]rovided it can be kept in a framework of accountability’ 278 this can lead to the outcome that ‘security may offer the necessary theoretical basis for the application of article 1F(b) in a context which also ensures the integrity of the international system of protection’. 279 However, while the questions are valid, the rationale and objectives of the two provisions must be separated: ‘Art. 1F aims at depriving persons undeserving of international protection of their refugee status, while Art. 33 para. 2 merely serves the purpose of the respective country of residence’. 280

Furthermore, despite the partial reference to protecting the safety of the asylum country enshrined in Article 1F(b), the intention of the drafters was not to enforce multiple objectives through Article 1F – each clause is an integral part of

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278 Ibid.

279 Ibid., p. 176; See also Rikhof, 2012, p. 489, concluding that ‘the gap between exclusion 1F(b) and national security tends to be smaller since the use of 1F(b) in the national security context, namely terrorism, often coincide with a finding of a danger of national security, as the level of the threat, while being high, is often met in terrorist cases, given the fact that national security goes beyond national considerations’.

the overall framework of the exclusion provision. Again, the aim was not to protect the safety of the asylum country, nor to identify a 'threat', but rather to reject international protection to the 'undeserving refugee'.²⁸¹

Where the exclusion clause concerns preventing an asylum seeker from taking advantage of the refugee regime by evaluating whether the applicant’s story indicates that he or she has committed or been involved in one of the exclusion crimes, Article 33(2) has a future-oriented aspect focused on assessment of whether the refugee can pose a future threat to the community of the host state. If the national authority determines that there are ‘reasonable grounds for regarding’ the refugee as a danger to the security of the country²⁸² due to heinous crimes the refugee has been convicted of, the authority has the power under Article 33(2) to withdraw protection from non-refoulement.²⁸³ Article 33(2) withdraws a safety net of protection and allows the state to create exceptions from the non-refoulement principle. However, even though Article 33(2) allows circumstances to derogate from the prohibition against refoulement, the terms must be interpreted restrictively. Further, the overall exception rule enshrined in Article 33(2) needs to be measured in line with international human rights norms.²⁸⁴ The applicant

²⁸¹ Hathaway and Foster, 2014, pp. 538 and 540. The objectives and ordinary meanings of Article 1F(b) and Article 33(2) shall not merge to have the same outcome. The CJEU underlined this point by declaring that Article 1F(b) is not to be invoked to address “any danger which a refugee currently poses to the Member State”, and that it is “Article 33(2) of the 1951 Geneva Convention [that allows a state to] refoul a refugee where there are reasonable grounds for considering him to be a danger to the security or the community of that Member State”, see Bundesrepublik, (CJEU, 2010), at para 101 and 104; The UNHCR supports the same position and stated in ‘Statement on Article 1F’, at p. 33, the following: ‘[T]he object and purpose of the exclusion clauses enshrined in […] Article 1F of the 1951 Convention are to ensure that refugee status is not granted to persons undeserving of protection. By contrast, the exception to the non-refoulement principle as incorporated in Article 33(2) of the 1951 Convention […] includes the element of dangers posed to the host State and society by a person who has already been recognized as a refugee […] Article 33(2) does not constitute a ground for exclusion […] [T]he exclusion clauses of Article 1F concern the integrity of the refugee protection regime’, Li, 2017, p. 320; In contrast, see MIG 2020:11 (Swedish Migration Court judgment) where the reading of the judgment indicates that the Court interprets the objectives of the exclusion clauses for refugee and subsidiary protection in the EU Qualification Directive to function as safety mechanisms to protect the host state’s interest and territory from undesirable refugees. The focal point of this case was to underline the importance of assessing the exclusion provision in each residence permit case, even if previous instances and external authorities (in this case the Swedish Intelligence Service) had rejected the claim of humanitarian protection. On this note, another interesting element of this case was that it brought attention to the dynamic between matters of protection, exclusion from protection and security.

²⁸² The Supreme Court of Canada interpreted ‘danger to the security of the country’ in the Suresh case and stated the following: “[t]he threat must be “serious”, grounded on objectively reasonable suspicion based on evidence, and involving substantial threatened harm”, see Suresh v. Canada (Minister of Citizenship and Immigration), p. 6.


²⁸⁴ See for instance UN Human Rights Committee, ‘General Comment No. 15: The Position of Aliens under the Convention’, UN doc. HRI/GEN/1/Rev/5, (11 April 1986), paras 9–10; Committee on Migration, Refugees and Demography of the Council of Europe Parliamentary Assembly, ‘Expulsion Procedures in Conformity
would not be relevant to the exception rule from non-refoulement due to being excluded from the entire normative scope of the Refugee Convention. To conclude, the ultimate line of distinction between the provisions is that Article 1F deals with matters of undeserving refugees who are excluded from accessing safe havens under refugee law;\(^{285}\) whereas Article 33(2) deals with matters of a refugee posing a risk to the security of the asylum country.\(^{286}\)

2.3.3.2 Observations from the Lisbon Expert Roundtable Meeting

During the expert roundtable meeting in Lisbon, several crucial aspects in terms of the interpretation and application of the exclusion clauses were mentioned.\(^{287}\) On an important note, although the objectives behind the exclusion clauses aim to protect the integrity of the asylum system and ensure that perpetrators not deserving international refugee protection are not granted this; it is still vital that the exclusion provision is interpreted restrictively and applied only in exceptional cases.\(^{288}\) This simply because the consequences of being excluded are serious, as the individual in question falls outside the entire regime of international refugee

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\(^{286}\) See, for instance, Bundesrepublik (CJEU, 2010), para 101 and 104 where the Court made a final conclusion stating that ‘it would not be consistent … to make exclusion from refugee status conditional upon the existence of a present danger to the host Member State.’; See also Gilbert, Geoff, ‘Terrorism and international refugee law’, p. 434, in Saul, Ben (2nd ed.), Research Handbook on International Law and Terrorism, Edward Elgar Publishing, 2020; Hathaway, 2021, pp. 399–423; Hathaway and Foster, 2014, p. 566: ‘[…] Article 1F(b) does not seek to replicate the role of Art. 33(2), that being to protect the safety and security of the asylum country. It rather exists to ensure that the political viability and integrity of the protection regime are not compromised by providing shelter to fugitives from justice who cannot be prosecuted and punished in the receiving state.’


law. In this case, the non-returnability under human rights law, which is a wide form of protection, as observed during the Expert Roundtable Meetings, should be applicable to the excluded applicant facing well-founded fear of persecution in his or her home country. However, as further analysed in Chapter 4 of this dissertation, it is important not to perceive the presented protection under human rights law as a general safety net, or as an argument defending broader application of Article 1F. In fact, the supplementary protection of human rights available in exclusion cases is, as a minimum standard, confined to basic rights, guaranteeing that the excluded asylum seeker is not deprived of his or her fundamental rights and freedoms, such as the prohibition on torture. To guarantee and secure the humanitarian objectives of the refugee legal system, the interpretation and application of the exclusion clause must be aligned with a protection-orientated approach. Thus, the restrictive interpretation and the exceptional nature of applying the exclusion provision must be perceived in light of the serious consequences that exclusion from refugee protection can cause.

Additionally, the Expert Roundtable Meeting found that the evolutionary approach is important to consider in relation to Article 1F. It is necessary to take inspiration from international law and developments in other areas of law, particularly human rights law, humanitarian law, criminal law, and extradition law, when interpreting and applying the exclusion clause. These international legal systems have developed dramatically after the 1951 Refugee Convention came into force. Given that the Refugee Convention should be seen as a living instrument, the interpretation and application of Article 1F need to be aligned with the

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290 Ibid.

291 For further analysis of this subject matter, see Chapter 4.


294 Türk, Nicholson, and Feller, ‘Summary Conclusions: exclusion from refugee status, expert roundtable, Lisbon, May 2001’, p. 480: ‘The interpretation and application of Article 1F should take an “evolutionary approach”, and draw on developments in other areas of international law since 1951, in particular international criminal law and extradition law as well as international human rights law and international humanitarian law’. (emphasis added), in: Türk, Nicholson, and Feller, Refugee Protection in International Law – UNHCR’s Global Consultations on International Protection, 2003; Executive Committee of the High Commissioner’s Programme, ‘Update on global consultations on international protection’, EC/51/SC/CRP.12, 30 May 2001, p. 2–3; See further Rikhof, 2023, pp. 577–587: ‘the interpretation of the exclusion clause has been influenced by other areas of international law, such as international humanitarian law, international criminal law, and international human rights law, from their inception and in recent times’ (at p. 577); For further analysis of the regime intersection, see Chapters 3–7.
recent changes within the international bodies of law that are closely linked to the normative framework of the exclusion provision.\textsuperscript{295} The evolutionary approach was also argued to be necessary, providing refugee law with the valuable principles and norms ‘to bridge the tension between the need to avoid impunity and the need for protection’.\textsuperscript{296}

Having discussed the objectives and purposes of the 1951 Refugee Convention and the exclusion provision, the next step in understanding Article 1F is to dive further into the substance of the provision. This will be done in the next section – with a particular focus on certain matters, such as the relationship between inclusion (i.e., recognised with refugee status) and exclusion (i.e., excluded from refugee status). The meanings of the different exclusion clauses will also be presented.

2.4 The Substantive Framework of the Exclusion Clauses

2.4.1 Two Sides of the Same Coin: Introducing the Political Refugee

In a general context, the term ‘refugee’ is often described as having a content verifiable according to principles of general international law. However, in ordinary usage, the term has a broader and looser meaning, referring to someone in flight with the purpose to escape conditions or personal circumstances considered to be intolerable. Within the framework of the term ‘refugee’, the essential element is the flight to freedom, not any precise destination. The vital point is therefore the possibility to cross international borders to access freedom or safety abroad. Not only is the destination unimportant, but the term ‘refugee’ also encompassed many different motives for seeking freedom. Examples include flight from oppression, flight from poverty, flight from prosecution, flight from war or civil strife, or flight from a natural disaster. Thus, the ordinary meaning of the word ‘refugee’ emphasises the notion that the person is worthy of being, and ought to

\textsuperscript{295} Türk, Nicholson, and Feller, ‘Summary Conclusions: exclusion from refugee status, expert roundtable, Lisbon, May 2001’, p. 485: ‘The goal should be towards developing a normative system that integrates the different applicable legal regimes in a coherent and consistent manner’, in: Türk, Nicholson, and Feller, Refugee Protection in International Law – UNHCR’s Global Consultations on International Protection, 2003; Similar objectives can be found in other international regimes, such as international human rights law, where the ECtHR stated in its rulings that “[t]he Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part [...]”, see ECtHR, \textit{Al-Adsani v. The United Kingdom}, Application No. 35763/97, Judgment, 21 of November 2001, para. 55. The Court makes a direct reference to systemic integration as enshrined in Article 31(3)(c) of the VCLT.

be, assisted, and if necessary, protected from any harm or consequences of fleeing the country of origin.297 Furthermore, the term ‘refugee’ highlights the relationship between an individual and a state regarding interests, treatment, credibility, and responsibility. Overall, the concept of refugee creates both rights and obligations and affects the balance of interest between an individual and the state.

The important elements describing Convention refugees are people who ‘are outside their country of origin’,298 ‘are unable or unwilling to seek or take advantage of the protection of that country, or to return there’, and for whom ‘such inability or unwillingness is attributed to a well-founded fear of being persecuted’. Furthermore, ‘the persecution feared is based on reasons of race, religion, nationality, membership of a particular social group, or political opinion’.299 This is also why the Refugee Convention is recognised mainly for its protective element and less for its elements that can exclude from protection. Unlike the inclusion provisions, the rationale of Article 1F is to restrict international refugee protection from those who seems to be ‘undeserving’ as refugees despite the well-founded fear of persecution that the asylum seeker might experience towards his or her country of origin. Thus, the exclusion clauses indicate a two-fold issue in relation to the humanitarian objectives.

Similarly, the international refugee system can be argued to sustain a two-fold issue, as it contains a framework aiming to provide humanitarian protection to political refugees, while at the same time supporting exclusion from refugee protection based on serious non-political crimes. This paradox also highlights the challenges and fragility of excluding refugees based on alleged terrorist crimes. How much truth there is in the classic saying ‘one man’s terrorist is another man’s freedom fighter’.300 With respect to this study, the Convention ground of greatest interest is ‘political opinion’. Therefore, before we dive into the aspects of when a refugee can be excluded due to serious non-political crimes, this section describes when an individual can be recognised as a political refugee.

297 McAdam and Goodwin-Gill, 2007, p. 15.
298 This encompasses refugees with or without a nationality and stateless persons.
299 Article 1A(2) of the 1951 Refugee Convention; McAdam, Goodwin-Gill, and Dunlop, 2021, p. 41.
300 In a Swedish asylum case, MIG 2020:11, this two-fold outcome was seen. The Migration Agency rejected the asylum seeker refugee or subsidiary protection and a decision of the Intelligence Service declared the applicant a security threat based on his association with Al-Shabab in Somalia. The Migration Court, by contrast, found the factual element of the asylum claim to be credible and justifiable for the recognition of a refugee status, and thus did not found any valid ground to not ascertain the applicant subject to the refugee definition due to political reasons.
The category of political refugee was aimed to include a broad spectrum of people such as diplomats thrown out of office ‘whose political party had been outlawed’, or ‘who fled from revolutions’.\(^3\) Hence, the intention was to include both those ‘with identifiable political affiliations’ and ‘other persons at risk from political forces within their home community’.\(^2\) In modern practice, the established international jurisprudence follows the same line of reasoning as that presented by the drafters and thus invites a broad scope of people to fall within the category ‘political opinion’.\(^3\)

An essential note to clarify is that ‘political opinion’ includes political beliefs attributed to the individual concerned. In other words, not only is the circumstance of what political opinion the applicant actually holds relevant for the purpose of the refugee definition, but also what political perception external agents, such as state or private actors, have attributed to the applicant.\(^3\) With regard to the mandatory forward-looking assessment procedure within the refugee definition, both possibilities of risk to the applicant’s life due to ‘political opinion’ must be taken into account.\(^3\) Therefore, the fact that an applicant has not pursued any political views of her or his own is not sufficient to cover the future-oriented assessment of the refugee category. What is critical is that ‘persecution may as equally be constituted by the infliction of harm on the basis of perceived political belief as of actual belief’.\(^3\) This relates also to the situation when an applicant refuses to comply with a demand to participate in various communities such as criminal organisations or guerrilla groups. The applicant’s decision not to join such groups may be perceived or understood as an expression of a political opinion which would trigger the nexus link between the well-founded fear of persecution and the Convention ground.\(^7\)


\(^{302}\) Hathaway and Foster, 2014, p. 405.

\(^{303}\) Also, the aspect of ‘non-membership in a political party’ is considered to be ‘irrelevant’ — political opinion for the purpose of the Refugee Convention ‘encompasses more than electoral politics or formal political ideology or action.’, see Arinse v. Canada (Minister of Employment and Immigration), [1989] F.C.J. No. 800 and Ahmed v. Keisler, [2007] 304 F.3d 1183, para. 1192; See also Al-Saber v. L.N.S. [2001] 268 F.3d 1143, paras. 1143 and 1146; Hilo v. Canada (Minister of Employment and Immigration), [1991] 130 NR 236 where the Federal Court of Appeal of Canada referred to the aspect of ‘irrelevance’ in relation to the applicant’s lack of ‘specific role or responsibility within the group’, para. 10.

\(^{304}\) Hathaway and Foster, 2014, p. 409.

\(^{305}\) Ibid., pp. 408–409.

\(^{306}\) Chan v. Minister for Immigration and Ethnic Affairs, [1989] HCA 62 169 CLR 379 F.C. 89/034, para. 20; See also EU’s Qualification Directive in Article 10(1)(e) which refers to ‘whether or not that opinion, thought or belief has been acted upon by the applicant’.

\(^{307}\) For relevant cases, see Hathaway and Foster, 2014, pp. 420–421 n. 383–387; See for instance the case of Tagaga v. Immigration and Naturalization Service [2001] 98-71251, concerning an ethnic Fijian Major who refused
of a political opinion is broad and may relate to examples such as ‘a person’s membership of a political party, organisation, or entity perceived to hold or express political views, or simply on the basis of a person’s family connections, race, or ethnicity’. However, an observation that must be made here is that the issue of attribution of a political belief to where an applicant may face persecution accordingly depends on whether ‘certain behavior or actions on the part of the applicant are or have been perceived by the authorities as political opposition’.

In conclusion, the broad and inclusive approach of ‘political opinion’ also encompasses the close intersection with the human rights approach with respect to ensuring that the humanitarian objectives of the international refugee instruments prevail. Given this, there is much to say about the special dynamic between the inclusion and exclusion clauses – a subject which is further analysed in the next section.

2.4.2 The Link Between Inclusion and Exclusion

Refugee law is perceived as a ‘special regime’. A regime that concentrates on certain rules and principles of ‘a certain problem area’ that leads to ‘an interpretation and application [that] should, to the extent possible, reflect that object and purpose’. What shapes the objectives of the Refugee Convention and refugee law, in general, is its humanitarian purpose. Article 1A(2) is the provision that determines who is recognised as a refugee and has a rationale in alignment with the humanitarian purpose. In contrast, while it is necessary to determine the merits for the inclusion criteria of refugee protection, the procedure of exclusion is also important. Despite the humanitarian objectives of the Refugee Convention,

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308 Hathaway and Foster, 2014, p. 410 with relevant references mentioned further in n 299–301.
309 Ibid., p. 411; See also WAFZ of 2002 v. Minister for Immigration and Multicultural and Indigenous Affairs, [2002] FCAFC 292, para. 18, where the Full Federal Court of Australia stated that ‘[a]t some times, and in some places, music has been part of the language of political dissent’.
310 In favour of a broad and inclusive dimension of ‘political opinion’, Hathaway and Foster underline that this open understanding of the refugee category is an ‘important means of maintaining the Convention’s vitality’ (a statement that I also echo), see Hathaway and Foster, 2014, p. 407, with reference to the case of Refugee Appeal No. 76044 [2008] NZ RSAA, para. 82.
313 Hathaway and Foster, 2014, p. 527; Interestingly, in the Swedish asylum case, MIG 2020:11, the Migration Supreme Court stated that when residence permit is granted in security cases (declared by the Swedish Intelligence Service and Migration Agency) by the Migration Court in an appeal – the merits of exclusion from refugee protection and status must be assessed.
the normative scope of the Convention also extends to identifying and excluding non-deserving refugees, regardless of the merits of the claim that the person has presented under Article 1A(2).\textsuperscript{314}

The interaction between Article 1A(2) and Article 1F tell us many things. First, the terms of Article 1A(2) is applicable as long as an applicant is not excluded under Article 1F. Second, the inclusion clause recognises political refugees, while the exclusion clauses exclude them due to ‘serious non-political crime’. As highlighted above, the inclusion provision protects those who fear prosecution for political reasons; the exclusion provision excludes asylum seekers who have been involved in criminal acts – which might have been committed for political reasons. This may still be considered to be a serious non-political crime, as the instigated harm against a state, civilian population or organisation need not be proportional to the actual aim. The tension between protection for political reasons and exclusion due to serious non-political crimes is another aspect that makes the relationship between the inclusion and exclusion provisions unique.

As the 1951 Convention and the 1967 Protocol do not set any requirements for status determination assessments, they also do not require any strict assessment procedures for inclusion and exclusion to follow a specific order (for instance, that inclusion should be assessed before exclusion or that the processes should be held separate).\textsuperscript{315} As much as it is necessary to examine if factors for inclusion are present, similar reasons for finding matters that qualify for exclusion should also be observed.\textsuperscript{316} Both the inclusion and exclusion clauses are important for the universal instruments regulating international refugee protection. Even though the provisions for inclusion and exclusions have different objectives and serve different purposes, they are both integral parts of the 1951 Refugee Convention and reflect the humanitarian objectives of the Convention and the Protocol. Therefore, the provisions should function in compliance with each other and within a complete framework.

\textsuperscript{314} Attorney General (Minister of Immigration) v. Tamil X, para 13.

\textsuperscript{315} For further analysis of the relation between inclusion and exclusion, see Chapter 5. In general, it was argued during the Lisbon Expert Roundtable Meeting that inclusion before exclusion should be considered. This would have several benefits, by establishing a holistic approach of the refugee status determination and because a ‘inclusion before exclusion’ order ‘allows proper distinction to be drawn between prosecution and persecution’; ‘exclusion is exceptional and it is not appropriate to consider an exception first’ and ‘exclusion before inclusion risks criminalizing refugees’, see Türk, Nicholson, and Feller, ‘Summary Conclusions: exclusion from refugee status, expert roundtable, Lisbon, May 2001’, p. 482, in: Türk, Nicholson, and Feller, Refugee Protection in International Law – UNHCR’s Global Consultations on International Protection, 2003.

2.4.3 Examining the Exclusion Provision – Mandatory or Not?

Despite the serious consequences of the exclusion provision and the guidance to interpret the provision ‘restrictively and apply[ it] with caution’, the systemic purpose of the exclusion provision makes one thing crystal clear – Article 1F includes a mandatory requirement. As emphasised by the Supreme Court of New Zealand: ‘The provisions of the Convention do not apply to a claimant who comes within the exclusionary terms of art. 1F. Whatever the merits of the claim under art 1A(2), such a claimant cannot be recognised as a refugee’. For the purpose of maintaining the goals of Article 1F, the benefits and provisions provided within the Convention ‘shall not apply to any person’ who qualifies under the terms of the exclusion clauses. The implication of Article 1F applies to anyone who has been involved in any of the crimes mentioned in Article 1F and may threaten ‘the systemic integrity and viability of refugee law’. This has been further evaluated and highlighted by the UNHCR, stating the following:

The rationale for the exclusion clauses, which should be born in mind when considering their application, is that certain acts are so grave as to render their perpetrators undeserving of international protection as refugees [. ..]. The exclusion clauses must be applied ‘scrupulously’ to protect the integrity of the institution of asylum.

Thus, the essential element of the exclusion provision is to ensure that the international community is not providing shelter to persons who have committed heinous international or domestic crimes or allegedly perpetrated acts contrary to the purposes and principles of the United Nations. Hence, the reason why the exclusion provision is important and mandatory is to guard the ‘integrity and viability of refugee law as a whole’. Article 1F therefore requires that any person who falls under the ambit of the exclusion provision is not granted the status of a Convention refugee.

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317 Al-Sirri v. Secretary of State for the Home Department, [2012] UKSC 54, 3 WLR 1263, para. 16. Equivalent statements have been made by the UNHCR: ‘as with any exception to human rights guarantees, the exclusion clauses must always be interpreted restrictively and should be used with great caution’, see UNHCR, Background Note on the Application of Article 1F, para. 4.

318 Attorney General (Minister of Immigration) v. Tamil X, para 13: In MIG 2016:22, the Swedish Supreme Migration Court also emphasised use of the exclusion provision as a procedural step in examining asylum claims for protection.


320 UNHCR, Guidelines on International Protection No. 5, para. 2. (emphasis added).


322 Ibid., pp. 526–531. The substantial and mandatory element of Article 1F is applicable in contexts of mass influx as well. Equally, the humanitarian principles must be guaranteed and leave no room for arbitrary assessments. As highlighted by the UNHCR: ‘From a practical perspective, however, an individual assessment may not be possible at an early stage in such circumstances. This does not mean that group exclusion is justified. Rather, humanitarian principles require that protection and assistance be afforded to all persons until such time as individual refugee status determination can take place.’, see UNHCR, Background Note on the Application of Article 1F.
The emphasis on the *rationale* of Article 1F indicates that the objectives of the exclusion provision prevail over the concern for ‘ensuring the interest of any one state, or indeed of rendering justice to any one person.’\(^{323}\) Thus, despite the discretion given to states to remain free to adopt their own asylum legal system – in any exclusion case, the mandatory element requires the host state to deny the person refugee status.\(^{324}\)

In addition, it is also worth highlighting some discrepancies within the exclusion provision. For instance, revocation of refugee status due to notified reasons related to the exclusion clauses (a) and (c) can be conducted after admission to the receiving state. However, this outcome is not possible in relation to serious non-political crimes, as Article 1F(b) is framed narrowly and requires that the person has allegedly committed the excludable crime ‘outside the country of refuge *prior to his [or her] admission* to that country as a refugee’.\(^{325}\) The geographical limitation simply means that while exclusion from international refugee protection may be possible to impose for crimes of international character after entering the asylum host state, efforts within the context of Article 1F(b) cannot be applied after the arrival to the asylum state. This contrast is crucial to comply with for the purpose of not confusing the objective and assessment procedure between the exclusion clauses and other critical provisions weakening the individual’s privileges of enjoying the benefits of the Refugee Convention; such as Article 33(2), dealing with matters of removing criminal refugees from the territory of the host state.\(^{326}\)

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\(^{323}\) Hathaway and Foster, 2014, p. 528; See also *Bundesrepublik* (CJEU, 2010), para. 115.

\(^{324}\) Hathaway and Foster, 2014, p. 528; See also the statement of Mr. Rochefort of France commenting that: ‘[I]t must be made quite clear that the object was not to specify in the Convention what treatment each country must meet out to individuals who had placed themselves beyond the pale, but only to state whether a country was entitled, in granting refugee status to such individuals, to do so on the responsibility of the High Commissioner and of the United Nations’. See Statement of Mr. Rochefort of France, ECOSOC Social Committee, UN Doc. E/AC.7/SR.166, 1950, p. 4; Also, see the UNHCR statement on how to approach the exclusion provision post-granting refugee status, see UNHCR, Guidelines on International Protection No. 5, para 6: ‘Where facts which would have led to exclusion only come to light after the grant of refugee status, this would justify *cancellation of refugee status on the grounds of exclusion*. The reverse is that information casting doubt on the basis on which an individual has been excluded should lead to reconsideration of eligibility for refugee status’. (emphasis added).

\(^{325}\) See UNHCR, Guidelines on International Protection No. 5, para. 5: ‘Articles 1F(a) and 1F(c) are concerned with crimes whenever and wherever they are committed. By contrast, the scope of Article 1F(b) is explicitly limited to crimes committed outside the country of refuge *prior to admission* to that country as a refugee.’; See, further, *RB (Algeria) v. Secretary of State for the Home Department*, [2010] 2 AC 110, para. 206.

\(^{326}\) Hathaway and Foster, 2014, pp. 531–532; *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, para. 73.
Having shed light on the significant aspect of the exclusion provision – the relationship between inclusion and exclusion – and the question of whether assessment of the exclusion provision is required, it is time to focus on the meaning of the specific exclusion categories in Article 1F.

2.4.4 The Exclusion Crimes of Article 1F

Returning to the Lisbon Expert Roundtable, the discussion about each of the exclusion categories pursuant to Article 1F alluded to the following. First, Article 1F(a) should be guided and inspired primarily by sources of international criminal law as it specifically deals with international crimes. Article 1F(b), focusing on 'serious non-political' crime, was more of a challenge. The main reason was because the interpretation of ‘serious non-political crime’ was not viewed from a homogenous perspective, as the states could not reach a consensus of what constituted a ‘non-political crime’. This not only adds an argument to why interpretation of the exclusion provision is more of an issue and challenge to terrorism, but also indicates why the international community struggles with the same challenges. As for exclusion due to acts contrary to the principles and purposes of the United Nations, the states acknowledged an aspect that remains accurate, namely, that Article 1F(c) is less applied than the other paragraphs as acts contrary to the principles and purposes of the United Nations are associated with the excludable crimes in (a) and (b) of Article 1F.

In this section, a deeper analysis of the exclusion crimes is presented to enable a proper understanding before delving into the process of when and how terrorism became integrated into the exclusion provision.


2.4.4.1 Drafting of Article 1F(a) and The Meaning of ‘Crimes against Peace, War Crimes and Crimes against Humanity’

Article 1F(a) explicitly mentions ‘crimes against peace, war crimes and crimes against humanity’ with reference to the codification of these crimes as defined in international instruments. The reference to ‘as defined in the international instruments drawn up to make provision in respect of such crimes […]’ provides guidance on which instruments it is sufficient to consider when interpreting and applying the exclusion category of international crimes. Examples of international instruments to consider could be the following: the London Charter, the Statutes of the International Criminal Tribunal for the former Yugoslavia (Statute of the ICTY) and the International Criminal Tribunal for Rwanda (Statute of ICTR), and the recently adopted international criminal law document – the ICC Statute, which has also been declared by both states and the UNHCR as a highly relevant ‘international instrument’ to consider when dealing with exclusion due to international crimes. The jurisprudence of international criminal courts or tribunals, such as the International Criminal Court (ICC), the ICTY and the ICTR, or similar are also relevant to take into account. Further, ‘domestic decisions applying norms of international criminal law through which the respective crimes [are] codified and further developed’ are also relevant. In other words, the reference to international sources underpinned by Article 1F(a) highlights that the exclusion of international crimes are, first and foremost, covered in several binding and substantial instruments. Furthermore, several international norms and judgment should be considered when assessing exclusion under Article 1F(a).

333 Despite the weak position of the Statutes of the Ad Hoc tribunals which are not uniform in regard to all issues, the instruments should not be disregarded as useful sources. Particularly as they may provide more guidance with respect to issues that has not (yet) been dealt explicitly by the ICC, see ‘The Michigan Guidelines on the Exclusion of International Criminals’, 35 Michigan Journal of International Law 3, 2013, p. 7; Li, 2017, pp. 165–166.
2.4.4.1 Genocide and Article 1F

It may come as a surprise that ‘genocide’, which was initially codified in the 1948 Genocide Convention – years before the 1951 Refugee Convention entered into force – is not mentioned in the exclusion category of international crimes. However, it is important to have in mind that ‘genocide’ as a criminal offence per se can still be included under Article 1F. Genocide can in most cases be considered a crime within the meaning of the exclusion provision. In other words, if the conditions defining the excludable international and national crimes are fulfilled, genocide can constitute a war crime, a crime against humanity,335 a ‘serious non-political crime’ or an act contrary to the principles and purposes of the UN.336

2.4.4.1.2 Article 1F(a): Crime against Peace

Crime against peace is the main core crime and generally requires that the perpetrator has had a leadership position.337 As the final definition of ‘crime of aggression’ was still in the drafting process, the agreed notion shared among the international community was that ‘only military or civilian leaders, i.e. persons at command level, acting on behalf of a State, could qualify as a group of potential perpetrators’.338 Through the 2010 Kampala Review Conference, the adoption of the amendment definition of ‘crime of aggression’ was pursuant to Article 8bis and 15bis.339 Article 8bis defines crime of aggression as ‘planning, preparation, initiation or execution of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations’. Through the wording of the criminal scope and the high gravity of it being a leadership crime, ‘aggression’ as an excludable crime would probably not ‘ever play a significant practical role’.340 For this reason, exclusion due to crime of aggression is not addressed in the thesis beyond this short description.

339 The provisions concerning ‘aggression’ was adopted in the ICC Statute in 2017 and the jurisdiction of the ICC became enforced from 17 July 2018 by the decision made by the Assembly of State Parties to activate the jurisdiction, see Res. ICC-ASP/16/Res.15: Assembly of States Parties to the Rome Statute of the International Criminal Court, 16th Session, 4–14 December 2017, ICC-ASP/16/20. From the latest confirmed date, 30 April 2021, the number of States that have ratified the amendments is 41, see McAdam, Goodwin-Gill, and Dunlop, 2021, p. 200, n. 255.
2.4.4.1.3 Article 1F(a): Crime against Humanity

The clear consensus within the international community is that the ICC Statute is the main international instrument concerning the definition of the criminal offences and the principles of individual criminal responsibility. Despite the lack of any adopted international convention codifying a particular international core crime, such as ‘crime against humanity’, the ICC Statute, through the adoption of Article 7(1), is the main provision to apply when interpreting the definitional elements of the crime.\(^{341}\) Scholars have also acknowledged the ICC Statute as containing the recently codified definition of ‘crimes against humanity’. With its gravity as a heinous crime, crime against humanity falls within the ambit of a core international crime and is considered to encompass serious violent crimes, such as murder, extermination, torture, or rape. Such severe criminal acts must further be conducted as a ‘part of a widespread or systemic attack directed against any civilian population’;\(^{342}\) However, ‘crime against humanity’ can occasionally be considered as committed even if the violent act includes only one single attack. An example is the 9/11 terrorist attacks, which due to the severity and the harmful consequences have been defined as a ‘crime against humanity’;\(^{343}\)

2.4.4.1.4 Article 1F(a): War Crimes

As opposed to crimes against humanity, which can take place either in peace time or in a war context,\(^{344}\) war crimes can only occur if there is an actual armed conflict. ‘War crimes’ can in general terms be defined as international crimes containing ‘violations of the laws or customs of war’ that can be conducted through criminal acts such as ‘murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity’;\(^{345}\)

\(^{341}\) Li, 2017, pp. 314–318; Gilbert, Geoff and Bentajou, Magdalena Anna, ‘Exclusion’, p. 715, in: McAdam, Foster, and Costello, The Oxford Handbook of International Law, 2021. However, scholars also address the importance that ‘exclusion based on a crime against humanity must be subject to extreme caution and reservation’ as the crime ‘is both broad and still unsettled’, see again Li, 2017, p. 315; Hathaway and Foster, 2014, pp. 577–578.


\(^{344}\) This has been stated by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the landmark case, Prosecutor v. Dusko Tadić (Appeal Judgement), IT-94-1-A, 15 July 1999.

\(^{345}\) McAdam, Goodwin-Gill, and Dunlop, 2021, p. 201.
An armed conflict can be defined as either an international armed conflict or a non-international armed conflict. This distinction is important as it determines which rules of international law of armed conflict and individual criminal responsibility for alleged war crimes that become applicable. Although this distinction is necessary to apply the relevant norms of international humanitarian law and international criminal law, it is not equally important for the exclusion provision. Article 1F(a) does not make a distinction between individual criminal responsibility for war crimes based on whether they were conducted in an international armed conflict or a non-international armed conflict.346 Similarly, the exclusion provision does not limit the scope of war crimes to only consider grave breaches. Instead, Article 1F(a) leans heavily on the Tadić case,347 where the Appeal Chamber of the ICTY confirmed that individual criminal responsibility for war crimes can emerge in either international or non-international armed conflicts.348 Thus, the provisions concerning grave breaches in international armed conflict, serious violations of the laws and customs of international or non-international armed conflict, pursuant to Article 8 of the ICC Statute, define the war crimes which can trigger exclusion under Article 1F of the Refugee Convention.349

2.4.4.1.5 The International Instruments as Interpretative Sources

With respect to the legality principle – ‘only the law can define a crime’ (nullum crimen sine lege) – the asylum seeker ‘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’.350 It is therefore important to take into consideration the codified international rules defining the core crimes to ensure that the excludable crimes in Article 1F(a) follow the same line of definitional meaning and classification. This is important to avoid any potential gaps and fragmentation between the two legal frameworks. Further, this can ensure that the assessment of the excludable crimes does not extend beyond the defined scope of these crimes under international criminal law doctrine.

346 However, the scenario of an armed conflict must exist.
347 ICTY, Duško Tadić aka ‘Dule’, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction before the Appeals Chamber of ICTY, IT-94-1-AR72, 2 October 1995.
However, the reference to ‘international instruments’ is made without any further guidance. Thus, the spectrum of international instruments could include as many relevant sources in the field of international criminal law as possible, such, the statutes and jurisprudence of the ICC and the ad hoc tribunals. As the ICC Statute contains the latest codification of the international crimes and has been ratified by over 100 state parties – this statute has become the main recognised instrument.351 Other instruments, such as the 1948 Convention on the Prevention and Punishment of the Crimes of Genocide, the four 1949 Geneva Conventions for the Protection of Victims of War and its Additional Protocol, or the 1948 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, could also be relevant to include as complementary to the international criminal framework.352 In contrast, some non-binding instruments have also been highlighted as valuable to consider. For instance, there has been interest in including the ILC documents or General Assembly resolutions when interpreting the exclusion clauses.353 Nonetheless, interpreting the exclusion provision in light of systemic integration requires integration with binding rules. Therefore, in interpreting Article 1F from an international law perspective, binding international instruments should retain their prevailing position. However, non-binding instruments, such as the ILC documents or General Assembly resolutions could, due to their normative high value within the international legal system, still be used as guidelines in the assessment of exclusion from refugee protection.


352 UNHCR, Background Note on the Application of Article 1F, para. 23, adding a list of more instruments. Although the UNHCR declares the ICC Statute as the recent codification of international crimes, the agency still highlights that the Statute ‘should not be referred to exclusively when interpreting the scope of Article 1F(a) and the definitions used in other instruments must also be given due consideration.’, see in particular UNHCR, Background Note on the Application of Article 1F, para 25; See also Bond, Jennifer, ‘Principled Exclusions: A Revised Approach to Article 1(F)(a) of the Refugee Convention’, 35 Michigan Journal of International Law 15, 2013, p. 30 – ‘[…] history supports a conclusion that the many developments that have occurred in international criminal law since the Refugee Convention was drafted must be taken into account by decision makers considering Article 1(F)(a).’ Bond refers to a similar catalogue of international instruments as mentioned above, though adding the Statute of the Special Court for Sierra Leone as well; Rikhof, 2012, p. 486 – ‘[…] a clear invitation to use international criminal law as […] its source for interpretation. This was already mentioned by the drafters of the Refugee Convention which wanted […] this provision set out as broadly as possible in order to take into account the jurisprudence developed after the Second World War and the emerging areas of international humanitarian law and international criminal law.’; Türk, Nicholson, and Feller, ‘Summary Conclusions: exclusion from refugee status, expert roundtable, Lisbon, May 2001’, p. 480, in: Türk, Nicholson, and Feller, Refugee Protection in International Law – UNHCR’s Global Consultations on International Protection, 2003; Rikhof, 2023, pp. 261–268.

353 UNHCR, Background Note on the Application of Article 1F, para. 24.
2.4.4.2 Drafting of Article 1F(b) and the Meaning of ‘Serious Non-Political Crimes’

Article 1F(b) is commonly understood as a clause which leans more on domestic standards than on international rules, unlike the other excludable categories. However, as correctly stated by Gilbert and Bentjaou:

‘Serious non-political crime’ is peculiar to the Convention but is left undefined, but it ought to be interpreted in its context, that is, it should be compared with war crimes, crimes against humanity, crimes against peace, and acts contrary to the purposes and principles of the United Nations in terms of seriousness, even if the context is wholly domestic.\(^{354}\)

The three central elements of ‘serious non-political crime’ that must be examined are the following. First, ‘whether there are serious reasons for considering that the individual in question has committed the offence’. Second, ‘whether the crime is serious, considered with due regard to context and individual circumstances’. And third, ‘whether it is non-political’.\(^{355}\) In the following sections, the elements of ‘seriousness’ and ‘non-political crime’ will be further defined and analysed.

2.4.4.2.1 Criterion of ‘Seriousness’

The exclusion crimes concerning the international crimes and ‘acts contrary to the purposes and principles of the United Nations’ contain a level of ‘seriousness’, with common support from the international community. Also, interpreting the exclusion crimes in Article 1F(a) and (c) in accordance with international standards strengthens the position taken by the international community – namely that the criminal offences defining international crimes and acts contrary to the fundamental foundation of the United Nations are to be considered ‘serious’ crimes carrying severe costs to international peace and security. Thus, the level of ‘seriousness’ in the international crimes and acts contrary to the purposes and principles of the UN Charter is a common concern shared by the international community, while ‘serious non-political crimes’ rather ‘pays tribute to the interests of the country’\(^{356}\) in which the applicant aims to seek refugee protection. This is also why the exclusion nature of ‘serious non-political crime’ falls within the scope of domestic criminal standards rather than international criminal standards.

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\(^{355}\) Li, 2017, pp. 319–331; McAdam, Goodwin-Gill, and Dunlop, 2021, p. 213.

Even if Article 1F(b) is closely associated to domestic standards and, thus, allow states to have some level of discretion when evaluating the level of ‘seriousness’ of a particular crime, the domestic criminal standard must still be aligned with the framework of international laws. In addition, international binding instruments, such as the UN Security Council Resolutions adopted under Chapter VII of the UN Charter, provide guidance on what sort of criminal acts that should be considered ‘serious crimes’. Terrorist acts have undoubtedly been claimed as serious crimes, due to UNSC Resolution 1373 calling upon all member states to qualify terrorist crimes as ‘serious criminal offences’.

Interestingly, Hathaway and Foster present a step-by-step structure for the assessment of whether a criminal offence is serious under the ambit of Article 1F(b). In this process, the decision-maker should start by asking:

i. ‘do the facts found amount to an act that is a serious, common crime in the place where it was committed? If not, Art. 1(F)(b) exclusion is not warranted.’

ii. ‘assuming the act was a serious crime where committed, is it also a serious, common crime in the state assessing refugee status? If not, Art. 1(F)(b) exclusion is not justified.’

iii. ‘assuming that the facts found would amount to a serious crime in both the place where committed and in the asylum state, is the crime in question an extraditable crime as defined by reference to international minimum standards?’ Following this three-step-structure, if then ‘each of these criteria is satisfied, […] the crime […] is fairly determined to be a “serious crime” for purposes of Art. 1(F)(b)’.

357 Hathaway and Foster, 2014, pp. 546–54; McAdam, Goodwin-Gill, and Dunlop, 2021, p. 210; See, further, AH (Algeria) v. Secretary of State for the Home Department, [2012] 1 WLR 3469, para. 31: ‘[w]hile the Convention leaves it to the domestic courts of the signatory states to decide whether, in any particular case, a non-political crime is “serious”, that determination must be founded upon a common starting point as to the level of seriousness that must be demonstrated if a person is to be excluded from protection of the Convention’; Pushpaanathan v Canada (Minister of Citizenship and Immigration), para. 73: ‘[i]t is quite clear that Article 1F(b) is generally meant to prevent ordinary criminals extraditable by treaty from seeking refugee status’.


360 UNSC Resolution 1373, 28 September 2001, UN Doc. S/RES/1373, p. 2, at para 2 (c): ‘Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts’. (emphasis added).

In general, I find the three-step process presented above a valuable framework to follow. Analysing how the questions are formulated – *i.e.*, if the crime is serious both in the country of origin (where the crime was committed) and in the country where the asylum seeker is seeking refugee protection – speaks of interest in examining if the crime is serious outside the national standards of the receiving state. Interestingly, Hathaway and Foster also separate in what situations a commission of a criminal act can warrant Article 1F(b) or justify Article 1F(b). Further, the third step is worth highlighting. It illustrates how the interpretation method of systemic integration and evolutionary approach comes into play by including extradition standard as a complementary mechanism in determining the character of the offence. However, the subsequent wording in the third step is difficult to follow. It does not add any further clarification on how to process the third step in relation to the other two criteria. Also, considering the criminal act as ‘fairly determined to be a “serious crime”’ does not give any strong direction of whether it is a ‘serious non-political crime’ or only close to reaching the ambit of Article 1F(b). Lastly, although I spoke in favour of the interesting distinction between the ‘warranting’ and the ‘justifying’ outcome by considering the criminal framework of the home country and the host state, it is important to bear in mind that the assessment of Article 1F(b) follows the domestic criminal standard of the receiving state (even if the crime was committed outside the territory of the asylum state). As mentioned above, Article 1F(b) ‘pays tribute to the interests of the country’. Ultimately, this means that the level of seriousness of the crime depends on the criminal standard of the asylum country – ‘not on how the seriousness of the respective crime would eventually be considered in the country of origin’.

Another aspect that may be relevant to include as a guiding notion when determining the seriousness of a criminal act is ‘if the respective individual has already served a sentence or has been granted or has benefited from an amnesty, where applicable and in line with international law’. One essential note in regard to this is that any grounds for prosecution, sentence or amnesty must be in accordance with international law.

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362 This is also what makes the exclusion clause of Article 1F(b) unique in itself.


365 However, UNHCR has proclaimed that some criminal offences are far too grave and heinous for even an amnesty or pardon to prevail over the necessity to apply the exclusion provision in the Refugee Convention, see UNHCR, Guidelines on International Protection No. 5, para. 23; See also UNHCR, Handbook, para. 157, stating the following: ‘In evaluating the nature of the crime presumed to have been committed, all the relevant factors – including any mitigating circumstances – must be taken into account. It is also necessary to have regard to any aggravating circumstances as, for example, the fact that the applicant may already have a criminal record. The fact that an applicant convicted of a serious non-political crime has already served his sentence or has been granted a pardon or has benefited from an amnesty is also relevant. In the latter case, there is a
Additionally, in order to determine whether the criminal conduct reaches the requisite level of ‘seriousness’, the decision-maker must consider ‘the nature of the act, the actual harm inflicted, the form of procedure used to prosecute the crime, the nature of the penalty, and whether most jurisdictions would consider it a serious crime’. Hence, despite discretion being left to states to determine whether a criminal offence reaches the requisite level of ‘seriousness’, an important factor to take into account is the overall discernment of other jurisdictions. The threshold of ‘seriousness’ within the context of Article 1F(b) must preferably be similar in several jurisdictions.

Concluding with a general observation, the level of ‘seriousness’ seems to be a standard that protects the exclusion provision from broad interpretation and justifies its application in relation to crimes that reach a gravity equivalent to the other exclusion categories. The level of ‘seriousness’ also seems to safeguard the objectives of Article 1F and the Refugee Convention as a whole. Further, it ensures that host states do not pursue a generalised approach of excluding refugees from the universal humanitarian protection that they deserve.

2.4.4.2.2 Defining the Exclusion Crime as Political or Non-Political

Another central component within the category of ‘serious non-political crime’ is the declaration of whether the criminal offence is defined as political or non-political. However, clarifying what is or is not a political crime is challenging and falls also outside the scope of this thesis. The reason why this issue is complex relates mostly to the lack of a precise definition of a ‘political’ crime. Much like in the case of the terrorism definition – what is to be considered a political crime...
remains within the margin of interpretation for each sovereign state. A common position for what defines a ‘political crime’ is that the crime ‘is ordinarily understood to involve actions that are taken to advance a political objective and which are not disproportionately harmful’. As noted already during the Lisbon Expert Roundtable – when determining whether a criminal act is political or non-political, the state should consider the ‘context, methods, motivation, and proportionality of a crime to its objectives’ (called the ‘predominance’ test). In support of this approach, when determining whether or not a crime is non-political, it is important to consider, first, if the criminal act has a political objective. If so, the second and ultimate step will be to examine whether the conducted action (i.e., the method) was proportionate to its political purpose (i.e., the motive).

As highlighted by Kingsley Nyinah, it ‘appears to be a consensus that a political motive for a serious crime does not suffice to shield an applicant from exclusion because additional factors must be considered beyond the applicant’s subjective reasons for resorting to violence’. With inspiration from the reasoning in the Gili case, the distinction between a political crime and a non-political crime could be described as follows:

A very serious crime, such as murder, may be accepted as political if the regime against which it is committed is repressive and offers no scope for freedom.

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369 Hathaway and Foster, 2014, p. 555 (emphasis added). For further analysis of ‘non-political crimes’, see pp. 554–562; Following this, the House of Lords stated that a political crime is an offence ‘carried out for a political purpose, that is, with the object of overthrowing or changing the government of a state of inducing it to change its policy’, see T v Home Secretary [1996] AC 742, pp. 749–750. See also p. 787, where the House of Lords shed light on the proportionality test when assessing the political purpose and the crime – ‘[i]n determining whether such a link exists, the court will bear in mind the means used to achieve the political end, and will have particular regard to whether the crime was aimed at a military or governmental target, on the one hand, or a civilian target on the other, and in either event whether it was likely to involve the indiscriminate killing or injuring of members of the public.’


371 The predominance test is about ‘whether the offence could be considered to have a predominantly political character and in this sense might be proportionate to the political objective’, see Türk, Nicholson, and Feller, ‘Summary Conclusions: exclusion from refugee status, expert roundtable, Lisbon, May 2001’, p. 481, in: Türk, Nicholson, and Feller, Refugee Protection in International Law – UNHCR’s Global Consultations on International Protection, 2003.

372 Hathaway and Foster, 2014, p. 557: ‘The inquiry into proportionality is understood to be an integral part of whether the crime is fairly deemed political, a notion sometimes framed as asking whether the political nature of the offense outweighs its common law character’.

of expression and the peaceful change of government or government policy. Under such a regime the claimant might be found to have had no other option to bring about political change. On the other hand, if the regime is liberal democracy with constitutional guarantees of free speech and expression [...] it is very difficult to think of any crime, let alone a serious one, which we would consider to be an acceptable method of political action. To put the matter in concrete terms, the plotters against Hitler might have been able to claim refugee status; the assassin of John F. Kennedy could never do so.374

2.4.4.2.3 Serious Non-Political Crime’ and the Influence of Extradition Law

In absence of a precise reference mentioned in the provision, the presence of extradition law within the context of exclusion due to ‘serious non-political crimes’ has been developed through the analysis of the travaux presented by scholars. Thus, extradition law has particularly been raised as a body of law necessary for the refugee regime to interact with in order to gain a deeper understanding of the exclusion clauses. Inviting the doctrine of extradition law has been argued to benefit the assessment of ‘serious non-political crimes’ through the means of clarifying the scope of the exclusion provision and its interaction with the refugee definition.375

Moreover, an integration between the two bodies of law could bring the exclusion category of ‘serious non-political crimes’ in alignment with other exclusion provisions, such as Article 14(2) of the UDHR376 and 7(d) of the UNHCR Statute.377 As observed by Grahl-Madsen, the interaction between refugee law and extradition law provides guidance worth bearing in mind:

[...] we are here concerned with persons who – were it not for Article 1 F (b) – would have a perfect claim to refugeehood by virtue of Article 1 A and B, it stands to reason to submit that crimes for which punishment has

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376 More about the drafting history of Article 1F(b) from the perspective of the interrelation between refugee and extradition law and the spirit of Article 14(2), see Hathaway and Foster, 2014, pp. 541–543.
been suffered, as well as crimes which are either too unimportant to warrant extradition or no longer justiciable, should not be held against persons seeking recognition as refugees.\textsuperscript{378}

However, the link to extradition law is not clearly mentioned in the wording of the exclusion category of ‘serious non-political crimes’. Is a possible interpretive method for systemic integration really possible within Article 1F(b), and if so, where can it be found? The answer is affirmative – it can be found in the objectives of the exclusion category ‘serious non-political crimes’.

The inherent objectives of Article 1F(b) are phrased as to ‘prevent the abuse of protection under the 1951 Convention by “fugitives from justice” and to prevent possible interferences with extradition conventions’.\textsuperscript{379} Further, they are ‘to be associated with legitimate national security interests of the respective country’.\textsuperscript{380} Thus, the link to extradition law becomes relevant as it assists in clarifying which categories of offences are to be determined as ‘serious non-political crimes’. In other words, the application of extradition law is not to limit the exclusion provision to being applied solely in extradition situations. Instead, through the meaning of ‘systemic integration’, the interrelation between refugee law and extradition law ‘enables the provision to be interpreted in such a way that any act to be qualified as a serious non-political crime in the sense of the exclusion clause, has to be of a kind of crime typically included in extradition treaties’.\textsuperscript{381} The reference to extradition law provides the guidance needed in relation to the key wordings of Article 1F(b), particularly in relation to the terms ‘crime’ and ‘non-political’. This demonstrates why extradition law through the political exemption rule plays an important role in interpreting the merits for exclusion due to ‘serious non-political crimes’.

The wording of Article 1F(b) already creates some challenges, mostly in reference to the objective of the clause to not grant refugee protection to ‘fugitives from justice’. Shedding light over the current challenge of the regular meaning of Article 1F(b), Goodwin-Gill, McAdam, and Dunlop describe it as follow: ‘It is one


\textsuperscript{381} Ibid, para 63.
thing to say that those seeking to escape prosecution for serious non-political crimes should not be recognized as refugees; but quite another to say that only such fugitives come within the scope of article 1F(b).\footnote{382} Equally, as clarified by Zimmermann and Wennholz: ‘[A]lthough there cannot be a direct link between Art. 1F(b) and the law of extradition, Art. 1F(b) should be related to, although not limited by, the jurisprudence developed with respect to the political offence exemption contained in extradition treaties.’\footnote{383} In other words, the influence of extradition law is not to limit the exclusion provision to being applied solely in extradition situations. Instead, through the meaning of ‘systemic integration’, the intersection between refugee law and extradition law ‘enables the provision to be interpreted in such a way that any act to be qualified as a serious non-political crime in the sense of the exclusion clause, has to be of a kind of crime typically included in extradition treaties’.\footnote{384} With knowledge about the complex aspects of the relationship between refugee law and extradition law, my argument would still point in favour of using extradition standards as a guiding framework in the assessment of Article 1F(b). Extradition law offers guidance in relation to central concepts of Article 1F(b), such as ‘crime’ and ‘non-political’. This is not to say that extradition standards should be strictly applicable and prevail over the purposes, values and language of Article 1F(b). It is crucial to respect the elements that distinguish the bodies of laws. However, it is also important to open the door to a developing normative system where these two regimes can coexist – provided that the interaction can benefit the interpretation and application of Article 1F and serve to bridge it closer to other areas of international law. Thus, with reference to the extradition framework proposed in Hathaway and Foster’s three-step process presented above – my argument rests on the fact that if a criminal offence is typically included in extradition treaties, it is most likely to be perceived as a ‘serious non-political crime’ qualifying an act under Article 1F(b). In contrast, if a criminal act falls under the political exception rule in extradition law, it is most likely a political crime that do not justify exclusion from refugee protection.

Illustrating this further, the interrelation with extradition law clarifies that the act causing risk of exclusion from refugee protection must constitute a crime within the framework of the receiving state’s criminal code. Nonetheless, it is worth clarifying that the wording of Article 1F(b) is not aimed at limiting exclusion to persons subject to criminal sanctions abroad. Instead, the terms of Article 1F(b) deliberately covers any person who ‘has committed a serious non-political crime

outside the country of refuge prior to his admission to that country as a refugee.\textsuperscript{385} As the wording of ‘crime’ in the context of Article 1F(b) is deemed a non-technical term, the insights of extradition law emphasise the general structure of Article 1F(b) as containing the associated link to domestic standards. Furthermore, as there is no unified definition of political or non-political term,\textsuperscript{386} the contribution of extradition law can diminish the potential inconsistency of acts defined as either political or non-political crimes through considering the political offence exception clauses in extradition treaties.\textsuperscript{387} Simply put, in order to find whether criminal conduct is to be defined as a ‘non-political’ offence, a recommendation would be to use extradition law as a direction to confirm if the excludable act constitutes a crime which is ‘not covered by exceptional clauses typically included in bi- or multilateral extradition treaties’.\textsuperscript{388}

However, scholars have underlined the consequences of imposing a systemic integration of refugee law and extradition law. With the initial intention to draw the boundaries between refugee law and extradition law more clearly in order to understand what constitutes a ‘serious crime’ within the exclusion clause, the normative development seems to have headed in the opposite direction. In recent times, the impact of extradition law within the context of the exclusion clauses has seemingly resulted into a pattern where states have increased the applicability of the exclusion provision by expanding the legal framework, ‘through the use of ever more expansive extradition provisions, increased use of “certification” and warrants procedures between “like-minded” States’.\textsuperscript{389} Additionally, several domestic jurisdictions appear to have eliminated the assessment requirement of reviewing ‘the individual characteristics of the particular case’.\textsuperscript{390} Even if there are reasonable arguments in favour of including the language of extradition

\textsuperscript{385} Hathaway and Foster, 2014, p. 540, more about crimes committed abroad, see pp. 544–546; See, further, Ovecharkh v Minister for Immigration and Multicultural Affairs [1998] FCA 1314; 88 FCR 173; 158 ALR 289; 51 ALD 549, per Whitlam J’s reasons for judgment, stating the following ‘the ordinary meaning of the words used in Art 1F(b) does not suggest the qualification [of justiciable, extraditable crimes] […] What is most striking […] about Art 1F is the plain, matter-of-fact requirement that there should be “serious reasons for considering that” a person “has committed” a specific type of crime […] Certainly the language may also apply to fugitives from prosecution or, for that matter, punishment. But there is no obvious reason to confine the plain meaning of the words to that category of persons’.

\textsuperscript{386} McAdam, Goodwin-Gill, and Dunlop, 2021, p. 213 – ‘The political aspect apart, the phrase “serious non-political crime” is not easy to define given the different connotations of the term “crime” in different legal systems’; See also Grahl-Madsen, 1996, pp. 289–299; Djorjevic, Ned, ‘Exclusion under Article 1F(b) of the Refugee Convention: The Uncertain Concept of Internationally Serious Common Crimes’, 12 Journal of International Criminal Justice 1057, 2014, pp. pp. 1057–1074.


\textsuperscript{390} Ibid.
law when interpreting Article 1F(b), this should be approached with careful manner. The drafters’ original position, as formulated by Hathaway and Foster, was – ‘not all extraditable crimes should be adjudged “serious” crimes for purposes of exclusion under Art. 1(F)(b)’.

It is challenging to address which specific extradition provisions should be considered in the systemic reading of Article 1F. This is because of the variation of extradition treaties and agreements between states. For this reason, extradition law has a limited scope and a slightly different role in the analysis of the research question. However, extradition law is still important to address, mainly in relation to the issues of terrorism and the understanding of a political versus a non-political crime. Despite the differing objectives and purposes between refugee and extradition law, the latter regime could be useful for two main reasons. First, from the perspective of offering guidance in categorising what sorts of acts fall under the categories of ‘political’ and ‘non-political’ crime. Second, in protecting the scope of political crimes. If a certain act would be considered as a political crime under an extradition agreement and thus subject to the exception rule of extradition, the same act cannot be labelled a terrorist crime sufficient to trigger the exclusion provision. Furthermore, the language of extradition law can ensure that national jurisdictions with broad criminalisation of terrorism do not succeed with their extradition proceedings. In this respect, extradition law functions as a protective regime for those who upon an extradition could have faced human rights violations. This can be shown with two recent Swedish cases – which although not related to the exclusion provision are relevant in the discussion of this subject. The Turkish authority had sent an extradition request to Sweden concerning two Turkish citizens convicted for associating with the Gülen movement – listed as a terrorist organisation under Turkish legislation. The act that the persons were accused of was downloading a specific app facilitated by the Gülen movement. According to Turkish criminal standards, this offence was enough to indicate their engagement with the commission of the organisation.

Despite the recently adopted amendment in the Swedish Terrorist Offence Act criminalising association with a terrorist organisation, the act of downloading an app used by a categorised terrorist organisation in Turkey was not sufficient be considered a terrorist offence. In order to hold a suspect accountable under the Terrorist Offence Act, the individual in question must be actively participating in the activities of the terrorist organisation. Since the requirement under

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391 Hathaway and Foster, 2014, p. 549.
392 One had a finalised conviction, the other was under prosecution.
393 The new implemented provision, paragraph 4 a § reads as follow: ‘Anyone who participates in the activities of a terrorist organisation in a way that is intended to promote, strengthen or support the organisation is convicted of participation in a terrorist organisation’. In the Swedish Terrorist Offence Act SFS: 2022:666 (adopted 2 June 2022).
Swedish criminal law was not fulfilled, there were no justified grounds to convict this behaviour as a terrorist crime. The Swedish Supreme Court therefore declined the extradition appeal. Interestingly, the Court emphasised the circumstance that both individuals had refugee status in Sweden and would thus face persecution upon a removal to their home country.\textsuperscript{394} Analysing this further, this type of case illustrates the limitations on criminalising every act as a terrorist offence. Thus, there is a threshold on what sorts of act that:

a) can be viewed as political or non-political crime,
b) can be justified under the scope of extradition law.

Further, the analysis points out the necessity of taking legal status into account. The aforementioned cases clearly illustrate the saying that ‘one’s man’s terrorist is another man’s freedom fighter.’ While the individual is recognised as a refugee in one country – he/she is a terrorist in another.

In conclusion, instead of presenting each of the extradition provisions to consider in a systemic interpretation, I argue that an overall systemic reading and evolutionary approach can support that the extradition regime can be taken into account when interpreting if there are ‘serious reasons for considering’ that an applicant has committed terrorist crimes.

With the analysis of exclusion due to the core international crimes and ‘serious non-political crimes’ completed, it is time to examine the third and final exclusion clause, exclusion based on ‘acts contrary to the purposes and principles of the United Nations’.

2.4.4.3 Drafting of Article 1F(c) and the Meaning of ‘Acts Contrary to the Purposes and Principles of the United Nations’

During the drafting process, the inclusion of the phrase ‘or any other act contrary to the purposes and principles of the Charter of the United Nations’ caused many debates regarding its meaning.\textsuperscript{395} Some national delegates even suggested it should be removed, or at least that caution should be used, due to its lack of

\textsuperscript{394} Swedish Supreme Court, cases B 7581-22 and B 7582-22, 13 July 2023.

clarity, coherency and foreseeability. Some delegates feared that the vague wordings of Article 1F(c) could have serious consequences and pave the way for states to abuse the exclusion clauses as they desire.\(^\text{396}\) Others found it difficult to determine the potential perpetrator of such a crime as membership in the United Nations was tied to sovereign states.\(^\text{397}\) Offering some clarity on the issue, the French representative, who was the one who initially suggested inclusion of this clause, underlined that ‘[t]he provision was not aimed at the man-in-the-street, but at persons occupying government posts, such as head of States, ministers and high officials’.\(^\text{398}\) According to the French delegate, those actors who might in some context have caused the desire and ‘helped to create the fear from which the refugee had fled’\(^\text{399}\) could not be worthy of refugee protection. Other representatives argued for a broader position and stated that ‘[a]n individual who, without having committed a crime against humanity, had violated human rights, for instance, by the exercise of discrimination, could be considered to have committed “acts contrary the purposes and principles of the United Nations”’.\(^\text{400}\)

The representative of the UN Secretary shed light on the matter of individual liability in regard to the aforementioned issue by emphasising that: ‘According to the terms of the Charter and judgment of the Nuremberg Tribunal, an individual could nowadays be held liable under international law, and could be called upon to answer for crimes constituting a violation of such international law’.\(^\text{401}\) This clarification confirmed the possibility to hold individuals accountable for crimes contrary to the purposes and principles of the United Nations. This created some certainty regarding the types of actors that could be excluded under the scope of Article 1F(c).\(^\text{402}\)


\(^{397}\) ECOSOC Social Committee, UN Doc. E/AC.7/SR.160, 1950, p. 15. The issue concerning the actor to be held accountable for acts that are contrary to the purposes and principles of the UN was addressed by the Chilean representative.


\(^{399}\) Ibid.

\(^{400}\) Ibid., p. 9.

\(^{401}\) Ibid., p. 8.

\(^{402}\) Hathaway and Foster, 2014, pp. 586–598.
The purpose of including ‘acts contrary to the purposes and principles of the United Nations’ is not to have a ‘catch-all clause’ covering all the remaining criminal offences that may not qualify for exclusion under Article 1F(a) or (b).\textsuperscript{403} Despite some jurisdictions’ attempts to impose a broader scope of ‘acts contrary to the purposes and principles of the United Nations’,\textsuperscript{404} the overall position supported within the international community is to have a restrictive interpretation method and limited scope for exclusion under Article 1F(c).\textsuperscript{405} Furthermore, not every conduct that might breach the principles of the United Nations falls under Article 1F(c).\textsuperscript{406} As in the case of the other exclusion categories, the contextual reading of Article 1F(c) reveals that a particular gravity of the crime is required to trigger the exclusion clause.\textsuperscript{407} Hence, the criminal act must violate the principles in a fundamental manner, \textit{i.e.}, impact the ‘very basis of the international community’s coexistence’.

The purpose of this thesis is not to solve the issue of Article 1F(c)’ vagueness, but rather to shed light on its descriptive content and aid understanding of what ‘acts contrary to the purposes and principles of the United Nations’ entails. Given the unclear elements of Article 1F(c), that exclusion clause should not prevail over the potential applicability of the other exclusion clauses in circumstances when a criminal offence could be considered an international crime or a ‘serious non-political crime’. This is the case as criminalisation of international crimes or


\textsuperscript{406} Sivakumaran, 2014, pp. 351 and 371.

\textsuperscript{407} Sivakumaran, 2014, pp. 378–379; UNHCR, Guidelines on International Protection No. 5, para. 17: ‘a correct application of Art. 1 F (c) involves an assessment as to the extent to which the act impinges on the international plane – in terms of its gravity, international impact, and implications for international peace and security’.

\textsuperscript{408} Li, 2017, p. 335; See further, Sivakumaran, 2014, pp. 377–379, in particular p. 379 where Sivakumaran lists several factors to consider when assessing if the act can reach the gravity of Article 1F(c) – ‘the nature, role and leadership position of the actor that committed the act; the number and identity of victims; the nature of the acts, together with their scale and systematicity; the involvement of the actor in those acts; the context in which the acts were committed; and the broader impact on the community assessed both geographically and temporally. Essentially, the situation must be considered as a whole’; UNHCR, Background Note on the Application of Article 1F, para. 47; Pushpanathan v. Canada (Minister of Citizenship and Immigration), para. 74 – ‘Until the international community makes clear its view that drug trafficking, in one form or another, is a serious violation of fundamental human rights amounting to persecution, then there can be no rationale for counting it among grounds of exclusion. The connection between persecution and the international refugee problem is what justifies the definitional exclusions in Article 1F(a) and F(c)’. 

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'serious non-political crimes’ is based on a codified framework of international and domestic criminal standards, as opposed to the vague and unclear language of the crimes within Article 1F(c). Therefore, ‘acts contrary to the purposes and principles of the United Nations’ should be viewed as the exclusion clause of last resort.409

Interestingly, the exclusion provision occurs not only in an international treaty. Similar provisions can be found in regional instruments. In the next section, a brief comparison of the language of Article 1F in the Refugee Convention and that of the provisions in the Organisation of African Union (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa and the European Qualification Directive is made.

2.5 The Exclusion Provision in Regional Instruments: A Comparison with Article 1F of the Refugee Convention

The objective and framework of the exclusion provision has also been adopted in several regional instruments. In this section, the analysis focuses on the reference to exclusion from refugee protection in the regional systems of the OAU and the EU. Although the present study focuses on the exclusion clauses, it is worth mentioning that these instruments cover other forms of humanitarian protection. The refugee status determination mirrors the wording of Article 1A(2), but the term ‘refugee’ can also be given to someone who has fled his/her home country because of external aggression, occupation, foreign domination or events seriously disturbing public order in either part of or the whole country of origin.410 If the refugee status cannot be applied, the person can be granted subsidiary protection status if he/she upon a return would be subject to serious harm – as in facing the death penalty, torture or inhuman treatment or punishment, or serious or individual threat to their life due to an armed conflict.411 Thus, while the OAU and the EU regional systems rest upon the Refugee Convention in terms of the wording of who is a refugee, the systems expand the scope of humanitarian protection to circumstances that extend beyond the framework of Article 1A(2) of the Refugee Convention. In relation to the exclusion clauses,

409 Zimmermann and Wennholz, ‘Article 1F’, para. 97: ‘[…] it would seem systemically incoherent, as well as against the protective purpose of the 1951 Convention, to resort to the general clause contained in Art. 1 F(c) in order to address such acts. The clause should therefore be considered barred from application whenever individual acts can already be subsumed under criminal law provisions of the receiving State’, in: Zimmermann, Machts, and Dörschner, The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary, 2011.


411 DIRECTIVE 2011/95/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 December 2011 on ‘standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted’, L337/9 (EU Qualification Directive), Article 15.
instead of merely identifying the comparable wordings of Article 1F and the exclusion provisions in the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (the OAU Refugee Convention) and the EU Qualification Directive, respectively, this analysis dives into the differences and the consequences of the discrepancies between the international and the regional exclusion norms.\(^{412}\)

\[\text{2.5.1 The Organisation of African Union (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa}\]

Looking first into the OAU regional system, the two norms that are most similar to the wordings of the exclusion provision in the Refugee Convention are Article 1(4) and 1(5) of the OAU Refugee Convention.

Whereas Article 1(4) of the OAU Refugee Convention contains the circumstances of when the OAU Refugee Convention ceases to apply to a refugee, Article 1(5) is recognised as representing the essence of the exclusion provision in the Refugee Convention. However, the interesting aspect relating to Article 1(4) of the OAU Refugee Convention is the duplicated references it makes to Article 1F(b):\(^{413}\)

\[
\text{This Convention shall cease to apply to any refugee if:}
\]
\[
\begin{array}{l}
\text{[\ldots]} \\
\text{(f) he has committed a serious non-political crime outside his country of refuge after his admission to that country as a refugee, or} \\
\text{(g) he has seriously infringed the purposes and objectives of this Convention.}
\end{array}
\]

From an initial glance at paragraph (f) one can see how well it mirrors Article 1F(b) of the Refugee Convention. However, the framework of Article 1(4) of the OAU Refugee Convention is related more to the exceptional rule of the prohibition of \textit{refoulement} in Article 33(2) of the Refugee Convention than to Article 1F. Another relevant factor to consider is the use in Article 1(4)(f) of the word

\[^{412}\text{Gilbert and Bentajou have presented a fruitful analysis about the differences, which I find convincingly presented, see Gilbert, Geoff and Bentajou, Magdalena Anna, 'Exclusion', pp. 722–726, in: McAdam, Foster, and Costello, \textit{The Oxford Handbook of International Law}, 2021.}\]

\[^{413}\text{Article 1(4) of the OAU Refugee Convention reads, in full: 'This Convention shall cease to apply to any refugee if: (a) he has voluntarily re-availed himself of the protection of the country of his nationality, or (b) having lost his nationality, he has voluntarily re-acquired it, or (c) he has acquired a new nationality, and enjoys the protection of the country of his new nationality, or (d) he has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution, or (e) he can no longer, because the circumstances in connection with which he was recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality, or (f) he has committed a serious non-political crime outside his country of refuge after his admission to that country as a refugee, or (g) he has seriously infringed the purposes and objectives of this Convention'}.\]
‘after’. While Article 1F(b) emphasises the limitation by narrowing it down to ‘prior to his admission to that country’, Article 1(4)(f) positions it from ‘after his admission to that country’. This is more in conformity with Article 33(2) of the Refugee Convention.

Paragraph (g) appears to be a broader version of the exclusion category of ‘acts contrary to the principles and purposes of the United Nations’, though with referring to having ‘seriously infringed the principles and purposes’ of the OAU Refugee Convention. An interesting element of this clause is how much it resembles the initial purpose of the entire exclusion provision of the Refugee Convention. Despite its general and, to some extent, vague wording, Article 1(4)(g) is inspired by the position presented by the drafters of Article 1F, stressing the importance of adopting a provision which excludes refugee protection to those who had been involved in serious international and national crimes. Compliance with the standards of the exclusion provision would guarantee that ‘undeserving refugees’ committing serious criminal acts do not exploit the integrity of the refugee system. A similar purpose can be found in Article 1(4)(g), as the clause contains ‘an intrinsic link “between ideas of humanity, equity and the concept of refuge”’.414

Article 1(5) of the OAU Refugee Convention, echoing the framework of exclusion from refugee protection, does not contain any remarkable differences to Article 1F. Duplicating the standard of exclusion based on ‘serious reasons for considering’ the exclusion crimes enshrined in Article 1F, Article 1(5) includes an additional exclusion category of ‘acts contrary to the purposes and principles of the Organization of African Unity’.415 Nonetheless, the additional exclusion crime focusing on ‘acts contrary to the purposes and principles’ of today’s African Union is not supposed to encompass purposes or principles distinct from the purposes and principles of the United Nations.416 Instead, the purposes and principles of the African Union are intended to conform with the purposes and principles of the United Nations. Thus, the supplementary exclusion category in Article 1(5) simply follows the principal framework of Article 1F(c), with

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415 Full text of Article 1(5) of the OAU Refugee Convention: ‘The provisions of this Convention shall not apply to any person with respect to whom the country of asylum has serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the Organization of African Unity; (d) he has been guilty of acts contrary to the purposes and principles of the United Nations’.

the inclusion of the OAU. The exclusion provision of the OAU covers the purposes and principles of both the regional and international community.\footnote{Generally, Article III of the OAU Refugee Convention is also linked to the context of ‘exclusion’ from protection. However, this provision consists of terms relating to when state parties can ‘remove a refugee’s protection under the OAU Refugee Convention’. It mainly contains elements similar to Article 1F(c) and Article 33(2) of the Refugee Convention and thus covers issues of when it is possible to justify an exception against the prohibition of refoulement, see Gilbert, Geoff and Bentajou, Magdalena Anna, ‘Exclusion’, pp. 724–725, in: McAdam, Foster, and Costello, The Oxford Handbook of International Law, 2021 with reference to a landmark case underlining the importance of the human rights approach in issues of deportation of refugees – Organisation mondiale contre la torture, Association Internationale des jurists democrats, Commission international des jurists, Union interafricaine des droits de l’Homme et l’Environnement, African Commission on Human and Peoples’ Rights, Comm Nos 27/8, 46/91, 49/91, 99/93, October 1996.}\footnote{Article 17(1)(b) of the EU Qualification Directive.}

2.5.2 The European Qualification Directive

The EU Qualification Directive includes the elements of the exclusion provision in relation to two forms of protection: refugee protection and subsidiary protection. In Article 12(2) of the EU Qualification Directive, a third-country national or a stateless person is excluded from being a refugee where there are serious reasons for considering that:

a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

b) he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee, which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes;

c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.

Exclusion from subsidiary protection pursuant to Article 17(1) of the EU Qualification Directive encompasses the framework of Article 12(2), though with a few amendments. Instead of excluding based on a ‘serious non-political crime’, exclusion from subsidiary protection can be triggered by any ‘serious crime’.\footnote{Note: Article 17(1)(b) of the EU Qualification Directive.} Moreover, Article 17(1)(d) includes an additional exclusion clause, stating that a third-country national or a stateless person is excluded from being eligible for subsidiary protection where there are serious reasons for considering that:

d) he or she constitutes a danger to the community or to the security of the Member State in which he or she is present.
Most aligned with the terms of Article 1F is Article 12(2) of the EU Qualification Directive. It describes the conditions concerning exclusion from refugee protection and generally repeats the elements of the exclusion provision in the Refugee Convention. However, there are some modifications worth mentioning. In relation to ‘serious non-political crime’, the exclusion category is broader in the EU Qualification Directive and refers to ‘the timeframe to permit exclusion until status has been determined’. Unlike the temporal limitation in Article 1F(b), this encompasses ‘only up to the point of entry to the territory of the country of asylum’. In addition, the category of ‘serious non-political crime’ in the EU Qualification Directive contains a more elaborated definition of what sorts of acts that can amount to such crimes. This means that ‘particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes’. This phrase places greater emphasis on the political objective and declares the criminal act to be eligible for exclusion from refugee protection regardless of if it had a specific political motive.

Lastly, despite many remarks having been made confirming the importance of separating Article 1F from Article 33(2), the exclusion from refugee protection and subsidiary protection in the EU Qualification Directive seems to include both conditions. To some extent, the language of exclusion in the Qualification Directive encompasses the goal of implementing Article 1F, yet also stands in alliance with the framework of Articles 32 and 33(2). Thus, in the context of exclusion from both refugee protection, subsidiary protection, and even issues concerning ‘revocation of, ending of or refusal to renew refugee status’ – the reference to ‘danger to the security of the Member State’ highlights how much the fundamental principles and objectives of Article 32 and 33(2) of the Refugee Convention have influenced the matters of exclusion from protection in the Common European Asylum System.

2.6 Concluding Remarks
The historical background clearly indicates that the aftermath of World War II shaped the intention of not establishing a humanitarian protection regime which would benefit perpetrators of heinous crimes. In this respect, to benefit from refugee status, a person had to be deserving. A deserving refugee would, in the

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420 Ibid.
421 See Article 17(1)(d) of the EU Qualification Directive – ‘he or she constitutes a danger to the community or the security of the Member State in which he or she is present’; Article 14(4)(a) of the EU Qualification Directive: ‘there are reasonable grounds for regarding him or her as a danger to the security of the Member State in which he or she is present’; For a critical analysis of Article 14 of the EU Qualification Directive and the refugee status in the Refugee Convention, see Gilbert, Geoff and Bentajou, Magdalena Anna, ‘Exclusion’, pp. 725–726 in: McAdam, Foster, and Costello, The Oxford Handbook of International Law, 2021.
views of the drafters, be someone who had not been involved in grave and serious crimes. This formed the fundamental objective of the exclusion provision: to prevent the ‘undeserving refugee’ from taking advantage of the refugee legal system. These two objectives are essential to bear in mind as a reminder of why the exclusion provision was included in the Refugee Convention. Though the refugee framework deals with matters of humanitarian protection – the exclusion provision is important, as it protects the integrity of the entire refugee legal system. With its unique position, the exclusion provision cannot be utilised by either a host states or an asylum seeker. What can be concluded regarding the object and purpose of, on the one hand, the Refugee Convention, and, on the other hand, the exclusion provision, is that these are not mutually exclusive. This is important to highlight, to reaffirm that both objectives, while perceived as opposite, serve the refugee regime and its instruments. Similarly, the Convention and Article 1F address the core purpose of identifying the refugee who is deserving of international humanitarian protection and thus, of receiving the protection and rights under the framework of the entire refugee regime. The objectives of the Convention and those of the exclusion provision have the same focus. However, the normative steps to realise this aim are pursued from different angles and perspectives.

Moreover, the objectives of the exclusion provision reveal that reasons such as ‘identifying the threat’ or the interest to protect national security were not originally among the purposes of Article 1F. As highlighted and argued in this chapter – issues of national security falls outside the ambit of the exclusion provision, even if exclusion due to ‘serious non-political crimes’ includes a reference to protecting the safety of the asylum country. The only provision that deals with matters concerning the safety of the asylum country is Article 33(2). Ultimately, the exclusion provision is not intended to have multiple objectives. Each exclusion category forms an integral part of the article and thus embodies the overall objectives of the provision.

While the exclusion clauses limit the applicability of the *ratione personae* and *ratione materiae* of the Refugee Convention, this does not mean that the objectives of the exclusion clauses are not protection the humanitarian purposes of the international refugee legal system as a whole. The exclusion provision is an integral part of the Refugee Convention and thus falls within the humanitarian context of the legal system. This is why the exclusion provision must have a protection-oriented approach and be interpreted restrictively. This relates most critically

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423 UNHCR, Handbook, para. 149; UNHCR, Background Note on the Application of Article 1F, para. 4; UNHCR, Guidelines on International Protection No. 5, para 2; Gilbert, Geoff, ‘Current issues in the application
to the rationale of Article 1F and why its purposes ‘must be viewed in the context of the overriding humanitarian objective of the 1951 Convention’. Ultimately, the humanitarian purpose is strongly present, protected and central for the refugee legal system and the interpretation of its norms — including exclusion from refugee protection. The same applies to the separate exclusion categories. Although encompassing different criminal acts, each of the exclusion clauses upholds the thresholds of ‘seriousness’ and the requirement of a ‘heinous crime’. Exclusion from universal humanitarian protection cannot be justified for minor crimes. The wording of the Lisbon Expert Roundtable meeting underlines the value of including an evolutionary approach when interpreting Article 1F. This highlights the living instrument element of the Refugee Convention. Furthermore, it underlines the close relation that the exclusion provision has with other international bodies of law. As analysed in this chapter, the evolutionary interpretative approach has revealed the presence of international human right law, criminal law and extradition law in the exclusion clauses. They have also enabled the exclusion provision to bridge the tension between its two identified objectives: excluding protection to the undeserving refugee and preventing impunity for fugitive refugees.

424 UNHCR, Background Note on the Application of Article 1F, para. 3.
3. Linking Terrorism to International Refugee Law

This chapter highlights the matter of terrorism as an excludable crime. It includes an analysis of how terrorism became associated with refugee law and how to better understand the link between terrorism and the exclusion provision. Furthermore, a central purpose of this chapter is to emphasise the sub-research question examining the impact of membership in a terrorist organisation in relation to the exclusion provision. Like the previous chapter, this chapter contains a substantive framework providing a scholarly and normative analysis of how to understand the relationship between terrorism (particularly in relation to the ‘mere membership doctrine’) and the exclusion clauses. The presented remarks should be seen as observations to keep in mind during further reading and in the investigation of the research questions.

3.1 Introduction

It is clear that the international community shares a mutual interest in excluding terrorists from the benefits provided within the international refugee system.425 Despite the urgent calls upon the Member States to exclude refugees from international refugee protection, the UN Security Council has not provided a final definition of terrorism that has gained universal approval within the international community, beyond the general definition of terrorism mentioned in the Terrorism Financing Convention aimed to suppress certain terrorist offences.426 Instead, the Counter-Terrorism Committee of the Security Council has stated that each state must approach this issue on its own, due to the lack of a universally


agreed definition of terrorism. This means states will criminalising terrorist offences based on their own domestic legislation. It remains unclear why a reference to asylum seekers and refugees was included in the resolutions, as none of the terrorist events leading up to the adoption of the resolutions was caused by asylum seekers or refugees.

Though terrorism is recognised as a threat to international peace and security, some boundaries have been instated to avoid paving the way for ‘illegitimate’ efforts in the fight against terrorism. As stated in Article 1(3) of the UN Charter, the respect for human rights must be provided and maintained. Thus, in the spirit of the purposes and principles of the United Nations and the human rights instruments – the measures implemented to ‘defeat’ international terrorism cannot be used ‘at all costs’. Further, the link established between Article 1F and terrorism is not an invitation to apply the exclusion provision as an anti-terrorist norm. The exclusion provision must still be applied restrictively and not be abused in a way that risks excluding genuine asylum seekers from refugee protection. Having this in mind, associating the concept of terrorism and asylum with each other can result in many challenging issues and normative matters. The next section brings light on the relationship between these concepts and the resulting outcomes.

3.2 The Concepts of Terrorism and Asylum

Given that ‘terrorism’ and ‘asylum’ have two separate meanings, one might question why the media or the public in general portray these two concepts as closely linked. What are the common grounds – if any – relating these two concepts to each other, despite their distinct meanings? Is this recent development perhaps a consequence of the issues listed in the United Nations Global Issues Overview?

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428 The terrorist events referred to are mainly 9/11 attacks and the 7/7 bombings in London; See Singer, Sarah, Terrorism and Exclusion from Refugee Status in the UK: Asylum Seekers Suspected of Serious Criminality, Brill-Nijhoff, Queen Mary Studies in International Law (volume 18), 2015, p. 15.


where ‘peace and security’ and ‘refugees’ were considered some of the most crucial global issues of the world.431 The interaction between the two concepts has also raised concerns regarding whether migration flows include both those in need of international protection and those with an intention to cause a climate of terror and damage a host society.432 This was discussed by the US State Department, Bureau of Counterterrorism and Countering Violent Extremism, in the Country Reports on Terrorism (2016), stating the following: ‘ISIS sought to exploit refugee and migrant flows to disguise the travel of its operatives, causing alarm but resulting in increased vigilance in many of the destination countries’.433 Thus, according to the official position taking by the US agencies, there is evidence of how terrorists exploit the vulnerability of their victims, seeking international protection, as a way to spread terrorist activities abroad.434 More recent global reports – such as the 2023 Global Terrorism Index – continue to highlight how terrorism has an impact in the world, putting people into vulnerable position and causing them to seek international protection. The 2023 Terrorism Global

434 US State Department, Bureau of Counterterrorism and Countering Violent Extremism, Country Reports on Terrorism 2016, Chapter 1, Strategic Assessment, July 2017, pp. 9–13; Simeon, 2020, p. 376–377; Mathew, Penelope, ‘Resolution 1373 – A call to Pre-empt Asylum Seekers?’ (or ‘Osama, the Asylum Seeker’), pp. 19–20 and 32: ‘The terrorist is perceived to pose fundamental challenges to the State-bound system of international law, while the refugee is an inconvenient problem because he or she also falls outside the State system’, in: McAdam, Forced Migration, Human Rights, and Security, 2008.
Index emphasises that terrorist groups are taking advantage of the world’s ongoing crises, whether related to climate issues or current conflicts. Thus, current terrorism consists not only of violent attacks against government authorities or specific groups targeted to be persecuted. It also involves taking control over facilities and sabotaging infrastructures and installations to prevent people from having access to water, electricity or other essential resources. These new tactics used by terrorists’ shed light on how terrorist violence fuels the need for people to seek protection elsewhere. This maintains the link between the concepts of refugee and terrorism.

Article 1F of the 1951 Refugee Convention functions as a barrier between terrorists and access to international refugee protection. Thus, through the exclusion provision aimed at protecting the integrity of the refugee system, terrorists who exploit their victims’ position and contribute to the production of refugees are not be able to gain any benefit from a system providing protection to their victims.

3.2.1 A Paradigm Shift: the ‘Security Model’

The events of 9/11 shifted the international refugee regime into what Bill Frelick calls the ‘security model’ paradigm. It was during the ‘security model’ period that terrorism and its criminalisation were seen as important priorities within the international community. The response from the international community was not only to oblige states to criminalise acts of terrorism, but also to prevent any

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435 Institute for Economics & Peace, *Global Terrorism Index 2023: Measuring the Impact of Terrorism*, Sydney, March 2023, pp. 75–76, available at: [http://visionofhumanity.org/resources](http://visionofhumanity.org/resources) [last accessed 25 October 2023]. The report covers many relevant matters related to terrorism, such as an analysis of recent terrorist incidents, current terrorist groups, trends in terrorism, and the ten countries most impacted by terrorism. From the 2023 report, those countries are: Afghanistan, Burkina Faso, Somalia, Mali, Syria, Pakistan, Iraq, Nigeria, Myanmar, Niger (see pp. 20–30); See also *Global Terrorism Database – Codebook: Methodology, Inclusion criteria, and Variables*, University of Maryland, August 2021, consisting of an event-level database containing more than 200,000 records of terrorist attacks that have taken place all around the world. A link to the database can be found here: [https://www.start.umd.edu/gtd/](https://www.start.umd.edu/gtd/) [last accessed 25 October 2023].


437 Furthermore, asylum systems are usually described as ‘among the most closely scrutinized and assessed making it extremely difficult for criminals to penetrate’, see Simeon, 2020, p. 385.

terrorists from taking advantages of the international refugee system.\footnote{There is perhaps no surprise that refugees during the early twenty-first century ‘often came to be regarded with deep suspicion, sometimes seen as being terrorists themselves or as being the sea in which the terrorist fish could hide and swim’, see Frelick, Bill, ‘Paradigm Shifts in the International Responses to Refugees’, p. 34, in: White and Marsella, \textit{Fear of persecution – Global Human Rights, International Law, and Human Well-Being}, 2007.} In the ‘security model’ stage, the interest of protecting the integrity of international refugee law were greater than ever before.\footnote{See UNSC Resolution 2322, 12 December 2016, UN Doc. S/RES/2322, para 9(d) – ‘Enhance cooperation to deny safe haven to those who finance, plan, support, commit terrorist acts, or provide safe havens’.} Thus, the global threat of terrorism did to some extent altered how the international community perceived refugees.\footnote{See Feller, Erika, ‘The Responsibility to Protect: Closing the Gaps in the International Protection Regime’, p. 289: ‘Today, asylum seekers are repeatedly mischaracterised as criminals, “possible terrorists” or illegal migrants whose presence is to be managed as a matter of border and crime control, and whose protection needs are a secondary issue’, in: McAdam, Jane, \textit{Forced Migration, Human Rights, and Security}, 2008.} Returning to the classic saying, ‘one man’s terrorist is another man’s freedom fighter’, illustrates how the view changed from initially describing refugees ‘in near heroic terms as freedom-lovers escaping tyranny\footnote{Frelick, Bill, ‘Paradigm Shifts in the International Responses to Refugees’, p. 34 or: ‘the “tail wagging the dog” that inspired military interventions in such diverse places as Haiti and Kosovo’, in: White and Marsella, \textit{Fear of persecution – Global Human Rights, International Law, and Human Well-Being}, 2007.} to later perceiving them as suspicious foreigners who threaten international peace and security.

The ‘security model’ has not raised concerns of a possible overwhelming wave of refugee influx. Rather, it is based on the fear of not detecting terrorists, criminals or other actors who have conducted violence against displaced people. From this aspect, a concern that terrorists or other criminals would take advantage of the asylum system by evading migration controls and pleading false claims of asylum and fear of persecution started to arise.\footnote{The ‘security model’ invited other restrictive measures, such as closing borders, forming counter-terrorism strategies,\footnote{Forced Migration, Human Rights, and Security, 2008.} and denying asylum and refugee protection. Overall, what the ‘security model’ clearly highlights is that the interest of keeping terrorists outside national borders prevailed over the interest of providing refugee protection.\footnote{Ibid.} \footnote{To clarify, the paradigms are not supposed to be viewed as the formal position taken by the international community, ‘but rather represent general trends, for which there will certainly be exceptions’, see Frelick, Bill, \textit{Paradigm Shifts in the International Responses to Refugees}, p. 34, in: White and Marsella, \textit{Fear of persecution – Global Human Rights, International Law, and Human Well-Being}, 2007.}}
3.2.2. Conflict of Interests: Humanitarian Objectives versus National Security

The conflict of interests between states’ security issues and humanitarian concerns for people in need of protection has also sustained the image of an unfamiliar person from a foreign country who might possibly hide behind the veil of ‘fear of persecution’ for the purpose of seeking a safe haven abroad. This comprehensive perception became even more common due to the 9/11 crisis and following occasions, which ‘also transformed the way migrants are processed or even treated’.447 As described by James D. White:

> In many cultures the person from outside the society is seen metaphorically and sometimes literally as the stranger, and therefore to be regarded as different, not to be trusted and not to be made welcome. The image of the outsider can easily transmute into a picture of something threatening. The refugee, the person without a place, is especially alarming.448

My own analysis is that if this is the reality, the illustration above obviously contradicts how the term ‘fear of persecution’ should be viewed. If the refugee is the threat or the ‘enemy’ – to borrow the wording of Carl Schmitt in his ‘friend and enemy’ distinction449 – the consequences would certainly develop into a concern of legal uncertainty and a range of ambiguous interpretations of the refugee definition. Subsequently, due to the lack of a uniform definition of persecution, many states might be more preoccupied with their own security interest than the asylum seeker’s circumstances. This would create an arbitrary sphere of who was considered to be an ‘deserving’ or ‘undeserving’ refugee. The result would be an increased risk of placing the central principle of international refugee law – the non-refoulement principle – under threat of violation. This would also risk creating an environment where refugees or migrants belonging to a particular race or religion would constantly face prejudices and be viewed in the eyes of the public as terrorists or a ‘threat’, which could easily refuel result in a society of ‘us’ and ‘them’. This was why the UNHCR immediately after 9/11 stressed that:

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449 The well-known formulation of the ‘friend and enemy’ distinction is presented in The Concept of the Political – ‘The specific political distinction to which political actions and motives can be reduced is that between friend and enemy [...] The distinction of friend and enemy denotes the utmost degree of intensity of a union or separation, of an association or dissociation.’, Schmitt, Carl, The Concept of the Political, Expanded Edition, Translated and with an Introduction by Schwab, George, University of Chicago Press, 2007, p. 26; The first version of Schmitt, Carl, The Concept of the Political, was published on January 1, 1927.
It is therefore crucial that the humanitarian objectives of international refugee law and the fundamental values of human rights law are sustained, preserved, protected and respected – also in exclusion from refugee protection based on terrorist crimes. As stressed by the ECtHR:

States are not allowed to combat international terrorism at all costs. They must not resort to methods which undermine the very values they seek to protect. And this applies the more to those ‘absolute’ rights from which no derogation may be made even in times of emergency […] Upholding human rights in the fight against terrorism is first and foremost a matter of upholding our values, even with regard to those who may seek to destroy them.  

In conclusion, the interest in not providing safe havens to terrorists is understandable. However, it is crucial not to neglect the central objectives of the refugee legal system, in light of the human rights principles excluding any room to derogate from norms of an absolute nature. Given this, it is important to devote space to introducing how terrorism became integrated into the language of international refugee law from the beginning. The next section is focused on precisely this. It provides a framework of different terrorism- and exclusion-specific matters. It also examines the question of definitions – how terrorism was associated with the modern exclusion provision in the first place and how terrorism was integrated into the exclusion categories. Further, it elucidates how one can understand the issue of association with a terrorist organisation as a reason for exclusion from refugee protection.

### 3.3 Integrating Terrorism into the Exclusion Clauses

#### 3.3.1 General Observations

The concept of terrorism is not mentioned in Article 1F, nor was terrorism the key issue raised during the process of drafting the exclusion provision. Recognising terrorism as an integral part of the exclusion clauses became relevant in the

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aftermath of the 9/11 attacks. Immediately after the terrorist attacks, the United Nations Security Council called on the member states to ensure ‘that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts’. This position officially associated terrorist crimes with Article 1F and indicated that a terrorist act could be an international crime, a ‘serious non-political crime’, or a crime that constitutes ‘acts contrary to the purposes and principles of the United Nations’. The scope of the provision also include those who participated in the activities of a terrorist organisation that could be considered responsible for the commission of such acts.

Thus, despite the lack of a universal definition of terrorism, the international community acknowledged acts of terrorism as an integral part of the exclusion clauses. Nevertheless, Article 1F of the Refugee Convention was not aimed to be used by a state for the security of the asylum country, i.e., seeing the asylum seeker as a threat. The purpose of the exclusion clauses was to protect the integrity of the entire international refugee system and identify ‘the undeserving refugee’. A similar position has been underpinned by the CJEU, stating that Article 1F is not intended to be invoked due to ‘any danger which a refugee currently poses to the Member State’. Still, applying Article 1F to asylum seekers due to

452 UNSC Res. 1373 (2001), para 3(g).
453 International crimes under Article 1F(a) of the 1951 Convention Relating to the Status of Refugees, entered into force 22 April 1954, 189 UNTS 137.
454 Article 1F(b) of the 1951 Refugee Convention.
455 Article 1F(c) of the 1951 Refugee Convention.
456 Singer, 2015, p. 3.
458 CJEU: Joined Cases C-57/09 and C-101/09 Bundesrepublik Deutschland v B and D, Judgment, 9 November 2010, para 101.
alleged terrorist offences inevitably adds an interest for states – namely, to protect their own national security and borders. The interest in excluding terrorists from refugee protection has also resulted in the exclusion provision being applicable extensively and in contradiction of its initial purposes.459 Though the Refugee Convention is a living instrument, this does not entail a recognition of a widespread interpretation and application of the exclusion provision with respect to exclusion of terrorists. Nor does the recognition of terrorism as an exclusion crime allow national decision-makers to invoke the objective to protect national security as way to justify exclusion.460

3.3.2 Definitions of the Concept of Terrorism

The absence of a definition of terrorism in the past might not have had the same impact as in today’s modern society. Without doubt, terrorism has legal consequences and high impact on states, the civilian population, organisations, institutions and communities (international, regional and national). International rights and duties are related to the term ‘terrorism’ more than ever before. Terrorism undermines fundamental human rights, endangers state governance and political relations, and causes serious threats to international peace and security and democratic principles. Dealing with the legal consequences of terrorism, the United Nations through its Security Council and General Assembly, has obliged states to implement measures against terrorist acts and terrorists.461 The well-known


461 For further citing to relevant UNSC and UNGA resolutions, see above section ‘3.3.1 General Observations’; Saul, Ben, Defining Terrorism in International Law, Oxford University Press, 2008, p. 5. In the aftermath of 9/11, an elaborated definition of terrorism was negotiated during the drafting of the UN Draft Comprehensive Terrorism Convention, see UNGA, Measures to Eliminate International Terrorism: Working Group Report (57th Session) (6th Committee), 16 October 2002, UN Doc. A/C.6/57/L.9, annex II, 7–8; According to Article 2(1), the crime of terrorism was stipulated as a criminal act if a person through unlawful and intentional means causes ‘[d]eath or serious bodily injury to any persons’; ‘[s]erious damages to public or private property’; or ‘[d]amage to property, facilities, or systems […] resulting or likely to result in major economic loss’, see UNGA, Measures to Eliminate International Terrorism: Working Group Report (56th Session) (6th Committee), 29 October 2001, UN Doc. A/C.6/56/L.9, annex I, p. 16; See, further, UNGA Official Reports, 30 November 2020, UN Doc. A/C.6/75/SR.17, pp. 3–4, and UNGA Official Reports, 21 February 2022, UN Doc. A/C.6/76/SR.27, pp. 8–10, emphasising the need to establish a clear definition of terrorism which contains the new and emerging threats, given the developing nature of the concept of terrorism. Also, the official reports underscore that even if the international community has agreed upon the need to establish a working group focusing on finalising the process on the Draft Comprehensive Convention on International Terrorism, there is also a view that the Draft Comprehensive Convention on International Terrorism should not contribute to the fragmentation of international law. Thus, it is essential that the Draft Comprehensive Convention on International Terrorism is consistent with other bodies of law; See also UNGA Official Records, 6 December 2018, UN Doc. A/C.6/73/SR.33 addressing an interesting discussion about whether the term ‘armed forces’ should be in-
UNSC Resolution 1373 contained obligations to ensure that terrorism-related acts and terrorist financing are considered serious crimes. The Council mandated states to harmonise their domestic laws with the established international framework on the issue of terrorism. Even though obligations and a certain number of mandates were enforced upon states, no final definition of the term was included. Instead, the requirement to criminalise terrorism was generally phrased. The measures necessary to implement were not intended to be limited to violent acts or a certain group, but rather to terrorist acts and terrorists. Further, including general terms of terrorism in binding resolutions or other international instruments could lead to even more of an ambiguous and decentralized national implementation – an outcome that have been raised as a concern.462

With lessons learned from Resolution 1373, the Security Council included a working definition (yet non-binding) of terrorism in Resolution 1566 (2004):

> [...] criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state or terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and calls upon all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature [...].463

462 See, for instance, Saul, 2008, pp, 129–271; See UNGA, Human Rights Council, ‘Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism’, 2 June 2008, A/HRC/8/13, paras 18–23: ‘[…] many States have adopted national legislations with vague, unclear or overbroad definitions of terrorism. These ambiguous definitions have led to inappropriate restrictions on the legitimate exercise of fundamental liberties, such as association, expression and peaceful political and social opposition’ (at para 20).

463 UNSC Res. 1566 (2004), para 3; See also Saul, ‘Terrorism as a legal concept’, p. 33; UN Special Rapporteur (Martin Scheinin), Report on the Promotion and Protection of Human rights and Fundamental Freedoms while Countering
There have been further attempts on the international arena to find a universal definition of terrorism. Currently, the closest we have come to an agreed definition of terrorism is found in the UN Draft Comprehensive Terrorism Convention,\textsuperscript{464} covering the actus reus and mens rea elements of terrorism. As regards the elements of actus reus, terrorism consists of ‘unlawful causing of (1) death or serious bodily injury to any person; (2) serious damage to public or private property; or (3) damage to public or private property, resulting or likely to result in major economic loss’. In regard to the mens rea criteria, the commission of the terrorist crime must be conducted ‘(1) intentionally, and additionally the perpetrator needs to have (2) a special intent directed at (a) intimidating a population or (b) compelling a government or an international organization to do or to abstain from doing any act’.\textsuperscript{465} The Draft Comprehensive Convention also stipulates rules on individual responsibility and complicity. Not only are both useful to consider, but they are also interesting to place in relation to the ICC liability forms.\textsuperscript{466}

\textsuperscript{464} See draft version of the terrorism definition pursuant in Article 2 of the UN Draft Comprehensive Convention presented in UNGA, Measures to Eliminate International Terrorism: Working Group Report (65\textsuperscript{th} Session) (6\textsuperscript{th} Committee), 3 November 2010, UN Doc A/C.6/65/L.10, p. 6 and UNGA, Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, 2013, UN Doc A/68/37, at pp. 6–7, with the latest version of the definition of terrorism containing both the actus reus and mens rea elements.; However, shedding light again on Article 2(1)(b) of the Terrorism Financing Convention as the only one of the multilateral treaties aimed to suppress certain terrorist offences that includes a general definition of terrorism. Despite the lack of a definition of terrorism in the other multilateral treaties, as observed by Kai Ambos: ‘[A]ll conventions do have comparable structure with a common element, namely that the victims of the respective offences are to be hit randomly and arbitrarily – they just “find themselves at the wrong place and at the wrong time”. Thus, ultimately, the victims are depersonalized (individual component)’, see Ambos, Kai (2\textsuperscript{nd} ed.), Treatise on International Criminal Law – Volume II: The Crimes and Sentencing, Oxford University Press, 2022, p. 264.

\textsuperscript{465} I have used Ambos structuring of Article 2 of the UN Draft Comprehensive Convention as an inspiration when clarifying the actus reus and mens rea elements of the terrorism definition, see Ambos, 2022, pp. 264–265.

\textsuperscript{466} Ambos, 2022, pp. 264–265; See also, in particular, the draft version of Article 2(4)(a) of the UN Draft Comprehensive Convention: ‘Participates as an accomplice in an offence as set forth in paragraph 1, 2 or 3 of the present article’. Article 2(4)(b) of the UN Draft Comprehensive Convention: ‘Organizes or directs others to commit an offence as set forth in paragraph 1, 2 or 3 of the present article’, mentioned in UNGA, Working Group Report (65\textsuperscript{th} Session) (6\textsuperscript{th} Committee), 2010, UN Doc A/C.6/65/L.10, p. 6; UNGA, Report of the Ad Hoc Committee, 2013, UN Doc A/68/37, at pp. 6–7. To clarify, the UN Draft Comprehensive Convention has yet not accepted that terrorism shall be prosecuted universally. The Convention strengthens the territorial sovereignty and requires a territorial link, at least to some extent. Further, the aut dedere aut indicare principle is included. However, extraterritorial jurisdiction is not approved, see Ambos, 2022, p. 269; For more on individual criminal responsibility in the exclusion context, see Chapter 6.
However, as the international community has not yet been able to provide a universal definition of ‘terrorism’, other actors, such as scholars, regional and international institutions, have been tempted to make the effort. For example,

467 The international community has also not succeeded in establishing a customary international law definition of terrorism, see, for instance, Saul, 2008, pp. 191–270: ‘National definitions of terrorism, while gradually drifting towards generic definition, are still too divergent to support the existence of a customary international law definition or crime of terrorism.’ (at p. 270); Saul, Ben, ‘Terrorism as a legal concept’, pp. 19–20, 36–37, in: Walker, Clive, and Lennon, Genevieve (eds.), Routledge Handbook of Law and Terrorism, Routledge, 2015; Timmermann, Anina, Ambos, Kai, ‘Terrorism and customary international law’, pp. 16–30: ‘While the elements of terrorism have a solid basis in customary international law, their lack of precision is proof of the lack of consensus of the international community as to the details of the definition of an international crime of terrorism.’ (emphasis added) (at p. 30), in: Saul, Research Handbook on International Law and Terrorism, 2020; However, the Appeals Chamber of the UN Special Tribunal for Lebanon argued in the STL decision that ‘a number of treaties, UN resolutions, and the legislative and judicial practice of State evidence the formation of a general opinio juris in the international community, accompanied by a practice consistent with such opinio, to the effect that a customary rule of international law regarding the international crime of terrorism, at least in time of peace, has indeed emerged’, see Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, STL-11-01/1, Special Tribunal for Lebanon, 16 February 2011, para. 85; For a scholarly analysis of the STL-decision, see Ambos, Kai, ‘Judicial Creativity at the Special Tribunal for Lebanon: Is There a Crime of Terrorism under International Law?’, 24 Leiden Journal of International Law 655, 2011, pp. 655–675; Saul, Ben, ‘Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism’, 24 Leiden Journal of International Law 677, 2011, pp. 677–700; Di Filippo, Marcello, ‘The definition(s) of terrorism in international law’, p. 9: ‘In spite of serious issues with the STL’s approach, the decision has re-launched the international debate on the definition of terrorism and underlined recent practice that deserves attention […]’, in: Saul, Research Handbook on International Law and Terrorism, 2020; On a critical note, see Mettraux, Guénaël, ‘The United Nations Special Tribunal for Lebanon: defining international terrorism’, pp. 588–599: ‘While the Special Tribunal makes a strong case for the need to establish such a definition and advances strong arguments in support of its own definition, it seems to have over-reached and gone beyond what international practice and opinio juris appears to have warranted normatively speaking, The Tribunal’s method and selectivity of sources is particularly problematic’, in: Saul, Research Handbook on International Law and Terrorism, 2020.
the European Union-funded Counter-Terrorism Monitoring, Reporting and Support Mechanism defines terrorism as ‘the unlawful use of violence and intimidation, especially against civilians, in the pursuit of political aims’. In contrast, the EU Framework Decision contains no references to political or equivalent motives as central elements in the definition of terrorism. Instead, the definition focuses on the damages and harm caused by terrorism and describes it as a criminal act that can ‘intimidate a population’, ‘unduly compelling a government or an international organisation to perform or abstain from performing any act’, or destroy ‘fundamental political, constitutional, economic or social structures of a country or an international organisation’. The Global Terrorism Database describes terrorist acts as ‘actual use of illegal force and violence to attain a political, economic, religious, or social goal through fear, coercion or intimidation’. Some scholars, such as Hoffman, present the definition of terrorism as ‘the deliberate creation and exploitation of fear through violence or the threat of violence in the pursuit of political change’. Others, like Laqueur, suggest a broader definition of terrorism, meaning ‘illegitimate use of force to achieve a political objective by targeting innocent people’. Thus, by analysing the different definitions of terrorism, one could notice two main observations. Firstly, that the notion of terrorism is generally labelled as a method used for the interest to cause

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469 Organized Crime Module 16 Key Issues: Definitions and Terminology (unodc.org) [last accessed 5 March 2023].


471 The Global Terrorism Database was established and developed by the United States National Consortium for the Study of Terrorism and Responses to Terrorism (START).


473 For a summary of different definitions of terrorism, including Laquer’s definition, see https://www.jewishvirtuallibrary.org/defining-quost-terrorism-quost [last accessed 5 March 2023]; See also the scholarly contribution where Laquer presents this definition, in Laquer, Walter, Terrorism, Weidenfeld & Nicolson, 1977; See also Bruce, Gregor, ‘Definition of Terrorism Social and Political Effects’, 21 Journal of Military and Veterans’ Health 26, 2013, citing Laquer’s definition of terrorism at p. 27.
fear in order to achieve a certain goal, usually a political one. Secondly, the conducted violence – described as a threat or the pursuit of power – has often been associated to a political concept.\textsuperscript{474}

The next section focuses on how the concept of terrorism is associated with the exclusion provision. Starting with a description of some recognised legal instruments containing the notion of excluding terrorists from refugee protection, it then dives into the interrelation between terrorism and Article 1F in the Refugee Convention.

3.3.3 Refugee Instruments Referring to Exclusion and Terrorism

The issue of excluding asylum seekers from refugee status became recognised after the Second World War, when the perspective shifted towards a more individualistic refugee definition, which mainly focused on the circumstances of the individual asylum seeker rather than on group membership entitling to refugee protection. The IRO Constitution excluded a large number of individuals from its mandate, such as war criminals, quislings, traitors and those who had, after the end of the hostilities, been involved and included in organisations hostile to the government of a member to the United Nations or had participated in terrorist organisations.\textsuperscript{475} Though the IRO Constitution highlighted that those who participated in terrorist organisations were considered to be excluded, terrorism was not initially mentioned during the debate regarding the exclusion provision of the 1951 Convention or in paragraph 7 of the UNHCR Statute.\textsuperscript{476}

In regional instruments adopted after the 1951 Convention entered into force, references to terrorism differ. For instance, the exclusion provision of the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa contains no reference to terrorism.\textsuperscript{477} The EU Qualification Directive,\textsuperscript{478} on the other

\textsuperscript{474} The discussion of terrorism within the aspect of power is, indeed, presented in Hoffman’s scholarly analysis. He states that terrorism is about ‘the pursuit of power, the acquisition of power, and the use of power to achieve political change’, see Hoffman, 1998, pp. 14–15 and in general pp. 13–44.


\textsuperscript{476} UNGA, Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, UN Doc. A/RES/428(V) (UNHCR Statute), see para. 7(d): ‘In respect of whom there are serious reasons for considering that he has committed a crime covered by the provisions of treaties of extradition or a crime mentioned in Article VI of the London Charter of the International Military Tribunal or by the provisions of Article 14, paragraph 2, of the Universal Declaration of Human Rights’.

\textsuperscript{477} See the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention), entered into force 20 June 1974.

\textsuperscript{478} The EU Qualification Directive is an integral part of the general Common European Asylum System. See both, EC Directive 2004/83/, ‘on the minimum standards for the qualification and status of third country
hand, refers to terrorism in relation to the exclusion category corresponding to Article 1F(c):

Acts contrary to the purposes and principles of the United Nations are set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations and are, amongst others, embodied in the United Nations Resolutions relating to measures combating terrorism, which declare that ‘acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations’ and that ‘knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations’.479

The exclusion provision in the EU Qualification Directive explicitly outlines that knowingly financing, planning, or inciting terrorism is an act contrary to the purposes and principles of the United Nations.481

3.3.4 The Call from the United Nations: Deny Safe Haven to Terrorists

The reference to asylum seekers and refugees in resolutions on terrorism initially appeared in the UN Security Council in Resolution 1269 of 1999. The resolution underlines the need to urge all states to ‘take appropriate measures … before granting refugee status, for the purpose of ensuring that the asylum seeker has not participated in terrorist acts’.482 Additional resolutions on terrorism in relation to asylum seekers and refugees were adopted by the UN Security Council. Within Resolutions 1373 and 1377, the UN Security Council called upon states ‘to take appropriate measures … before granting refugee status, for the purpose of ensuring that the asylum seeker has not participated in terrorist acts’ and to ‘[e]nsure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts’.483 Furthermore, in Resolution 1624, a direct link between ‘terrorism’ and exclusion category of 1F(c)

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479 See Recital 22 of the EC Qualification Directive; Recital 31 of the EU Qualification Directive.
481 The relevant international instrument that the EU Directive refers to concerning Article 1F(c) is the UN resolutions which define ‘acts, methods and practices of terrorism’ to fall within the scope of the exclusion clauses.
483 UNSC Res. 1373, paras 3(f) and (g).
is made. This acknowledges that ‘acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations’.

Resolutions 2178 (2014) and 2322 (2016) also address the issue of excluding terrorists from taking advantages from the refugee system. With a focus on denying safe haven to foreign terrorist fighters, Resolution 2178 requiring states to ‘ensure […] that refugee status is not abused by […] foreign terrorist fighters’, Resolution 2322 sheds light on the exclusion provision and recalls the critical requirement to deny safe haven to perpetrators of terrorist crimes. Although they make no clear reference to the exclusion provision or the matter of denying safe haven, many of the recently adopted Security Council resolutions are not adopting a position distinct from what has previously been stated. Many resolutions shed

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484 UNSC Res. 1624 (2005), p. 3; A similar statement is to be found in UNSC Res. 1373, at para 5; UNSC Res. 1377 (2001), p. 2. In the last two decades there have been several resolutions adopted by the UN General Assembly and Security Council, beginning with the UNGA Res. 49/60 (1994) with the additional annexed ‘Declaration on Measures to Eliminate International Terrorism’ and UNGA Res. 51/210 (1997) with the annexed ‘Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism’ contained in UNGA Res. 51/210 of 17 December 1996. Both declarations contain paragraphs with reference to asylum seekers and refugees, declaring that ‘acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations’ and that ‘knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations’. The call upon states to take appropriate measures and to ensure that an asylum seeker has not participated in terrorist acts already appeared in the wording of both declarations., see UNGA Res. 49/60 (1994), pp. 4–5, paras 2 and 5(f); UNGA Res. 51/210 (1997), p. 6, paras 2, 3 and 4; For further relevant UN Security Council resolutions addressing the importance to deny safe haven to terrorists and stating that terrorist acts are threats to international peace and security, see UNSC Resolution 1390, 28 January 2002, UN Doc. UNS/RES/1390, para 4; UNSC Resolution 1535, 26 March 2004, UN Doc. S/RES/1535; UNSC Resolution 2178, 24 September 2014, UN Doc. S/RES/2178, pp. 1, 3–4; UNSC Res. 2322 (2016), paras 9(d) and 10; UNSC Resolution 2368, 20 July 2017, UN Doc. S/RES/2368 (recalling many of the previous resolutions underlining the need to prevent refugee protection to those conducting terrorist acts); UNSC Resolution 2610, 17 December 2021, UN Doc. S/RES/2610; UNSC Resolution 2617, 30 December 2021, UN Doc. S/RES/2617, p. 3: ‘underlining that safe havens provided to terrorists continue to be a significant concern and that all Member States must cooperate fully in’; UNSC Resolution 2665, 16 December 2022, UN Doc. S/RES/2665; Collection of Security Council’s resolutions from 1946 to 2023, see https://www.un.org/securitycouncil/content/resolutions-0 [last accessed 30 June 2023].

485 UNSC Res. 2178 (2014) p. 3; See Jafarnia, Niku, ‘The United Nations Security Council’s Counterterrorism Resolutions and the Resulting Violations of the Refugee Convention and Broader International Law’, 35 Harvard Human Rights Journal/255, 2022, pp. 255–294. In this insightful scholarly work, Jafarnia examines the impact of counter-terrorism resolutions on the refugee legal system and how widely asylum seekers have been labelled as terrorists. Though arguing from a legal perspective, Jafarnia also includes the political and policy perspectives in the analysis. Jafarnia advocates, in general, for a requirement to comply with international obligations when implementing the UNSC counter-terrorism resolutions, as the ‘resolutions have led to the enactment of a host of new laws and policies by the EU and EU member stated that have resulted in the widespread denial of protection to many refugees seeking asylum in Europe.’ (see p. 255). Also, due to many adopted resolutions calling upon states to deny safe haven to terrorists, Jafarnia highlights the negative impact that these resolutions have on individuals fleeing from territories controlled by UN-labeled terrorist organisations (for instance, regions in the Middle East).
light on the importance of combating terrorism in order to maintain international peace and security (as terrorist acts threaten international peace and security) – the most updated resolutions linking terrorism to exclusion from refugee protection reaffirm the need to ensure that terrorists cannot enjoy beneficial outcomes from the refugee system. Denying safe haven remains crucial. Thus, the initial approach of excluding terrorists from refugee protection, as highlighted in the aftermath of 9/11, is reiterated in the latest resolutions. With a basis in where the association between terrorism and the exclusion first emerged, let us continue to the next section, which focuses on the interaction between terrorism and exclusion, both as regards definitional matters and the notion of depicting terrorism as a crime within the exclusion clauses.

3.3.5 Examining Terrorism as an Exclusion Crime

There being no reference to terrorism crimes in the exclusion provision simply means that terrorist offences can arguably fall within any of the excludable categories of Article 1F. Thus, they can either be an integral part of the core international crimes, ‘serious-non-political crimes’ or acts contrary to the principles and purposes of the United Nations. Though there is no requirement on identifying

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486 See for example UNSC Res. 2617 (2021); Read more about the latest ‘Open briefing of the UN Counter-Terrorism Committee on #DenyingSafeHaven’ (conducted on 5 April 2017) discussing Resolution 1373 in terms of both the measures that member states are required to undertake to deny safe haven to individuals who finance, plan, support or commit terrorist attacks and the challenges in implementing the efforts; https://www.un.org/securitycouncil/ctc/news/open-briefing-un-counter-terrorism-committee-denying-safehaven-4 [latest accessed 4 July 2023]; Additional UN instruments adopted from UNGA on this matter, see, for instance, UNGA Res. 49/60 (1994) and UNGA Res. 51/210 (1996) stating that terrorism qualifies as acts contrary to the principles and purposes of the UN. Although equivalent in this aspect, the two instruments are different in terms of their subject areas. The Declaration on ‘Measures to Eliminate International Terrorism’ contains issues concerning state cooperation and the importance of implementing relevant international law into national law. The ‘Supplementary Declaration’, on the other hand, focuses on issues concerning extradition rules and the principle of aut dedere aut iudicara (meaning extradite or prosecute). In particular, territorial sovereignty is the fundamental jurisdictional link in the ‘Supplementary Declaration’ instrument; See also UNGA Res. 69/127 (2014), reaffirming the ‘Measures to Eliminate International Terrorism’ and ‘Supplementary Declaration’ and calling upon all states to implement the instruments and the need for all states to implement effective measures to eliminate terrorism in accordance with international law. As a correlated step, they should deny safe haven to perpetrators of terrorist crimes; See also UNGA Resolution 77/113, 20 December 2022, UN Doc. A/RES/77/113, at p. 5, para. 10 calling upon all states, ‘in accordance with their obligations under applicable international law and the Charter, to deny safe haven’ to those committing terrorist acts; UNGA Resolution 77/298, 3 July 2023, UN Doc. A/RES/77/298, continues to highlight the need to strengthen cooperation to prevent and combat terrorism in all its different forms and strictly reaffirms that ‘any acts of terrorism are criminal and unjustifiable, regardless of their motivation, wherever, whenever and by whomsoever committed’. It also sheds light on the exclusion provision regarding the need to deny safe havens to any person with respect to whom there is credible information supporting that there are serious reasons for considering that the individual is guilty of a terrorist offence., see p. 1, Recital 3 and pp. 12–14, paras. 26, 32 and 39.

only one excludable crime in the assessment process, it is usually preferable to associate the criminal offence (including in the case of terrorism) to one of the sub-paragraphs in Article 1F. 488

3.3.5.1 Must the Criminal Act be Defined as “Terrorism”? 
The obligation to not grant refugee status to persons involved in terrorist acts raises a central question – what sort of criminal activities can be defined as terrorist crimes in a given case? 489

In light of the UNSC resolution, the Security Council has usually taking inspiration from the International Convention for the Suppression of the Financing of Terrorism, which defines terrorism as an act: 490

[...] intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act. 491

The central element to search for when assessing whether a criminal act can be qualified as terrorism is the deliberate motive behind the activity. In other words,
if the predominate feature of a certain criminal offence points to other motives than purely political, the crime should, as a general rule, be understood as a terrorist act. Based on statements by scholars:

[...] it needs to be examined whether the offence was committed out of genuine political motives or merely for personal reasons or gain, whether it was directed towards the modification of the political organization or the very structure of the State, and whether there is a close and direct causal link between the crime and its alleged political purpose and object.492

Thus, criminal activities that are ‘grossly disproportionate to the respective object and purpose or egregious acts of violence (such as many acts commonly considered as terrorism) will be most likely to fail the predominance test’.493

The central element to delve into when examining whether an act can be qualified as terrorism concerns the causal link between the actual crime and the alleged political purpose of the perpetrator(s). In cases where the outcome of the criminal activity is disproportionate to the objective, the criminal conduct would most likely be defined as terrorism.494 This was further analysed by the House of Lords in T. v. Secretary of State for the Home Department, where the Court stated the following:

[...] the court would consider the means used to achieve the political end and, in particular, whether the crime was aimed at a military or governmental target, or a civilian target, and in either event whether it was likely to involve the indiscriminate killing or injuring of members of the public.495

However, in the absence of a binding international convention criminalising terrorism, the crime cannot be put into either the ‘ordinary transnational crime’,

‘treaty-based offence’ or ‘international crime’ boxes. Nonetheless, given the adopted international instruments on the matter, terrorism can surely be labelled a ‘serious transnational, treaty-based crime that is on the brink of becoming a true international crime’.\(^\text{496}\)

Obviously, recognising terrorism as an exclusion crime is undoubtedly linked to terms like ‘threat’ and ‘national security’. In addition, terrorist offences occurring in one country may distress other states.\(^\text{497}\) Thus, the critical ambition to protect national security is a mutual shared interest, as the security of one country ‘is often dependent on the security of other nations’.\(^\text{498}\) However, defining the criminal act as ‘terrorism’ is perhaps a minor matter. As pointed out by Saul, ‘[…] until the international community agrees on a definition, reference to the term is of little legal or practical use in excluding undeserving persons from international protection’.\(^\text{499}\) A description to lean on for guidance could be Hathaway’s observation, in analysing the Suresh decision regarding how a refugee may pose a threat to national security. Hathaway stated:

\[\text{[A] refugee poses a risk to the host state’s national security if his or her presence or actions give rise to an objectively reasonable, real possibility of directly or indirectly inflicted substantial harm to the host state’s most basic interests, including the risk of an armed attack on its territory or its citizens, or the destruction of its democratic institutions.}^\text{500}\]


\(^{497}\) Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 SCR 3, para 87: ‘International conventions must be interpreted in the light of current conditions. It may once have made sense to suggest that terrorism in one country did not necessarily implicate other countries. But after the year 2001, that approach is no longer valid.’ (emphasis added).

\(^{498}\) Suresh v. Canada (Minister of Citizenship and Immigration), para. 90, presenting the Court’s full statement: ‘[A] person constitutes a ‘danger to the security of Canada’ if he or she poses a serious threat to the security of Canada, whether direct or indirect, and bearing in mind the fact that the security of one country is often dependent on the security of other nations. The threat must be ‘serious’ in the sense that is must be grounded an objectively reasonable suspicion based on evidence and in the sense that the threatened harm must be substantial rather than negligible’; Hathaway, James C. (2nd ed.), The Rights of Refugees under International Law, Cambridge University Press, 2021, pp. 299–301.


\(^{500}\) Hathaway, 2021, p. 301.
This statement relates to the Court’s view of the meaning of ‘national security’ in the aforementioned case. By contrast, the term ‘national security’ does not occur in Article 1F. However, I believe Hathaway’s articulation of ‘acts posing threats against national security’ could be useful in assessing terrorist offences as exclusion crimes. In summary, instead of focusing on the question of definition, the emphasis should be on the actual violent act and methods of the crime, to determine whether the offence is a terrorist act.\(^{501}\)

### 3.3.5.2 Terrorism as a Crime Under Article 1F(a): Crimes Against Peace, War Crimes and Crimes Against Humanity

Although terrorist crimes can fall into any of the mentioned excludable categories, linking terrorism and crimes against peace is unlikely. This is mainly because terrorism focuses on factors relating to the means, intentions and methods of criminal behaviour, rather than on the framework of ad bellum violation by a state authority against another state (which is relevant in crimes of aggression/crimes against peace).

However, terrorism can constitute a war crime or crime against humanity as defined in the international instruments. A general example of how and when terrorism can be an integral part of a war crime is in circumstances when an indiscriminate attack on civilians occurs.\(^{502}\) With respect to ‘crimes against humanity’, the terrorist act must fit the description of any of the criminal offences in Article 7(1) of the ICC Statute. Hence, in cases assessing where terrorism can constitute a crime against humanity, the offence must involve one of the specific crimes (such as murder) constituting ‘a widespread or systemic attack on a civilian population with knowledge on the part of the perpetrator’.\(^{503}\) Without a link between a specific crime presented in Article 7(1) of the ICC Statute and an element of the crime instituting ‘a widespread or systemic attack on a civilian population with knowledge on the part of the perpetrator’, the terrorist act cannot amount to a ‘crime against humanity’ as defined in an international instrument.\(^{504}\)

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\(^{501}\) As highlighted by the CJEU, terrorist acts ‘are characterized by their violence towards civilian population’, Bundesrepublik, (CJEU, 2010), para 81.


\(^{503}\) Article 7(1) of the 1998 Statute of the International Criminal Court, entered into force 1 July 2002.

3.3.5.3 Terrorism as a Crime Under Article 1F(b): Serious Non-Political Crimes

The exclusion category of ‘serious non-political crime’ pursuant to Article 1F(b) is that into to which terrorist acts usually fall. There is a growing number of exclusion cases in relation to Article 1F(b) where the individual has ‘committed crimes that are politically and ideologically motivated, but which now fall under the rubric of terrorism, terrorist activities, or terrorist acts’. However, exclusion due to ‘serious non-political crimes’ is a unique category. This particular clause does not refer to any specific codification of crimes. Thus, exclusion based on ‘serious non-political crime’ is relatively open to interpretation. The fact that a codification of a criminal conduct is not a key element to trigger the application of Article 1F(b) – because of the broad diversity of domestic criminal jurisdictions – means that the exclusion clause comprises a broad scope and notion of flexibility. With this in mind, the need for vigilance in cases of exclusion based on terrorist crimes becomes even greater.

The concept of ‘political offence’ originally emerged from extradition law, which, at that time, was necessary to ensure that fugitive offenders were not subject to penalties for crimes that constituted political offences. The political offence

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505 Hathaway and Foster, 2014, p. 569; Rikhof, 2012, pp. 346–347, but also see p. 486 where Rikhof stresses that terrorists crimes more often fall under ‘acts contrary to the purposes and principles of the United Nations’, but that ‘[…] terrorist activities had traditionally been dealt with under article 1F(b) […]’.


509 Gilbert, Geoff (2nd ed.), Responding to International Crime, Brill-Nijhoff, International Studies in Human Rights (volume 88), 2006, particularly Chapter 5: ‘The Political Offence Exemption’. In this chapter, the author addresses the issue that the exemption rule has been extended too far and consequently reached the level of including multiple categories of fugitives. The criticism that Geoff Gilbert highlights is that ‘it is currently too wide and it needs to be circumscribed or, possibly, even abolished’, (at p. 197).
exception rule was understood to encompass ‘crimes of violence as self-proclaimed alleged anarchists adopted “propaganda by the deed”’.\textsuperscript{510} However, during the twentieth century, a transformation caused the concept of ‘political offence’ to become associated with terrorist violence. Suddenly, the old perception of political offence was replaced with a new understanding. This was linked to fugitives committing crimes usually described as terrorism.\textsuperscript{511}

The relation between the political offence exception rule and the condition constituting exclusion from refugee protection was addressed and examined further in \textit{T v Secretary of State for the Home Department}.\textsuperscript{512} In this case, the House of Lords used the Swiss approach,\textsuperscript{513} shedding light on two main elements to consider when analysing a ‘political offence’. The first is the central goal of the organisation that the fugitive person is a member of. The second is the level of proportionality relative to the desired goal. This means that if the factual circumstances indicate targeted violence against a state regime conducted in a proportionate manner, those acts would normally fall under the scope of the political offence.

\begin{itemize}
  \item \textsuperscript{511} Ibid; See also, Gilbert, Geoff and Bentajou, Magdalena Anna, ‘Exclusion’, p. 717, in: McAdam, Jane, Foster, Michelle, and Costello, Cathryn, (eds.), \textit{The Oxford Handbook of International Refugee Law}, Oxford University Press, 2021.
  \item \textsuperscript{512} \textit{T v. Secretary of State for the Home Department}, pp. 785–787 (Lord Lloyd).
  \item \textsuperscript{513} See Gilbert, Geoff and Bentajou, Magdalena Anna, ‘Exclusion’, p. 717 n 29 with reference to the Swiss approach enshrined in \textit{In re Parvan} [1927–28] Annual Digest of Public International Law Cases 347, 349. Cf \textit{Watin v Ministère Public Fédéral} [1964] 72 ILR 614 (Swiss Federal Tribunal), in: McAdam, Foster, and Costello, \textit{The Oxford Handbook of International Refugee Law}, 2021; See further; Singer, 2015, pp. 72–76 and 83–84, where Singer draws on interesting observation from analysing the \textit{T v. Secretary of State for the Home Department} case. Namely, that this judgment focused on ‘a specific form of terrorism […] – acts of indiscriminate violence directed towards innocent civilians – rather than any form of terrorism \textit{per se}'. In this regard, as emphasised by Singer, this outcome amounts to the understanding that not every criminal offence containing terrorist-related nature will be considered as a ‘serious non-political’ crime., (see pp. 83–84); Li, 2017, pp. 325–331; Also, see Rikhof, 2023, in particular pp. 457–458, for a comparative analysis of the predominance and proportionality test in domestic refugee jurisprudence, see pp. 463–527, see also pp. 527–540, where Rikhof highlight the systemic integration aspect by stating that '[t]his test is very similar to the test developed in international extradition law, and some courts have relied on extradition law to apply this approach to refugee law, while noting that the refugee context is slightly different’. (see p. 534). Lastly, Rikhof concludes, thus, that several jurisdictions apply the predominance and proportionality test in Article 1F(b) cases. However, while the test contained an equivalent understanding in theory amongst the different countries, the actual application of the test in the exclusion cases differed; See also UNHCR Handbook, para. 152; UNHCR, Background Note on the Application of 1F, para. 81; UNHCR, Statement on Article 1F of the 1951 Refugee Convention – Issued in the context of the preliminary ruling references to the Court of Justice of the European Communities from the German Federal Administrative Court regarding the interpretation of Articles 12(2)(b) and (c) of the Qualification Directive, July 2009, p. 23; In addition, see Council of Europe: Committee of Ministers, ‘Recommendation Rec(2005) 6 of the Committee of Ministers to Member States on Exclusion From Refugee Status in the Context of Article 1 F of the Convention Relating to the Status of Refugees of 28 July 1951’, Adopted by the Committee of Ministers on 23 March 2005 at the 920th meeting of the Ministers’ Deputies, para. 1(d).}

\end{itemize}
exception rule and not result in exclusion from refugee protection. In other words, for terrorist activity to trigger Article 1F(b), the alleged violence must be indiscriminate and extend well beyond the level of proportionality. Only then is it possible to declare that there is ‘serious reasons for considering’ that the person has committed ‘serious non-political crime prior to [her/his] admission to that country as a refugee’. It is interesting to highlight the creation of layers in the exception norms in relation to terrorism. One could safely say that the exclusion provision is an exception to the fundamental objective to provide humanitarian protection. Exclusion based on serious non-political crimes is the exception rule to any legitimate or minor crime. Lastly, terrorism, in the third order, is the exception to a political crime – despite any political reasons or ideology initiating the commission of the crime. Therefore, even if terrorism may be placed within the context of a ‘political crime’, the severe destruction and harm from the violent activity is not proportionate to the conducted political aim. Therefore, it cannot be claimed to be a political crime.

3.3.5.4 Terrorism as a Crime Under Article 1F(c): Acts Contrary to the Purposes and Principles of the United Nations

The fact that the Security Council presented a call to the international community to perceive and acknowledge terrorism as a crime violating the purposes and principles of the United Nations is perhaps not that problematic in itself. The question is perhaps not whether ‘terrorism’ can amount to ‘acts contrary to the purposes of Article 1 and 2 of the UN

517 Rikhof, 2012, p. 487: ‘The international community has mentioned five activities since the drafting of the Convention, namely hostage taking, torture, forced disappearance, apartheid and terrorism but only the last one in specific connection with article 1F(c) and then only recently which were also accepted at the national level as was were attacks against peacekeepers.’; Sivakumaran, Sandesh, ‘Exclusion from Refugee Status: The Purposes and Principles of the United Nations and Article 1F(c) of the Refugee Convention’, 26 International Journal of Refugee Law 350, 2014, p. 351: ‘In the last decade or so, however, the use of article 1F(c) has grown considerably. This is particularly true in respect of terrorism’.
518 Worth citing again, see EU Qualification Directive, Recital 31: ‘Acts contrary to the purposes and principles of the United Nations are set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations and are, amongst others, embodied in the United Nations resolutions relating to measures combating terrorism, which declare that “acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations” and that “knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations”.’ (emphasis added); Rikhof, 2012, p. 4866[...] terrorist activities had traditionally been dealt with under article 1F(b) until 2001, when the United nations was of the view that they could also be brought
Charter. Multiple jurisdictions have addressed this issue, with the Canadian case *Pushpanathan* seeming to hold the leading position. In regard to Article 1F(c), the Supreme Court of Canada emphasised that:

> There are […] several types of acts which clearly fall within the section. The guiding principle is that where there is consensus in international law that particular acts constitute sufficiently serious and sustained violations of fundamental human rights as to amount to persecution, or are explicitly recognized as contrary to the purposes and principles of the United Nations, then Article 1F(c) will be applicable […] The second category of acts which fall within the scope of Article 1F(c) are those which a court is able, for itself, to characterize as serious, sustained and systemic violations of fundamental human rights constituting persecution.

The Court’s decision and statement in *Pushpanathan* has indeed inspired various jurisdictions to address the need of interpreting the interaction between terrorism and Article 1F(c) in line with international obligations and not rely on domestic definitions of terrorism. Thus, in recognising terrorism within the context of Article 1F(c), the act of terrorism must threaten ‘international peace and security through the use of improper means as set out in the ICC Statute or UN multilateral anti-terrorism treaties’.

There is no need to argue that acts of terrorism do in fact destroy the most foundational principles and purposes shaping the foundation of the United Nations. However, one needs to bear in mind the distinction between adopting a policy standard confirming terrorism to be considered as criminal offence violating the UN’s purposes and principles and implementing this condition into a rule of law for the purpose of applying it as an international obligation to exclude people from international refugee protection. As stated by scholars within the field of international refugee law: ‘[J]ustifiable concerns remain about where to draw the line between political acts and protest, on the one hand, and “terror”, on the under article 1F(c), a position adopted at the national level soon after’.; Sivakumaran, 2014, p. 351: ‘Despite the uncertainty surrounding terrorism as a crime under international law, individuals have been excluded from refugee status trough article 1F(c) under the rubric of terrorism. Article 1F(c) is, however, by no means limited to terrorism. Other acts have also been considered to fall within the scope of the provision, including human rights violations and attacks against UN personnel’.; Hathaway and Foster, 2014, pp. 591–592.

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520 *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, paras. 65 and 70.
521 See, for instance, *Al-Sirri v. Secretary of State for the Home Department*, [2012] UKSC 54, 3 WLR 1263, at paras. 36–40. Also, the Court’s reasoning in the *Al-Sirri* case refers explicitly to the *Pushpanathan v Canada* case, see paras. 13–14, 25, 66–67.
523 See, for example, Sivakumaran, 2014, pp. 353–380: ‘Other acts, such as certain terrorist acts, will only be covered to the extent that they have serious international repercussions’.
other. Furthermore, based on the statements from the Security Council itself, states are obliged to ensure that their anti-terrorism measures are in alignment with the obligations under international law. In particular, this must be done in accordance with the provisions of international refugee law, human rights law and humanitarian law.

Certainly, terrorism can be considered an ‘act contrary to the purposes and principles of the United Nations’. However, the terrorism link to Article 1F(c) creates another debate that still might be unresolved. This relates to whether only state agents conducting any sort of control over a policy can be held accountable for the crimes under Article 1F(c) or if the clause extends to private non-state actors. This will be discussed more thoroughly in the next section.

3.3.5.5 Terrorism and the Personal Scope of Article 1F(c)

Initially, perpetrators associated with the crimes under Article 1F(c) were actors representing the state in military or civilian leadership positions. In fact, possible perpetrators of crimes of aggression were those who could commit crimes violating the purposes and principles of the UN Charter.

The UNHCR has also commented on the issue relating to the personal scope of ‘acts contrary to the purposes and principles of the United Nations’. Accordingly, the perpetrator ‘must have been in a position of power […] and instrumental’ when conducting acts contrary to the principles enshrined in the UN Charter.

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524 McAdam, Goodwin-Gill, and Dunlop, 2021, p. 231 (emphasis added).
525 Ibid.; See further, UNSC Res. 1269 (1999), para. 4; UNSC Res. 1373 (2001), para. 3(f) and para 3(g): ‘[…] to take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum seeker has not planned, facilitated or participated in the commission of terrorist acts.’; Goodwin-Gill, S. Guy, ‘Forced Migration: Refugees, Rights and Security’, p. 17: to ‘insist on compliance with reviewable standards of justification’ and ‘to translate the rhetoric of human rights protection in time of emergency into a working reality that is commensurate with human dignity, compatible with international obligations and consistent with the rule of law’, in: McAdam, Forced Migration, Human Rights, and Security, 2008.
526 McAdam, Goodwin-Gill, and Dunlop, 2021, p. 221.
527 More analysis about this, see Sivakumaran, 2014, pp. 379–380. Sivakumaran identifies two issues concerning the shifted view of possible perpetrators under Article 1F(c), stating that '[t]he first relates to the nature of the individual, as a state official, an official of a state-like-entity, or a private individual. The second relates to the level of the individual within the hierarchy’; In the mid-1990s, domestic jurisprudence presented two groups of actors to which the exclusion clauses could apply: ‘one focused almost exclusively on State officials and those similarly situated, while the other sought to extend the scope of individual responsibility’, see McAdam, Goodwin-Gill, and Dunlop, 2021, p. 221.
528 UNHCR Handbook, paras. 162–163.
This is perhaps not a far-reaching assessment, as these purposes and principles mainly comprise ‘the maintenance of international peace and security,’ the development of friendly relations, international cooperation, […] the protection of human rights’. They also encompass ‘the idea of sovereign equality,’ the prohibition of the use of force, and the principle of peaceful settlement of disputes. Unsurprisingly, these principles are commonly referred to as responsibilities held by state agents and leaders.

However, due to the language of Resolution 1373, stressing that those who commit terrorist acts are violating the fundamental purposes and principles of the international community – the category of perpetrators has shifted to private actors. This altered the ratione personae of Article 1F(c), with a critical impact as the Security Council’s call to states to exclude ‘terrorists’ from the refugee system confirmed that ‘terrorism, like aggression, is contrary to the purposes and principles of the United Nations’. As state practices revealed a shifted position to include low ranking or private individuals as perpetrators of acts contrary to the purposes and principles of the United Nations, the UNHCR also amended its position.

Meanwhile, the Security Council was silent on the topic of ‘the “legislative” level, the general constituent elements of the act’ or if ‘terrorism, as such and apart from the conventions making specific provision in particular respects, is an international crime’. However, this aspect had already been examined in the Canadian Supreme Court case of Pushpanathan. The applicant had been involved in drug trafficking and the Canadian authorities determined that his alleged offence qualified as an ‘act contrary to the purposes and principles of the United Nations’. Still, the Canadian Supreme Court underlined the restrictive approach of applying the exclusion clause by stating:

The rationale of Art. 1F of the Convention 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. In the light of the

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530 Article 1(1) of the 1945 Charter of the United Nations, 1 UNTS XVI, entered into force 24 October 1945.
531 Article 1(2) of the UN Charter.
532 Article 1(3) of the UN Charter.
533 Article 2(1) of the UN Charter.
534 Article 2(4) of the UN Charter.
535 Article 2(3) of the UN Charter; See further McAdam, Goodwin-Gill, and Dunlop, 2021, pp. 220–221.
537 See, for instance, Pushpanathan v. Canada (Minister of Citizenship and Immigration), para. 68, with reference to the Tehran case (Australia); Al-Sirri v. Secretary of State for the Home Department, para 25; Kapferer, 2000, pp. 206–207 analysing the amending position in French jurisprudence.
539 McAdam, Goodwin-Gill, and Dunlop, 2021, p. 227.
general purposes of the Convention and the indications in the travaux préparatoires as to the relative ambit of Arts. 1F(a) and 1F(c), the purpose of Art. 1F(c) is to exclude those individuals responsible for serious, sustained or systemic violations of fundamental human rights which amount to persecution in a non-war setting. Article 1F(c) may be applicable to non-state actors. Although it may be more difficult for a non-state actor to perpetrate human rights violations on a scale amounting to persecution without the state thereby implicitly adopting those acts, the possibility should not be excluded a priori.540

The Supreme Court of Canada also shed light on personal involvement in ‘acts contrary to the purposes and principles of the United Nation’ in regard to matters of individual criminal responsibility. Someone who has committed acts of persecution would most likely be held accountable for crimes under Article 1F(c). The position presented in the Pushpanathan case contains support from both past and present-day practices.541

Furthermore, the Court’s statement highlights the ‘legislative level’ of the crimes within Article 1F(c) and encourages states to present examples of acts that are ‘sufficiently serious and sustained violations of human rights’.542

One can wonder why the Pushpanathan case is relevant in this analysis when the excludable crime was drug trafficking, not terrorism under the scope of Article 1F(c). The Court’s reasoning is important for a number of reasons.543 First, it clarified that severe human rights violations threaten the purposes and principles of the international community. Second, the statement sheds light on the standing that ‘the interpretation and application of article 1F(c) need a principled framework, keyed to legality544 rather than ‘to serve as an open-ended basis for exclusion’.545 Thus, the outcome and guidance from Pushpanathan clarifies that the framework necessary to comply with is, first, to detect acts causing ‘serious, sustained or systemic violations of fundamental human rights’, and, second, to find

542 McAdam, Goodwin-Gill, and Dunlop, 2021, p. 223.
543 Ibid.
544 Ibid.
545 Ibid.
‘consensus in international law’ that such acts are sufficiently serious to be considered contrary to the UN’s purposes and principles.\textsuperscript{546}

Based on valuable guidance provided by Goodwin-Gill and McAdam, an example of perpetrators of crimes under Article 1F(c) could be the following:

a) policymakers and those holding positions of political responsibility, in situations where, for example, violations of human rights or other activities contrary to the purposes and principles of the United Nations have occurred, and where they may be considered to have covered such activities with their authority;

b) the agents of implementation of such policies, including for example, officials in government departments or agencies who knew or ought to have known what was going on; and the members of government and other organizations engaged in activities, such as persecution, contrary to the purposes and principles of the United Nations;

c) individuals, whether members of organizations or not, who, for example, have personally participated in the persecution or denial of human rights of others; and

d) those individuals, whether connected with the organization of a State or not, who are considered to have committed ‘terrorist’ or ‘terrorist-related’ acts.\textsuperscript{547}

Analysing the different categories of perpetrators that could possibly fall under the scope of Article 1F(c) reveals that both state agents and non-state actors can be held responsible for terrorist acts that violate the purposes and principles of the United Nations. Nonetheless, the general formulation of ‘whether connected with the organization or a State or not’ in combination with including private actors as perpetrators of terrorist crimes does not mean that the element of hold-

\textsuperscript{546} Ibid. (emphasis added).

\textsuperscript{547} McAdam and Goodwin-Gill, 2007, pp. 189–190; The jurisprudence from mid-1990 and onwards also confirms the applicability of the exclusion provision ‘acts contrary to the purposes and principles of the United Nation’ to individuals at state authority level or high officials, to individuals persecuting serious human rights violations, and lastly, to individuals committing terrorist crimes as a result of the UNSC Resolution 1373 and several adopted resolutions afterwards, see McAdam, Goodwin-Gill, and Dunlop, 2021, p. 224; Zimmermann and Wennholz, ‘Article 1F’, paras. 84 and 95, in: Zimmermann, Macht, and Dörschneider, The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary, 2011; Sivakumaran, 2014, p. 380: ‘Therefore, once terrorism is considered to fall within article 1F(c), by definition, the article must be extended to individuals other than state officials. [...] all actors – whether state officials, officials of state-like entities, or private individuals; high-ranking officials or low-level officials – can have a highly deleterious effect on the purposes and principles on the UN and may attack the “very basis of the international community’s coexistence”. International terrorist acts are one such example. On that basis, the organisational affiliation and institutional rank of an individual are but two of the factors that need to be assessed in determining gravity’. 
ing a ‘policy-making’ position is entirely removed. In fact, this condition is retained in the ratione personae scope. Thus, so as not to expand the scope of perpetrators under Article 1F(c) or cause needless overlapping between Article 1F(c) and the other exclusion categories, Gilbert emphasises that:

[… it would promote consistency within international law to confine the scope of Article 1 F (c) to acts committed by persons in high office in government or in a rebel movement that controls territory within the State or in a group perpetrating international terrorism that threatens international peace and security.

Contrarily, ‘those perpetrating acts of international terrorism constituting a threat to international peace and security who are not high-ranking members of the organization should be excluded under Article 1F(b).’

The statements above points to a compelling approach to draw a distinction between acts of terrorism falling under either ‘act contrary to the purposes and principles of the United Nations’ or ‘serious non-political crime’. As an excludable crime, terrorism can fall under either, with the former category usually being applied in the context of crimes with an international dimension. This can be considered to be the ultimate way to distinguish terrorism as an exclusion act under Article 1F(b) versus Article 1F(c).

As mentioned in the introduction chapter – there are several limitations in the relationship between terrorism and the exclusion provision that fall outside the scope of this study. However, a point of departure in this present study is to thoroughly analyse the issue concerning membership of a terrorist organisation. Following this introduction to the intersection between the concept of terrorism and the specific exclusion clauses, the next section examines association in a terrorist organisation as a trigger for exclusion from refugee protection.

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551 McAdam, Goodwin-Gill, and Dunlop, 2021, p. 224.
3.4 Membership of a Terrorist Organisation and Exclusion from Refugee Protection

3.4.1 Association with Terrorist Crimes and Terrorist Groups

The foundation of the exclusion provision takes as its point of departure cases where there are serious reasons for considering that a refugee has committed a particular excludable act under the scope of Article 1F. Thus, the wordings of the exclusion provision shed light on the criminal acts an individual might be held accountable for. However, state practices and methods of interpretation have expanded the interest of questioning how far association to a crime can extend within the scope of Article 1F. The interpretation and assessment of the exclusion provision has indeed gone far beyond the individual perpetrator who is seeking refugee status. It includes other roles of contribution to the committed crimes, such as being the mastermind behind a crime, the one directing criminal activities, or even co-conspirators to criminal conduct. This development has been inspired by the context of international criminal law and the established framework of criminal liability to determine if and when a perpetrator is guilty of certain criminal acts.

Now, in connection to terrorism and exclusion, this issue becomes even more vital to address as one needs to ask two related questions. First, ‘how far does “association” with terrorism extend?’ Second, ‘how far should “guilt by association” be sufficient to exclude?’ In the Canadian case of *Ramirez v. Canada*, the Court held that ‘where an organization is principally directed to a limited, brutal purpose . . . mere membership may by necessity involve personal and knowing participation in persecutorial acts’. This approach, referred to as the ‘mere membership doctrine’, has evolved to a central issue in cases concerning terrorist association and exclusion from refugee protection. The question at its heart is whether a membership or supporting a particular terrorist group or organisation can meet the threshold of the exclusion standard of proof, and if such circumstances can amount to a serious crime under Article 1F. It is important to emphasise that the mere membership doctrine associated with Article 1F can have a double meaning. It can either be interpreted to mean that membership of a terrorist group as such is a criminal conduct sufficient to meet the exclusion standard, or that the membership is adequate evidence to show that the person

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553 Ibid.

has personally participated in the criminal acts conducted by the terrorist organisation. The following sub-section discusses the mere membership doctrine further as well as how it is supposed to be regarded in the context of exclusion.

3.4.1.1 The ‘Mere Membership’ Doctrine

The general position taken by the UNHCR and scholars is that ‘mere membership’ of an organisation as a sole criterion would not be considered sufficient to reach the threshold of ‘serious reasons for considering.’ In other words, membership alone does not excuse decision-makers from making diligent assessments of the facts in the case at hand, in accordance with the principles of procedural fairness and rules on individual responsibility. Thus, to decide in favour of exclusion from refugee protection based merely on association with an organisation would not be justified.

However, the ‘mere membership’ dilemma becomes even more obvious when it relates to association to an organisation which exists for the purpose of performing serious criminal acts and has violent behaviour as its sole objective. As put forward by the UNHCR:


557 Although confirming that a mere membership of a violent group is not sufficient to justify the exclusion decision, it was also highlighted in summary conclusions of the Expert Roundtable that ‘depending on the nature of the organization, it is conceivable that membership of a certain organization might be sufficient to provide a basis for exclusion in some instances’. (emphasis added), see Türk, Nicholson, and Feller, ‘Summary Conclusions: exclusion from refugee status, expert roundtable, Lisbon, May 2001’, p. 483, in: Türk, Nicholson, and Feller, *Refugee Protection in International Law – UNHCR’s Global Consultations on International Protection*, 2003. However, what ‘a certain organisation’ entails were left unsaid. The conflicting approach of on the one hand rejecting solely membership of a violent organisation as a ground for exclusion yet, on the other hand, adding an exception that this might, on some occasion, depending on the organisation’s behaviour, be sufficient to exclude, is the reason why the mere membership doctrine in exclusion cases remains unclear.; For more scholarly analysis on ‘membership’ in relation to the exclusion provision, see Rikhof, 2023, pp. 300–302, 394–407.
the purposes, activities and methods of some groups or terrorist organisations are of a particularly violent and notorious nature. Where membership of such a group is voluntary, the fact of membership may be impossible to disassociate from the commission of terrorist crimes. Membership may, in such cases, amount to the personal and knowing participation, or acquiescence amounting to complicity in the crimes in question.\textsuperscript{558}

In response to this, a general overview of state practice also shows support for sidestepping the principal rule of not relying on the ‘mere membership’ doctrine when assessing exclusion from refugee protection.\textsuperscript{559} However, this set of state practices would, in my view, impact the interpretation and application of the exclusion provision only in a negative manner. In general, terrorist organisation would most likely be of a ‘particularly violent and notorious nature’. Nonetheless, excluding purely on voluntary membership without conducting the additional step of assessing the individual contribution to the criminal conduct could potentially expand the scope of the exclusion provision. Equally importantly, it could also lead to a poor and ambiguous assessment procedure in the absence of ‘clear and credible’ evidence to justify the exclusion decision.\textsuperscript{560} In what is arguably a reasonable statement, the UK House of Lords highlighted in \textit{T v. Secretary of State for Home Department} that in ‘applying Article 1F to persons suspected of terrorism, the standard procedural fairness guarantees and substantive law must be complied with’.\textsuperscript{561}

Interestingly, in the UK case of \textit{JS (Sri Lanka)}, the Supreme Court likewise rejected the ‘mere membership’ doctrine and highlighted that:

Rather, however, than be deflected into first attempting some such sub-categorisation of the organisation, it is surely preferable to focus from the

\textsuperscript{558} UNHCR, ‘The Exclusion Clauses: Guidelines on their Application’, para. 47, see also para 43; See also, UNHCR, Background Note on the Application of Article 1F, paras. 60–62.

\textsuperscript{559} \textit{T v. Secretary of State for Home Department} [1996] 2 All ER 865, 2 WLR 766; Bliss, 2000, p. 127.

\textsuperscript{560} My position is inspired by the analysis presented in Bliss, 2000, pp. 123–127. Especially Bliss’s statement on p. 127 stating that: ‘[c]areful application of Article 1F exclusion clauses and the required procedural safeguards will ensure the exclusion of persons engaged in terrorism without denying asylum seekers rights of due process or contravening international obligation’.

\textsuperscript{561} \textit{T v. Secretary of State for Home Department} [1996] 2 All ER 865, 2 WLR 766; Interesting analysis about ‘secret trials’ of terrorists, see Campbell, R. John, ‘Guilt by Association: Contrasting Views on the Fairness of ‘secret trials’ of ‘terrorists’, pp. 92–122, in: Simeon, \textit{Terrorism and Asylum}, 2020. In this chapter, Campbell discusses the context of ‘secret trials’ of terrorists ‘by contrasting the normative judgements of the law with the anthropological requirements of situating the cases in the wider social context of society to understand the complex legal processes and the roles played by the state, the courts, judges, lawyers, and defendants.’ (see p. 18 with further description of the chapter’s contribution to this volume). In conclusion, Campbell underlines the concerning issue which the study reveals. Namely that ‘terrorist legislation has rebalanced the scales of justice in favour of security over individual liberty and that, by anthropological standards, the legal proceedings analyzed in this chapter are unfair’ (see p. 96).
outset on what ultimately must prove to be the determining factors in any case, principally (in no particular order) (i) the nature and (potentially of some importance) the size of the organisation and particularly that part of it with which the asylum-seeker was himself most directly concerned, (ii) whether and, if so, by whom the organisation was proscribed, (iii) how the asylum-seeker came to be recruited, (iv) the length of time he remained in the organisation and what, if any, opportunities he had to leave it, (v) his position, rank, standing and influence in the organisation, (vi) his knowledge of the organisation’s war crimes activities, and (vii) his own personal involvement and role in the organisation including particularly whatever contribution he made towards the commission of war crimes.  

The Court’s statement presented the essential elements to consider when examining associations with terrorism and how far they extend in cases concerning exclusion. The Court’s remarks also emphasise the need to establish a nexus between the person seeking refugee status and the terrorist activities. Similar aspects were addressed by the CJEU in the Bundesrepublik Deutscheland v B and D case. The issue before the Court concerned whether membership of a terrorist organisation and supporting the armed struggle of the organisation was enough to fall under the scope of ‘serious non-political crime’ and ‘acts contrary to the purposes and principles of the United Nations’ within the meaning of Article 12(2)(b) and (c) of the EU Qualification Directive.  

The CJEU underlined the need to consider both objective and subjective criteria when individual responsibility is assessed under the exclusion clauses.  

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562 R(JS)(Sri Lanka) v Secretary of State for the Home Department, [2010] UKSC 15, at para 30; See also decision presented by the Court of Appeal in R(JS)(Sri Lanka) v Secretary of State for the Home Department [2009] EWCA Civ 364; However, the UK extend the terrorism definition in the UK Anti-terrorism, Crime and Security Act of 2001 to include those who have links with an international terrorist group (see section 21(2)(c)). Links, within the meaning of the UK terrorism definition, could, for example, be if a person ‘supports or assists’ a terrorist organisation or group (section 21(4)), see Zard, 2002, p. 33; For more cases addressing this subject area, see, for instance, Zrig v Canada (Minister of Citizenship and Immigration) [2003] FCA 178; MH (Syria) v Secretary of State for the Home Department [2009] EWCA Civ 226; SK (Article 1F(a) – exclusion) Zimbabwe v Secretary of State for the Home Department [2010] UKUT 327 (IAC); A.B. v Refugee Appeals Tribunal & The Minister for Justice, Equality and Law Reform, [2011] IEHC 412, at paras. 12–13 finding inspiration and guidance from the CJEU’s reasoning in Bundesrepublik (CJEU 2010); Ezokola v. Canada (Minister of Citizenship and Immigration), [2013] SCC 40, para 84 and 92; See, further, Bliss, 2000, p. 125.  

563 Bundesrepublik (CJEU 2010), para. 81: ‘First, it is clear that terrorist acts, which are characterised by their violence towards civilian populations, even if committed with a purportedly political objective, fall to be regarded as serious non-political crimes within the meaning of point (b)’ and para. 82: ‘Secondly, with regard to acts contrary to the purposes and principles of the United Nations, as referred to in point (c) of Article 12(2) of Directive 2004/83, recital 22 to that directive states that such acts are referred to in the preamble to the Charter of the United Nations and in Articles 1 and 2 of that Charter and that they are among the acts identified in the UN Resolutions relating to ‘measures combating international terrorism’.  

564 Bundesrepublik (CJEU 2010), para. 96: ‘individual responsibility must be assessed in the light of both objective and subjective criteria’; See Commentary to the first version of the EU Qualification Directive supporting this
purpose of association to a terrorist organisation specifically, the CJEU held that
decision-makers ‘must assess the true role played by the person concerned in the
perpetration of the acts in question; his position within the organisation; the ex-
tent of the knowledge he had, or was deemed to have, of its activities; any pres-
sure to which he was exposed; or other factors likely to have influenced his con-
duct’.565

Ultimately, what the CJEU concluded as a response to this issue was the follow-
ing:

the fact that a person has been a member of an organisation which, be-
cause of its involvement in terrorist acts, is on the list forming the Annex
to Common Position 2001/931 and that that person has actively sup-
ported the armed struggle waged by that organisation does not automati-
cally constitute a serious reason for considering that that person has com-
mitted ‘a serious non-political crime’ or ‘acts contrary to the purposes and
principles of the United Nations’;

the finding, in such a context, that there are serious reasons for consider-
ing that a person has committed such a crime or has been guilty of such
acts is conditional on an assessment on a case-by-case basis of the specific
facts, with a view to determining whether the acts committed by the or-
ganisation concerned meet the conditions laid down in those provisions
and whether individual responsibility for carrying out those acts can be
attributed to the person concerned [...].566

In analysing the outline of reasoning by scholars and case laws, one can observe
that mere ‘membership’ of a terrorist-group or organisation has initially not been
considered enough to justify exclusion from refugee protection. If this were pos-
sible, the procedural safeguards, such as performing a case-by-case assessment,
and examining the asylum seeker’s own individual responsibility of the terrorist
crime, would be entirely absent. This outcome would be problematic as the case-
by-case framework and investigating the individual’s participation and responsi-
bility of the crime are critical elements of the exclusion process. Further, plainly

565 Bundesrepublik (CJEU 2010), para. 97.
566 Bundesrepublik (CJEU 2010), para. 99; See, further, Gilbert, Geoff, ‘Current Issues in the Application of the
Exclusion Clauses’, p. 450, in: Türk, Nicholson, and Feller, Refugee Protection in International Law — UNHCR’s
Commentary, 2011; Li, 2017, p. 274; Gilbert, Geoff, ‘Terrorism and international refugee law’, p. 433 in: Saul,
acknowledging ‘the mere membership’ doctrine as a sufficient standard for exclusion would be questionable as a doctrine standing in alignment with the object and purpose of the exclusion provision and the Refugee Convention. A statement from the UNHCR strengthens the position I argue for:

The assessment must include a careful review of all specific circumstances of the case. In other words, the activities of an individual in supporting an organization designated to be a terrorist organization do not lead to exclusion merely because of the label ‘terrorism,’ but only if the particular crimes in question constitute excludable acts falling within the scope of [the exclusion provision], for which the person concerned carries individual responsibility.567

Given this, even if host states are at their own discretion to enforce terrorism legislation – in the context of exclusion from refugee protection – the matter of the individual’s personal role and participation must be related to the particular crime,568 even if this concerns membership of a terrorist group. Thus, the criteria established by the CJEU to consider when examining an exclusion case based on association with a terrorist group include assessment of the asylum seeker’s personal contribution and involvement in the act.569 Additionally, though this thesis


568 Sweden is one of several jurisdictions that recently adopted an amendment, in this case in the Swedish Terrorist Offence Act SFS: 2022:666 (adopted 2 June 2022) including a paragraph (4 a §) criminalising association with a terrorist group. However, the amended provision has been criticised by several scholars, policymakers and practitioners. Even if the recent adopted provision demands actual participation in a terrorist group in order to justify criminalisation of a terrorist act, the critique points at the broad and ambiguous scope of the term ‘participation’. The issue rests upon the concern that everything from assisting a terrorist group by nursing their members’ children to offering support with facilities or finance could be considered a terrorist crime; See for instance, https://www.svd.se/s/08eVM3/lagforslaget-om-deltagande-i-terrororganisation-ar-diupt-problematiskt-skriver-debattorerna; https://www.dagensjuridik.se/debatt/ger-verkliga-lagen-det-som-erdogan-vill-av-sverige/https://www.svt.se/nyheter/utrikes/rattsexperten-om-nva-terrorlagen-definitionen-inte-helt-fastsstald[http://pablerge.blogspot.com/2023/06/deltagande-i-terroristorganisation.html?rm=1 [last accessed 16 October 2023].

569 Interestingly, the Swedish Migration Supreme Court refers to equivalent criteria in MIG 2019:11, a citizenship case on the issue of whether an applicant had or was about to practise ‘an honourable way of living’ in Sweden. The Supreme Migration Court also discussed the need of considering if the individual’s involvement in a violent organisation was during adulthood or if the person was a minor. Further, it considered whether there were any threats forcing the person to associate with the organisation. Another criterion emphasised as highly important was whether the person could constitute a security threat in Sweden. Even if this case dealt with a citizenship matter, not an exclusion matter, it is interesting to address how criteria relevant to apply in an exclusion process are already used in the context of other national migration cases.; See also, ECtHR, Internationale Humanitäre Hilfsorganisation e. V. v. Germany, Application No. 11214/19, Judgment, 10 October 2023, a case concerning a decision of the German authorities on the issue of dissolving and seizing the assets of the charitable society called Internationale Humanitäre Hilfsorganisation e. V due to its addressed donations to
does not examine the issue of defining the concept of terrorism or a terrorist group, there is reason to highlight the concern of applying an overly broad definition of a terrorist group. Adopting a certain, clear and efficient definition of a terrorist group when investigating an asylum seeker’s own personal participation within a group could arguably be a way to maintain a restrictive application of the exclusion clauses related to the ‘mere membership doctrine’. Ultimately, the aspect of ‘association with a terrorist group’ and the commission of a criminal act should still have a ‘high degree of seriousness’ in order to meet the evidentiary standard of ‘serious reasons for considering’ and justify an exclusion decision.

3.4.1.2 An Alternative Approach
In the *Lounani* case, the CJEU considered the question of whether a person claiming to be a refugee, who was giving assistance to alleged terrorists, could be guilty of acts contrary to the purposes and principles of the United Nations under Article 12(2)(c) of the Qualification Directive. As a short background, in this case, the person concerned was convicted by the Criminal Court in Brussels of participation in the activities of a terrorist group called the Moroccan Islamic Combatant Group (‘the MICG’). Mr. Lounani had not himself committed the terrorist crimes, but had provided support to the terrorist group. This was done by offering logistical and material support and resources, contributing in forgery of passports and networking for sending volunteers to Iraq. Following conviction in Belgium, dated 16 February 2006, the applicant applied for refugee status and claiming a need of refugee protection from the Belgian authorities due to the fear of facing persecution upon his return, as he would most likely be treated by Hamas – a group listed as a terrorist organisation within the EU. Worth to highlight, the ECtHR did not find the question of whether the plaintiff was a member of the organisation as relevant in the process of deciding whether an association to a terrorist crime had occurred. Instead, the central aspect was the persons own contribution – as in the conducted act. Therefore, from the perspective of the Court, if the factual circumstances show that the plaintiff has provided donations to a terrorist group – the critical elements to examine is the actual support; in this case, the substantial funding given to the organisation, and the terrorist nature of the organisation (the recipient); See also related blogposts about the case, Virgili, Tommaso, ‘Internationale Humanitäre Hilfsorganisation v. Germany: An Organisation Supporting the Terrorist Entity Hamas Does Not Enjoy Protection under the ECHR’. 19 of January 2024, link to the blogpost: https://strasbourgobservers.com/2024/01/19/internationale-humanitare-hilfsorganisation-v-germany-an-organisation-supporting-the-terrorist-entity-hamas-does-not-enjoy-protection-under-the-echr/ [last accessed 15 February 2024].

570 For instance, a definition of a terrorist group worth highlighting for inspiration is the formulation used in the EU Directive on Combating Terrorism – EU Framework Decision – in Article 2(3), stating that “terrorist group” means a structured group of more than two persons, established for a period of time and acting in concert to commit terrorist offences; “structured group” means a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.

571 *Lounani* (CJEU 2017).

the Moroccan authorities as a radical Islamist and jihadist. The question to examine in the refugee assessment procedure was whether the applicant’s association and engagement in the activities conducted by the MICG could exclude him from refugee protection.573

Interestingly, as mentioned above in connection to the discussion that ‘acts contrary to the purposes and principles of the United Nations’ are usually committed by actors in a position of power in a state or state-like entity,574 the CJEU held, in this particular case, another straightforward approach on the personal scope – declaring that ‘financing, planning and inciting’ terrorism is established grounds for exclusion, even for those who do not have a position of power, and can be assessed under the Article 1F(c) clause. The Court clarified that it was also relevant that the group was listed as a terrorist organisation by the UN Security Council and that the person had been convicted of terrorist offences in another jurisdiction.575 ‘This strengthened the argument for believing that there were ‘serious reasons for considering’ that the applicant had committed offences, even if he had not instigated or participated in a terrorist act.576

In the Lounani case, the Court appears to adopt a slightly different reasoning on the legal question compared to one presented in the B and D case, where the Court stressed that supporting the armed struggle of a terrorist organisation would not automatically result in exclusion from humanitarian protection. However, in the Lounani case, the level of support associated with the terrorist organisation was sufficient to exclude under the clauses. Thus, the reading of the Lounani case indicates that applicants linked to terrorist organisations may potentially...
be excluded ‘even if it is not established that they committed, attempted, or threatened to commit, a terrorist act’.\textsuperscript{577}

In contrast, to maintain the humanitarian objectives pursued within the framework of the refugee instruments and the objectives of the exclusion provision – the factual circumstances of the case must emphasise the existing link of ‘association’ between the applicant’s own contribution and the terrorist crime. As rightfully highlighted by the UNHCR, it is essential to bear in mind that:

Although acts commonly considered to be terrorist in nature are likely to fall within the exclusion clauses, Article 1F is not to be equated with a simple anti-terrorism provision. The fact that an individual may be on a list of terrorist suspects or be a member of an organization designated as terrorist should not suggest an automatic application of the exclusion clauses. It may nevertheless trigger consideration of the applicability of the exclusion clauses, and in some instances, depending on the organization and circumstances, individual responsibility for excludable acts may arise. \textit{However, it will not in itself constitute sufficient evidence to justify exclusion}.\textsuperscript{578}

Moreover, to ensure that the principles of procedural fairness are not ignored just because a person has a mere association with a terrorist organisation, we need to recall that:

[...] the 1951 Refugee Convention provides adequate mechanisms for the exclusion of persons who have engaged in terrorist crimes: the Article 1F exclusion clause will apply. There is no need for a State to violate its international obligations and to deny procedural fairness by preventing such persons from applying – the usual Convention decision making process will be sufficient to deal with such persons.\textsuperscript{579}

3.5 Concluding Remarks

It is usually said that we have had two distinct worlds: one pre-9/11, one post-9/11. The post-9/11 world, with binding Security Council resolutions, international guidelines and annual global terrorism reports, has had a huge impact on the interest to combat what is considered one of the biggest threats in said world:

\textsuperscript{577} McAdam, Goodwin-Gill, and Dunlop, 2021, p. 197; \textit{Lounani} (CJEU 2017), paras 54, 70.

\textsuperscript{578} UNHCR, ‘Statement on Article 1F of the 1951 Refugee Convention’, 2009, pp. 7–8 (emphasis added); See also UNHCR, Guidelines on International Protection No. 5, para. 26, reiterating the similar position.

\textsuperscript{579} Bliss, 2000, pp. 113, 126–27; It is worth remembering that Article 1F recognises the benefit of the doubt and the presumption of innocence principle, see UNHCR Handbook, paras. 203–204; Gilbert, Geoff, ‘Terrorism and international refugee law’, p. 433, in: Saul, \textit{Research Handbook on International Law and Terrorism}, 2020. More about the procedural principles, such as ‘benefit of the doubt’ and ‘presumption of innocence’ in the context of exclusion from refugee protection, see Chapter 5.
terrorism. Today, international refugee law should be discussed in the context that terrorist violence is a key driver in forcing people to become refugees. One serious destruction triggers the next serious event, forcing people to flee their home country out of well-founded fear of persecution.580

The link between the concepts of ‘refugee’ and ‘terrorism’ has been acknowledged in several international instruments, with the UN Security Council Resolutions being the most recognised. The attitude publicly presented by the Security Council was to oblige states to adopt the measures necessary to restrict terrorists from gaining access to safe havens abroad. The most surprising and, hereto forth, vague aspect is that the UN Security Council links international terrorism to refugees when none of the accountable perpetrators at the time was in fact a refugee.581 Whether or not it was a presumed concern that terrorists would start taking advantage of their victims’ need to find place of safety abroad has remained unsaid. The apparent outcome of associating ‘refugees’ and ‘terrorism’ has been remarkable costs in how refugees are perceived by the public and the international community at large.

Through the benefits and privileges that emerge from the concept of sovereignty, states are provided the discretion to control their own borders. They also have authority over determining who is perceived as the deserving refugee able to enjoy refugee protection. Here, the exclusion provision has an important purpose. However, a general concern is that connecting terrorism with Article 1F could further exacerbate the existing issues of the exclusion provision. The absence of a universal definition of terrorism, unfortunately increases the risk of creating more incoherency and ambiguity concerning the interpretation and assessment of Article 1F. Adding a non-universal concept of terrorism that threatens the international peace and security requires that any investigation of the exclusion provision be approached with utmost caution. In respect to this, crimes that would put the exclusion provision in jeopardy or be insufficient to justify exclusion should be detached from the scope of the provision. Having said that, ‘mere membership’ of a terrorist organisation should not be sufficient for exclusion from refugee protection. The ‘true role’ of the individual in the crime when it was committed has to be settled. In particular, the position that the individual had, their knowledge and whether there may be any factual circumstances indicating threats which the person was subjected to, must be assessed to determine the ‘true role’ of the person in the crime.

580 Simeon, 2020, p. 378.
In conclusion, defeating terrorism cannot be achieved at the cost of infringing the principles aimed at protecting the refugee legal system from illegitimate assessments. Policies excluding safe havens from perpetrators committing terrorist crimes must continually be justified with respect to the rule of law, procedural fairness and legal certainty. Thus, states are obliged to ensure that their anti-terrorism measures are aligned with their obligations under international law. Overall, the same principles and purposes of the exclusion provision are applicable regardless of whether a terrorist crime or some other excludable crime triggers the provision.
This chapter focuses on the regime interaction between international refugee law and human rights law in matters concerning an exclusion decision. In this regard, the chapter captures several issues related to the consequences of an exclusion determination, such as the framework of available and non-available protection, additional procedural principles of balancing fear against crime, and the danger of perceiving human rights law as a safety net. This chapter describes both the human rights approach within the framework of exclusion and the importance of applying a critical perspective on the intersection between these two bodies of law. Thus, the interpretative techniques of systemic integration and evolutionary approach make up the foundation of the normative analysis presented in this chapter. Essentially, the chapter emphasises that one can identify a human rights approach in the understanding of Article 1F. However, applying human rights law as a supplementary body of law in exclusion cases does not mean that the serious consequences of Article 1F should be viewed as less important.

4.1 Introduction

In recent times, refugee law has gained a broader position in international law. While it was relatively isolated in the past, refugee law has developed to a regime linked to human rights law.

a ‘human rights treaty’, the structure and the substantial nature of the convention differ from those of other human rights treaties. For instance, the 1951 Refugee Convention is based upon the status of refugee, rather than on the rights of refugees. In other words, it defines the term ‘refugee’ – a legal status that the subject must hold to claim the rights enshrined in the Convention. Furthermore, the Convention does not frame the provisions as ‘refugee rights’ in terms such as ‘every refugee shall enjoy’ or ‘no refugee shall be denied’. The fundamental content of the Convention is instead the principle of non-refoulement, which protects a refugee from facing the risk of being returned to a country where he or she faces a serious threat to their life or freedom. Thus, the status as a refugee is critical to access the refugee rights in the Convention. This speaks clearly of the roots of the exclusion clauses, namely to function as the gatekeepers to the refugee legal system. As will be analysed further in this chapter, the result of an exclusion decision is the rejection of refugee status and refugee protection. However, as the asylum seeker in question might need protection due to reasons correlated with the Convention grounds, human rights instruments separate from the 1951 Refugee Convention may provide a substitute form of protection keeping the individual from harmful deportation.

Consequently, even though human rights can be a protective element hindering expulsion to a territory where an individual would face inhuman and degrading treatment such as torture, they cannot guarantee the ultimate protection to the individual who is left in a limbo situation – as someone who is, on the one hand, excluded from the rights within the refugee regime, while, on the other hand, being unreturnable due to the risk of facing torture or inhuman treatment in the country of origin. The human rights approach is rooted in multi-layered regimes, for example within the African, American and European regional systems. In addition, the norms enshrined in the CAT and the ICCPR can be perceived as representing a ‘global multi-layered regime’. While the analysis of this thesis will consider relevant norms in several human rights treaties, the discussions will largely focus on the human rights norms within the European Convention on Human Rights (ECHR). Although the ECtHR is only authorised to apply the ECHR, not the Refugee Convention, the need to comply with human rights norms in cases associated with refugee matters is possible through systemic integration. Thus, the impact of human rights as governed in the ECHR and applied by the ECtHR is not to replace the refugee system, but rather to step in when the rights in the framework of the international refugee system are no longer

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583 As well as regulating the rights of displaced persons and the obligation of states to protect them.
applicable. This also applies to the other international human rights treaties, such as the CAT, the ICCPR and the ICESCR.

In the following sections, the interactions between international refugee law and human rights law are discussed further in light of the consequences of Article 1F. This is followed by an analysis of complementary protection and how its effects in the exclusion context. The final parts of this chapter examine a debated issue – the balancing test. The analysis covers two aspects. First, I will discuss the issue of balancing the risk of persecution against the criminal act. The idea is to highlight the discussions of whether there can be reasons not to exclude an individual due to the level of fear of persecution. The second part of the analysis focuses on the balancing within the framework of human rights law. In this aspect, the issue concerns the balancing of the non-refoulement principle against criminal behaviour (or a national security interest).

4.2 Serious Consequences of Exclusion from Refugee Protection
The severe and critical consequences of the exclusion provision could be divided into several areas of negative outcomes. These implications underline why human rights law cannot be taken for granted as a safety net in exclusion cases, even if norms like Article 3 of the ECHR may prevent deportation. First, a central negative consequence of an exclusion decision concerns the deprivation of a broad range of rights. The asylum seeker becomes excluded from international refugee protection and all rights enshrined in the Refugee Convention, such as right to movement, access to court, labour and educational rights, access to travel documents and identity papers, and naturalisation, to mention a few. Furthermore, the categories of human rights the person can enjoy in general are also limited.

585 Hathaway, James C. (2nd ed.), The Rights of Refugees under International Law, Cambridge University Press, 2021, p. 295: ‘If a particular person is found not to be a Convention refugee, including on the basis of criminal or other exclusion under Art. 1F, no rights under the Refugee Convention accrue, and removal from the territory or the imposition of other restrictions is allowed.’ (emphasis added). In contrast, additional international or domestic standards may operate to prevent a deportation from the asylum state if the individual in question might be subject to torture or other inhuman treatment upon a return.

586 Refugee-specific rights within the category of judicial status, welfare, employment, naturalisation, etc., see Articles 3–34 of the Refugee Convention; For a scholarly analysis of the specific refugee rights, see McAdam, Jane, Michelle, and Costello, 2021, Part VI ‘Refugee Rights and Realities’.

In response to this, the human rights regime usually ‘steps in’ as a protective safeguard under the non-refoulement principle\(^{588}\) and ensures that decisions regarding deportation are aligned with standards emerging from the human rights framework.\(^{589}\) Thus, a central aspect to highlight is that the framework of human rights treaties does not necessarily contain all the rights of refugee-specific concern, even if many of the international human rights treaties may be critical and entered into force 3 September 1981; The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), entered into force 26 June 1987; The 1989 Convention on the Rights of the Child (CRC), entered into force 2 September 1990.

\(^{588}\) The protection of non-refoulement in international human rights law is integrated within several conventions, such as the ECHR (Art. 3: ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment’), the CAT (Art. 3.1: ‘No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture’), the ICCPR (Art. 7: ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation’), the 1969 American Convention on Human Rights (ACHR), entered into force 18 July 1978, (Art. 22.8: ‘In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions’) and the 1981 African Charter on Human and Peoples’ Rights (ACHPR), entered into force 21 October 1986, (Art. 5: ‘Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited’). It is an absolute norm. Therefore it is mandatory to protect the asylum seeker subject to exclusion from refugee status and refugee protection from being expelled to a state where the individual might face such treatments; See also Goodwin-Gill, Guy S., ‘The International Law of Refugee Protection’, p. 40, in: Sigona, Long, Loescher, and Fiddian-Qasmiyeh (eds), The Oxford Handbook of Refuge and Forced Migration Studies, 2014 – ‘Today, the principle of non-refoulement is not only the essential foundation for international refugee law, but also an integral part of human rights protection, implicit in the subject matter of many such rights, and a rule of customary international law.’

\(^{589}\) Gilbert, Geoff and Bentajou, Magdalena Anna, ‘Exclusion’, pp. 723–724, in: McAdam, Foster, and Costello, Cathryn, The Oxford Handbook of International Refugee Law, 2021; McAdam, Jane, ‘Complementary protection’ p. 675, in McAdam, Foster, and Costello, The Oxford Handbook of International Refugee Law, 2021; Dawody Nylén, Hevi, ‘International Crimes and Exclusion from Asylum in a Swedish Context’, p. 388, in: Lundstedt, Lydia (ed.), Investigation and Prosecution in Scandinavia of International Crimes, Scandinavian Studies in Law (volume 66) 385, 2020; Commission of the European Communities, ‘Commission Working Document: The relationship between safeguarding internal security and complying with international protection obligations and instruments’, Brussels, COM (2001) 743 final, 5 December 2001, para 2.4: ‘The question that remains unresolved – and which falls outside the scope of refugee/international protection law – relates to the status that must be accorded to persons who disqualify for refugee status or other forms of international protection, who cannot be successfully prosecuted, and yet who cannot be expelled because of the absolute nature of the prohibition of refoulement as laid down in some international and regional human rights instruments. There are no international legal instruments, which regulate the status and rights of persons who are excluded from any protection status but cannot be expelled because of legal obstacles’. (emphasis added); Related to this, the ECtHR has in previous jurisprudence declared that there is a prohibition against invoking diplomatic assurance to justify a decision of deportation if it would constitute a violation of the non-refoulement principle. See, for instance, ECtHR, Saadi v Italy, Application No. 37201/06, Judgment, 28 February 2008; See also, Othman (aka Abu Qatada) v Secretary of State for the Home Department [2007] UKSIAC 15/2005, paras. 252, 276, 292, 490; In addition, other human rights could also be enshrined, such as right to family life, the right to liberty, right to fair trial, freedom of expression, and freedom from expulsion for aliens.
valuable in the context of exclusion decisions. Taking the ICCPR as an example, it is arguable an important source of rights for refugees as it contains rights-specific matters that cannot be found in the refugee instruments (e.g., right to life and family, freedom of opinion and expression, protection from torture and inhuman, degrading treatment and slavery). However, from a critical point of view, the ICCPR does not contain certain valuable rights and concerns related to the refugee, such as personal status, naturalisation, immunity from penalisation for illegal entry, and the need for identity documents. In other words, the human rights framework is not entirely sufficient to meet all the needs of either the refugee or the excluded asylum seeker.

Furthermore, the situation for the excluded person is not necessarily equivalent in all jurisdictions. It is essential to bear in mind that some jurisdictions offer a welfare system that provides the excluded with rights that reach the minimum level of a decent living standard, or even slightly above this. Other jurisdictions constrain most basic rights and place excluded refugees in detention facilities, waiting for deportation to take place. Therefore, an excluded asylum seeker cannot expect to enjoy the broader spectrum of political, social, economic or cultural rights. In general, rights related to medical care, education, work, social assistance or family reunification are far from the excluded asylum seeker. Often, the excluded person is limited from both accessing the host state’s welfare system and being reunited with his or her family. Likewise, regardless of how long an excluded person awaits deportation, the opportunity to be eligible to apply for a residence permit will not arise. Thus, several factors necessary for building a future are absent for the person subject to the exclusion clauses. Constraining the possibility to benefit from the welfare system or enjoy a broader category of rights places the excluded person in one of two parallel worlds. In one world, the excluded person is protected from facing persecution upon deportation. In the other, the person is excluded from the protection and rights provided within the

590 The ICCPR also contains a limitation in scope of application, as the rights usually relate to persons who reside in their state of citizenship, see Hathaway, 2021, p. 88.

591 See Hathaway’s interesting analysis of the interplay between international refugee law and human rights law, criticising that neither the refugee or human rights regime is completely equipped to meet all the needs of importance to a refugee, Hathaway, 2021, pp. 88–102; Even if it is acknowledged that human rights articulate a framework of protecting migrants, there are still elements that cannot equip the human rights regime to cover all matters of protection. See Chetail, illustrating this further by stating that ‘[a] non-citizen must be lawfully within the territory of a state in order to benefit within that territory from the right to liberty of movement and freedom to choose his/her residence. But, even when lawfully within the territory, he or she may still be deported from that territory as long as some basic conditions and procedural guarantees are fulfilled.’, Chetail, Vincent, ‘The Human Rights of Migrants in General International Law: From Minimum Standards to Fundamental Rights’, 28 Georgetown Immigration Law Journal 225, 2013, p. 245.

592 Rikhof, Joseph, Exclusion and Refoulement: Criminality in International and Domestic Refugee Law, Irwin Law Inc., 2023, p. 697: ‘The [United Nations Human Rights Committee and United Nations Committee against Torture] have specifically indicated that a person who has been found excluded for 1F reasons is still entitled to a human rights refoulement assessment’.
pillars of the host state’s welfare system. Therefore, the exclusion clauses must, as a fundamental rule, be interpreted restrictively, and applied with caution and only in exceptional cases. As rightfully stated by Rikhof – addressing a statement I equally agree with – ‘it is important not to lose sight of the overarching

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93 See also, Fitzpatrick, Joan, ‘The Post-Exclusion Phase: Extradition, Prosecution and Expulsion’, 12 International Journal of Refugee Law 272, 2000, p. 279; Bond, Jennifer, ‘Excluding Justice: The Dangerous Intersection between Refugee Claims, Criminal Law, and ‘Guilty’ Asylum Seekers’, 24 International Journal of Refugee Law 37, 2012, p. 56; Holvoet, Mathias, ‘Harmonizing Exclusion under the Refugee Convention by Reference to the Evidentiary Standards of International Criminal Law’, 12 Journal of International Criminal Justice 1039, 2014, pp. 1040–1041, straightforwardly illustrating the negative outcome of an exclusion decision: ‘He or she will probably be returned, potentially risking further persecution. If an asylum seeker cannot be expelled because of non-refoulement concerns, the individual’s liberty may be significantly constrained. Such individuals usually remain undocumented, are not entitled to be employed, have no access to insurance and have to depend on their social network and the underground labour market to survive. Finally, the asylum seekers may be criminally prosecuted by the state where he or she sought refuge or, alternatively, by a third state after extradition’; Li, 2017, p. 56; Rikhof, 2023, p. 706.

94 ‘The Michigan Guidelines on the Exclusion of International Criminals’, 35 Michigan Journal of International Law 3, 2013, p. 5, available at: https://repository.law.umich.edu/mjl/vol35/iss1/2 [last accessed 20 February 2024]; Kwakwa, Edward, ‘Article 1F(c): Acts Contrary to the Purposes and Principles of the United Nations’, 12 International Journal of Refugee Law 79, 2000, p. 82: ‘One of the key goals of international refugee law is to provide international protection to all who need it. In interpreting and applying the exclusion clauses, the primary consideration for decision-makers should be to ensure that everyone who deserves protection gets it. The secondary consideration should then be to ensure that those who do not deserve protection are excluded. An expansive application of international refugee law, and a correspondingly restrictive application of the exceptions to the application of international refugee law, will achieve this objective.’ (emphasis added); See also Saul, Ben, ‘Exclusion of Suspected Terrorists from Asylum: Trends in International and European Refugee Law’, No. 26, July 2004, IIS Discussion Paper, at p. 11, available at SSRN: https://ssrn.com/abstract=735265 or http://dx.doi.org/10.2139/ssrn.735265 last accessed 20 February 2024], criticising the term of ‘unworthy’ as being an outdated concept and that it is perhaps more accurate to consider a revision of the Refugee Convention to connect to the respect of human dignity. As stated by Saul, ‘[human rights are rights, not privileges, and cannot be taken away for bad behaviour’;

Again, even if international human rights law provides protection when the refugee framework is silent, this does not mean that human rights law functions as a ‘safety net’ allowing immigration authorities to apply the exclusion provision in a flexible and broad manner. In fact, it is dangerous to place too much trust in the notion of a ‘safety net’. Many of the human rights instruments were developed after the establishment of the Refugee Convention. During the adoption of the exclusion clauses, an inherent notion of applying a human rights ‘safety net’ was not even considered. Additionally, human rights law generally covers the protective element of not expelling a person to a territory where he or she would be subject to serious human rights violations. In this respect, states are obliged to respect and not violate the prohibition of torture as a jus cogens norm. On a
critical note, the contribution of human rights law thus focuses on protecting the individual from a limited amount of violation and covers only a limited number of rights.

In conclusion, though there is a catalogue of rights that a person can benefit from by virtue of being a human being, this does not extend to the favourable outcome of (also) falling under the humanitarian protection of the refugee regime. The excluded asylum seeker will still face a deportation decision. Therefore, arguing that human rights law would provide a comprehensive catalogue of rights to the excluded, to an extent where he or she would not experience any loss due to being excluded from refugee status and protection is simply incorrect. Having a strong belief in human rights law as the ultimate regime that steps in and restore all the costs of an exclusion decision is a dangerous development. The close interaction between international refugee law and human rights law is not supposed to be viewed to mean that an exclusion decision has no significance or should not be examined seriously. Instead, through the language of systemic integration and evolutionary interpretation, international human rights standards should function as a complementary regime influencing the interpretation, to understand the exclusion provision.

By no means should human rights law be used as a regime prevailing over the objectives of refugee law. The next section describes the concept of ‘complementary protection’ and how this is understood in light of the exclusion provision.

PARLIAMENT AND OF THE COUNCIL of 13 December 2011 on ‘standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for refugee protection, and for the content of the protection granted’, L337/9; See also Kälin, Walter, and Künzli, Jörg (2nd ed.), The Law of International Human Rights Protection, Oxford University Press, 2019, pp. 61–62; Rehman, Javiad (2nd ed.), International Human Rights Law, Pearson Education Limited, Longman, 2010, p. 26: ‘Although there is no specification as to what constitutes such a norm, fundamental rights such as the right of all people to self-determination, and the prohibition of slavery, genocide, torture and racial discrimination represent settled examples of jus cogens.’; Li, 2017, p. 57; Rikhof, 2023, p. 696; Provisions regulating peremptory norms (“jus cogens”), see Articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties (VCLT), entered into force 27 January 1980. These provisions are also recognised as customary international law and binding upon all States, see, e.g., Kälin, Künzli, 2019, pp. 61–62; Also stressed in Rehman, 2010, p. 26.

Inspiration for this position can be found in, for instance, Moreno-Lax, Violeta, ‘Systematising Systemic Integration: ‘War Refugees’, Regime Relations, and a Proposal for a Cumulative Approach to International Commitments’, 12 Journal of International Criminal Justice 907, 2014, pp. 907–929, analysing the regime interaction between international refugee law, human rights law and humanitarian law in the context of war and refugees. The crossroads of the three fields of law is studied through the angles of systematising their limits and purposes. The author presents a suggestion of a ‘cumulative approach’ to clarify their interplay justified by the language of Article 31 of the VCLT.
4.3 The ‘(Non)Complementary Protection’ in Exclusion Cases

The notion of ‘complementary’ involves relying upon a ‘complementary legal framework’ which goes beyond the scope of the instruments of international refugee law. In this context, relevant ‘complementary’ sources are international human rights treaties and other instruments supporting the humanitarian principle of providing protection. The element of ‘protection’ refers to the notion of ‘non-refoulement’. Thus, through the phenomenon of ‘complementary protection’, the bridge between international refugee and human rights law is clear.

As described by the Inter-American Court of Human Rights, ‘complementary protection’ should be understood as constituting ‘a normative development that is consistent with the principle of non-refoulement, by means of which States safeguard the rights of those who do not qualify as refugee[s] […] but who cannot be returned’. This would require states to put measures including ‘a number of administrative or legislative mechanisms […] in place for regularizing, on a variety of grounds, the stay of persons, including those who may not be eligible for refugee protection but who may be in need of international protection’.

Thus, the outcome of ‘complementary protection’ means that individuals who need international protection but are unable to qualify as refugees can attain a legal status providing them with a subsidiary form of protection based on the non-refoulement principle.

Borrowing the criteria specified by McAdam, complementary protection is usually granted in circumstances when the individual either:

1. ‘(a) has a well-founded fear of being persecuted that is not linked to one of the five Refugee Convention grounds,
   (b) is precluded from being granted refugee status owing to a domestic carve-out; or

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600 The concept of ‘complementary protection’ has been examined and presented in comprehensive scholarly work, see, for instance, McAdam, Jane, Complementary Protection in International Refugee Law, Oxford University Press, 2007.


603 UNHCR Executive Committee (ExCom) Conclusion No 103 (LVI), ‘The Provision of International Protection including through Complementary Forms of Protection’, A/AC.96/1021, 2005, preamble.

The concept of complementary protection becomes more complicated in cases concerning the applicability of Article 1F (and Article 33(2) of the Refugee Convention, for that matter). Strictly speaking, the notion of complementary protection falls outside the sphere of the exclusion provision as the individual is not provided a legal status. Nevertheless, in cases of exclusion from refugee protection, where the asylum seeker faces deportation, yet is subject to a well-founded fear of persecution, will gain protection under the non-refoulement principle in human rights law. In these circumstances, the non-refoulement principle hinders the deportation from taking place as there are obstacles to execution of the decision. However, this ‘form’ of protection is only at hand while there is a prohibition on returning the excluded asylum seeker to his/her home country. This solution has been criticised as a ‘fundamental system error’, as the excluded person faces a limbo situation of being unwanted, yet unreturnable. Therefore, the interaction between international refugee law and human rights law needs to be strengthened to provide a long-term resolution for unreturnable

605 McAdam, Jane, and Chong, Fiona, ‘Complementary Protection in Australia two Years on: An Emerging Human Rights Jurisprudence’, 42 Federal Law Review 441, 2014; See also case of AC (Syria) [2011] NZIPT 800035, at paras 70–80, where the Court in New Zealand declared that the level of harm ‘persecution’ encompasses an equivalent level of harm as inhuman and degrading treatment.


607 This also applies in regard to exclusion from subsidiary protection in the framework of the EU Qualification Directive.

608 This also applies to perpetrators allegedly guilty of heinous crimes – the interest to protect ‘national security’ would not prevail over the obligation to protect the individual’s most non-derogable rights, see ECtHR, Chahal v. The United Kingdom, Application No. 22414/93, Judgment, 15 November 1996; ECtHR, Saadi v Italy, Application No. 37201/06, Judgment, 28 February 2008.


610 For more scholarly analysis on the situation of ‘undesirable’ and ‘unreturnable’ that many excluded asylum seekers are facing, see, for instance, Singer, Sarah, ““Undesirable and Unreturnable” in the United Kingdom’, 36 Refugee Survey Quarterly 9, 2017, pp. 9–34; Langer, Máximo, and Eason, Mackenzie, ‘The Quiet Expansion of Universal Jurisdiction’, 30 European Journal of International Law 779, 2019, at p. 799 discussing the issue of ‘undesirable’ yet ‘unreturnable’ in a criminal law context, stating that many host states may face difficulties following principles and norms under extradition law. Langer and Eason conclude that “[i]n any of these situations in which an accused individual is considered not only “undesirable” but also “unreturnable”, state officials may have little choice but to pursue prosecution”; See Li, 2017, p. 58 n 221 referencing to interesting readings about the aspect of ‘undesirable but unreturnable’; Rikhof, 2023, presents alternatives to refoulement for the interest to provide solutions to the issue of many excluded person being stuck in the limbo of ‘undesirable’ yet ‘unreturnable’, see pp. 707–737.
asylum seekers. Like McAdam, I agree that a step closer to accomplish this could be taken by paying ‘attention to the role of non-refoulement with respect to rights other than the right to life and the prohibition on torture and other cruel, inhuman, or degrading treatment or punishment’.\footnote{McAdam, Jane, ‘Complementary Protection’, p. 677, in: McAdam, Foster, and Costello, The Oxford Handbook of International Law, 2021.}

The next section examines the human rights approach in exclusion cases from the aspect of the exclusion determination procedure. It also considers whether a balancing between a fear of persecution and a criminal act entails something of normative value to consider in an assessment.

4.4 Balancing the Fear of Persecution against the Exclusion Crime?

The balancing test in respect to Article 1F was suggested by some delegates in the drafting proceeding, additional scholars and the UNHCR to be included as a part of the decision-making process.\footnote{Bliss, 2000, pp. 108–109; Türk, Nicholson, and Feller, 2003, p. 481, para 12; McAdam, Jane, Goodwin-Gill, Guy S., and Dunlop, Emma (4th ed.), The Refugee in International Law, Oxford University Press, 2021, pp. 214–215.} The test involves balancing the aspects of ‘persecution or treatment an asylum seeker fears upon return’ against ‘the nature of the excludable crimes which he or she is presumed to have committed’.\footnote{Bliss, Michael, ‘Serious Reasons for Considering’: Minimum Standards of Procedural Fairness in the Application of the Article 1F Exclusion Clauses’, 12 International Journal of Refugee Law 92, 2000, p. 108.} Even if the position is not entirely clear on whether the exclusion provision require a balancing test\footnote{Hathaway, James C., and Foster, Michelle, The Law of Refugee Status, Cambridge University Press, 2014, p. 564.} – the overall intention of some drafters was to include a balancing test in the exclusion context. As stated in the drafting instruments: ‘When a person with a criminal record sought asylum as a refugee, it was for the country of refuge to strike balance between the offences committed by that person and the extent to which his [or her] fear of persecution was well-founded’.\footnote{Statement of the President, UN doc. A/CONF.2/SR.29, at 23 (1951) cited in Bliss, 2000, p. 108; However, the recent development show that the balancing test in exclusion cases is not widely supported in state practice; see, for instance, Gilbert, Geoff and Bentajou, Magdalena Anna, ‘Exclusion’, p. 722, in: McAdam, Foster, and Costello, The Oxford Handbook of International Law, 2021.}

The substantial value of the proportionality test is thus related to the interest to maintain the objectives of the refugee regime, and to underpin it as a procedural measure to protect human rights from arbitrary assessment based on the exclu-
sion provision. Balancing in the context of the exclusion provision has been debated and evaluated by experts,\textsuperscript{616} the UNHCR\textsuperscript{617} and legal scholars\textsuperscript{618} and is presented in several nation’s jurisprudence.\textsuperscript{619} Still, there is (thus far) no uniform and constant state practice or \textit{opinio juris} providing clarity on this subject matter. Thus, there is no customary international principle in support of either using or rejecting a balancing test in exclusion cases. Nor does a textual or contextual reading of Article 1F provide any guidance on this issue.\textsuperscript{620} Therefore, the debate about the proportionality test has created two opposing camps. On this note, the human rights approach has been applied in favour of both sides. The position inclined to use a balancing test views the human rights approach as tying into the interest to protect the humanitarian purpose of refugee law.\textsuperscript{621} This would be possible if the assessment contains a balancing test between the fear of persecution (‘the risk’ factor) and the serious nature of the crime (‘the criminality’ factor).

\begin{footnotesize}
\begin{enumerate}
\item[(616)] Discussions about the balancing test began during the Lisbon Expert Roundtable Meeting, see Türk, Nicholson, and Feller, 2003, p. 481, para 12; See also, EC, 96/196/JHA, Joint Position of 4 March 1996 defined by the Council on the basis of Article K.3 of the Treaty on European Union on the harmonized application of the definition of the term ‘refugee’ in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees, available at: EUR-Lex - 31996F0196 - EN - EUR-Lex (europa.eu) [last accessed 20 February 2014], at para. 13.2; ‘The severity of the expected persecution is to be weighed against the nature of the criminal offence of which the person concerned is suspected’.
\item[(617)] UNHCR Handbook, para 156; UNHCR, Guidelines on International Protection No. 5, para 24.
\item[(619)] See Hathaway and Foster, \textit{The Law of Refugee Status}, 2014, pp. 562–565 analysing different domestic cases examining the balancing test in relation to Article 1F(b), see, in particular, p. 563, n 243 with reference to the Swiss Federal authority standing in favour of including a balancing test, \textit{A v. Swiss Federal Office for Migration}, E2284/2007 [2011] Sw. BverWg, at para. 4.6; For examples of further state practice, mainly positioned against a balancing test, see; Mahof v Canada (Minister of Citizenship and Immigration) [1995] 1 FC 537; T v. Secretary of State for Home Department [1996] UKHL 8, AC 742; INS v Aguero-Aguero [1999] 526 US 415; Pushpanathan v Canada (Minister of Citizenship and Immigration) [1998] 1 SCR 982, at para 73: ‘Article 1F(b) contains a balancing mechanism in so far as the specific adjectives “serious” and “non-political” must be satisfied […];’ N.ABD of 2001 v. Minister for Immigration and Multicultural Affairs, [2002] FCAFC 326, at para 41: ‘there is no textual or contextual basis for reading into Art 1F(b) an additional requirement of a balancing test nor would such a requirement be justified on the basis that it is giving effect to a purpose or object of Art 1F(b) of the Refugee Convention’.
\end{enumerate}
\end{footnotesize}
For example, UNHCR has been one of the leading actors promoting the balancing test by arguing that it is ‘a useful analytical tool to ensure that the exclusion clauses are applied in a manner consistent with the overriding humanitarian object and purpose of the 1951 Convention’. Further: ‘[A]s with any exception to a human rights guarantee, the exclusion clauses must therefore be applied in a manner **proportionate to their objective**, so that the gravity of the offence in question is weighed against the consequences of exclusion’.

In line with this pathway of reasoning, Hathaway argues that:

> [T]he risks associated with exclusion from refugee status must not outweigh the harm that would be done by returning the applicant to face persecution or punishment [...] [T]he decision-maker needs to consider the facts of the claim. If the gravity of harm feared by the applicant outweighs the **significance of her criminal activity**, she [or he] is not appropriately excluded under this clause.

The opposing position instead refers to the endorsed international human rights obligations as a settled legal framework which would prohibit an expulsion to a harmful place from taking place. Further, this side argues that the excludable crimes have a high level of seriousness that is not exceeded by the reasons for refugee protection. This was demonstrated by the CJEU in the landmark **Bundesrepublik** case, where the Court, when interpreting ‘serious non-political crime’, stated that the exclusion clause:

> [I]s linked to the seriousness of the acts committed, which must be of such a degree that the person concerned cannot legitimately claim the protection attaching to refugee status [...] Since the competent authority has already, in its assessment of the seriousness of the acts committed by the person concerned and of that person’s individual responsibility, taken into account all the circumstances surrounding those acts and the situation of that person, it

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622 UNHCR, Guidelines on International Protection No. 5, para. 24 (emphasis added); Interestingly, see also how Li, although arguing in favour of a balancing test, underlined that ‘[a] proportionality criterion would imply what governments have a discretionary option of exclusion with less to the “seriousness” requirement. This is a possible practical danger that must be prevented, but does not per se argue against a balancing test. We merely have to ensure that in the first place, the compulsory seriousness criterion is considered; only then should balancing take place.’, Li, 2017, p. 183.


624 Interestingly, Hathaway seems to have change his position on the issue of the balancing test, see Hathaway, and Foster, 2014, p. 565.

cannot [...] be required, if it reaches the conclusion that Article 12(2) applies, to undertake an assessment of proportionality [...].\textsuperscript{626}

Highlighting some remarks, a general observation is that the proportionality test is usually linked to ‘serious non-political crime’.\textsuperscript{627} The exclusion clause of Article 1F(b) not only includes the terminology of ‘seriousness’, but is also the category in which the seriousness of the crime is determined in light of domestic criminal law. Overall, Article 1F(b) is a very different exclusion category than the other clauses. The determination of acts qualifying as ‘serious non-political crimes’ differs between domestic jurisdictions. Further, the terms ‘serious’ and ‘political’ are not coherently defined.\textsuperscript{628} In this regard, the idea of including a balancing test in relation to Article 1F(b) might be argued as reasonable.\textsuperscript{629} In support of scholars’ positions, the UNHCR confirms the existence of a balancing test in relation to Article 1F(b), emphasising that:

Cases of exclusion are often inherently complex, requiring and evaluation of the nature of the crime and the applicant’s role in it (including any mitigating factors) on the one hand and the gravity of the persecution feared on the other. An assessment of the case requires that these elements be weighed against one another (often referred to as the proportionality test).

\textsuperscript{626} CJEU: Joined Cases C-57/09 and C-101/09 Bundesrepublik Deutschland v B and D, Judgment, 9 November 2010, paras 108–109.

\textsuperscript{627} See for instance, Bliss, 2000, p. 111; Zimmermann, Andreas and Wennholz, Philipp, ‘Part Two General Provisions, Article 1 F (Definition of the Term ‘Refugee’/Définition du Terme ‘Réfugié’),’ para 108, in: Zimmermann, Andrea, Machts, Felix (Assistant), and Dörschner, Jonas (Assistant) (eds.), The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary, Oxford Commentaries on International Law, 2011; Hathaway and Foster, 2014, pp. 562–567; UNHCR, Handbook, paras 156–157: ‘If a person has well-founded fear of very severe persecution, e.g. persecution endangering his life or freedom, a crime must be very grave in order to exclude him. If the persecution feared is less serious, it will be necessary to have regard to the nature of the crime or crimes presumed to have been committed in order to establish whether the applicant is not in reality a fugitive from justice or whether his criminal character does not outweigh his character as a bona fide refugee’; UNHCR, Guidelines on International Protection No. 5, at § (i), para 9; See also Paul Weis’ comment in Weis, Paul, ‘The Concept of the Refugee in International Law’, 87 Journal du Droit International 928, 1960, pp. 984–986: ‘[i]t is [...] difficult to see why a person who before becoming a refugee, has been convicted of a serious crime and has served his sentence, should forever be debarred from refugee status. Such a rule would seem to run counter to the generally accepted principle of penal law that a person who has been punished for an offence should suffer no further prejudice on account of the office committed’.


\textsuperscript{629} See for example, Zimmermann and Wennholz, ‘Article 1F’, para 105, in: Zimmermann, Machts, and Dörschner, The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary, 2011: Considering as well that States have a certain discretion as to whether or not to qualify a common crime as serious, it is hard to conceive of any such individual decision taking place without due regard to overall proportionality under principles of due process. In many cases the assessment of the serious nature of a crime cannot take place without regard to the situation of persecution in the country of origin, for the latter might well have an impact on the former, e.g. in the ambit of mitigating circumstances.’ (emphasis added).
This can only be undertaken by officials familiar with the case and nature of the persecution feared by the applicant.\(^{630}\)

The interesting aspect is whether similar balancing tests exist in relation to the international crimes in clauses 1F(a) and (c).\(^ {631}\) For instance, the UNHCR has imposed the need to apply the proportionality test in relation to Article 1F(a) in cases concerning ‘less serious war crimes’. Though the wording of ‘less serious war crimes’ indicates a need to adopt a balancing test, the definition of a war crime does not contain references to ‘less serious war crimes’. Article 8 of the ICC Statute codifies war crimes as ‘grave breaches’ of the Convention and the Protocol, respectively, and ‘serious violations of [Article 3 as well as] serious violations of the laws and customs of war applicable in non-international armed conflicts’.\(^ {632}\) Therefore, applying the proportionality test in regard to Article 1F(a) would most likely be difficult to support.\(^ {633}\) Ultimately, as observed by Goodwin, McAdam and Dunlop:

\[
\text{[T]he crimes mentioned in article 1F(a) are necessarily extremely serious, to the extent that there is no room for any weighing of the severity of potential persecution against the gravity of the conduct which amounts to a war crime, a crime against peace, or a crime against humanity. Being integral to the refugee definition, if the exclusion applies, the claimant cannot be Convention refugee, whatever the other merits of his or her claim.}^{634}\]

On the other hand, there are some positions arguing that there is a need to assess the balancing test in relation to exclusion categories (a) and (c). The reason are said to be the definition of the international crimes in the ICC Statute and the

\(^{630}\) UNHCR, Handbook, para 156; UNHCR, Guidelines on International Protection No. 5, at § (ii), para 9.

\(^{631}\) Bliss, 2000, p. 109; See also McAdam, Goodwin-Gill, and Dunlop, 2021, p. 200 ‘Arguably also the crimes mentioned in article 1F(a) are necessarily extremely serious, to the extent that there is no room for any weighing of the severity of potential persecution against the gravity of the conduct which amounts to a war crime, a crime against peace, or a crime against humanity. Being integral to the refugee definition, if the exclusion applies, the claimant cannot be Convention refugee, whatever the other merits of his or her claim’. (emphasis added); Zimmermann and Wennholz, ‘Article 1F’, para 103, in: Zimmermann, Machts and Dörschner, The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary, 2011, stating in light of UNHCR, Guidelines on International Protection No. 5 para 24 that: ‘given the prima facie extreme gravity of crimes against peace, crimes against humanity, and acts falling under Article 1 F (e), such a test would normally not be required in this context, making room to have Art. 1 F (b) applied’.


\(^{633}\) Ibid.

\(^{634}\) McAdam, Goodwin-Gill, and Dunlop, 2021, p. 200 with reference to jurisprudence, Gonzales v Minister of Employment and Immigration [1994] 3 FC 646 (FCA); New Zealand, RSAA, Refugee Appeal No. 74796 [2006] (emphasis added).
broad inclusion of several criminal offences. Given the high level of seriousness of the international crimes, a balancing test would only be appropriate in cases 'where the asylum seeker is facing imminent and extremely severe persecution, such as execution or torture'. Nonetheless, including a balancing test to the international crimes mentioned in the exclusion clauses would be difficult. In line with the statement by Goodwin, McAdam and Dunlop – the nature of the international crimes already comprehends a high level of seriousness and leaves no space to question its gravity. For this reason, balancing the international crime committed by the applicant against the risk of persecution upon a return would most likely result in exclusion from refugee status. In other words, the serious nature of these international crimes builds a wall against the balancing test.

In order for the protective element of the international refugee system to be achieved and to do justice to the individual at risk of being subjected to Article 1F, I argue for the need to consider all relevant elements and circumstances of the case. This includes a balancing test, where it can be important. However, given the various positions for and against the proportionality test, I consider the arguments on both sides to hold a valid point, to a certain extent. Though I am inclined to include principles in support of maintaining a restrictive interpretation of the exclusion provision, to protect the humanitarian objectives of the Refugee Convention – there are reasonable arguments regarding why the proportionality test is concerning. A critical aspect, borrowing the reasoning from Hathaway and Foster, is that the outcome of applying the principle could lead to ‘analytic confusion’ and ‘potential unfairness’. Most prominently, it may impact the interpretation of refugee status and create different categories of refugees depending on the level of persecution they fear. Additionally, it may cause more uncertainty in an exclusion proceeding as the predictability in knowing what sort of crimes that qualify for exclusion diminishes. This highlights why the balancing test in exclusion cases may be described as problematic.

These reflections about the balancing test raise several critical questions. For instance, how can the seriousness of a crime stand in balance with the level of fear of facing persecution upon a deportation? What are the parameters to consider

635 Bliss, 2000, p. 110.
636 Ibid.
637 Ibid.
638 McAdam, Goodwin-Gill, and Dunlop, 2021, p. 217, see also p. 219, highlighting that: ‘It will be right and proper and consistent with the object and purpose of the Convention to deny refugee status to those at the far end of the spectrum, who have persecuted others or committed crimes against humanity; the risk is, however, that so much emphasis on the exception will distort a properly evaluative assessment of all the circumstances and mark a step too far from the goal of protection’.
and to what extent would the balancing test actually safeguard the proceedings of the exclusion cases? To answer the most valid concerns – the general consensus is that there is a possibility to carry out a proportionality test when assessing the exclusion provision. The keyword here is ‘possibility’. In other words, there is no recognised obligation to combine the assessment of the exclusion provision with a balancing test. Due to the absent requirement of a principled balancing test in relation to Article 1F, some domestic legal systems approach an inconsistency. To illustrate, in the case of Aguirre-Aguirre v. INS, the Court of Appeal mentioned the substantial effect of the balancing test and required that such an assessment in principle must be enforced in relation to the exclusion provision. On the other hand, the Supreme Court dissented to this position and rejected the requirement of assessing the exclusion provision in light of the proportionality test. Simply put, the domestic assessment procedures of the exclusion provision differ, with some host states acknowledging the need to assess the proportionality test in exclusion cases, while others do not. Also, even if criminal offences and persecution are two distinct concepts these two elements are inevitably associated in the scope of exclusion from refugee protection. This is another element that shapes the uniqueness of Article 1F.

Though certain positions argue in favour of a balancing test (and the majority argue against it) – a common position is that the balancing test should not be considered if an asylum seeker has committed heinous crimes. Terrorist crime is, indeed, defined along those lines. Further, terrorist offences have been defined as acts contrary to the purposes and principles of the United Nations. This suggests a high level of seriousness that threatens the international peace and security. Because of the heinous character of the crime and the level of destruction against democratic values, it could be argued that the risk of persecution cannot exceed the level of criminal act and harm the terrorist offence causes. Due to the challenges identified with the balancing test, using this principle in exclusion cases associated with terrorist crimes could, as I perceive it, only result in more unfairness and uncertainty. The proportionality test may not necessarily hold the idea of protecting the restrictive approach of Article 1F in relation to terrorist crimes. Rather, in every exclusion case when terrorism is involved, the balancing approach may be utilised to argue for exclusion, emphasising that crimes causing a threat to national security will prevail over the individual’s fear of persecution.

This describes the potential outcome in the context of exclusion based on terrorism. The situation would be different in the field of human rights law – with the non-refoulement as the critical principle. This matter is discussed further in the section below.

4.5 A Different Human Rights Approach when Excluding Terrorists from Refugee Protection?

The fact that the 1951 Refugee Convention is a living instrument and the evolution in recognising terrorism within Article 1F perhaps echoes what the House of Lords in the Suresh case once stated:

International conventions must be interpreted in the light of current conditions. It may once have made sense to suggest that terrorism in one country did not necessarily implicate other countries. But after the year 2001, that approach is no longer valid.641

Exclusion from universal refugee protection related to terrorism increased markedly after 9/11. The exclusion provision was also applied as a component in the counter-terrorism movement. In contrast, the balance of interest between providing humanitarian protection and protecting the national security of the host state is enshrined within the framework of the Refugee Convention.642 Therefore, transferring the interest of ‘protecting national security’ into the language of exclusion from refugee protection is perhaps not an issue. However, what must be reiterated is that the central objectives of Article 1F are not to serve and protect the national security of the asylum country. The purpose behind the provision is to identify the undeserving refugee. In the process of doing this, the interesting question to discuss is if the expanded interest of excluding terrorists from enjoying refugee international protection leads to a distinct evolutionary approach in relation to the human rights standards – in particular the non-refoulement principle.643 In other words, do exclusion cases based on terrorist crimes create a demand for a balancing test or an exception rule against a balancing test? Does national security interest prevail over the interest of protection in cases where terrorism triggers the exclusion provision?

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642 NBMZ v. Minister for Immigration and Border Protection, [2014] FCAFC 38, para. 21: ‘Article 33(2) and the circumstances within it reflect the balance contained within the [Refugee Convention] between protection of those who need it, and the legitimate entitlement of Contracting States not to be required to give protection to those who pose a danger to the host State and its people’. Observe that the matter of balancing interests is mentioned in light of Article 33(2), the exceptional rule against the non-refoulement principle, not in relation to Article 1F; See, further, Hathaway, 2021, pp. 402–403.
643 For a scholarly analysis on the non-refoulement principle in relation to serious criminal activity under the exclusion provision from the angles of examining international jurisprudence (decided by ECtHR, UN HRC, UN CAT, and IACtHR) and national jurisprudence, see Rikhof, 2023, pp. 648–705.
There is currently no established state practice or binding instrument confirming where it is required to apply a balancing test in an exclusion proceeding. As mentioned above, there are various debates and arguments for or against the proportionality test. In the field of human rights law, the ECtHR has clearly rejected the balancing test within Article 3 of ECHR.644 This is interesting to discuss further in relation to exclusion cases based on terrorist offences (which trigger the interest of protecting national security). Additionally, this highlights how the ECtHR’s reasoning has had an evolutionary contribution in the field of refugee law through the non-refoulement principle.645

For clarity, it should be stated that the ECtHR has no judicial authority to interpret the refugee status provision or any of the norms contained in the Refugee Convention or the Protocol. However, the Court is an authoritative judicial body in cases concerning expulsion of an alien when it triggers states’ obligations under relevant provisions of the ECHR (e.g., Articles 2 and 3).646

Returning to the issues addressed above – would the non-refoulement principle in human rights law be interpreted differently in exclusion cases based on terrorist crimes? In analysing some recent cases from the ECtHR, such as the cases of X v. Sweden (2018),647 K.I. v. France (2021)648 and R v. France and W v. France (2022),649 some interesting observations are worth highlighting. First, all cases mentioned national security issues that raised the question of revocation of refugee status. The applicants in all cases were perceived as terrorists by the domestic immigration or criminal authorities, and accused of participating in terrorist activities or terrorist organisations. Interestingly, all applicants had refugee status and had not been subject to the exclusion provision. Even if the matter was not about exclusion, the element of expulsion and revocation of refugee status based on claims that an individual is a terrorist becomes significant in the overall analysis in this thesis on how to approach the non-refoulement principle. This would also impact

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644 A landmark case established this position is ECtHR, Chahal v. The United Kingdom, Application No. 22414/93, Judgment, 15 November 1996.
646 This has been highlighted in several landmark cases of the ECtHR. See, for instance, ECtHR, F.G. v. Sweden, Application No. 43611/11, Judgment, 23 March 2016, paras. 110–111 and 117; ECtHR, Safi and Elmi v. the United Kingdom, Application No. 8319/07 and 11449/07, Judgment, 28 November 2011, paras. 212 and 226.
the balancing test between protection, on the one hand, and national security, on the other.650

The conclusion that can be drawn from all the mentioned cases is that the statement once included in the landmark case of Chahal v. United Kingdom651 seems to remain relevant. Though the issue concerned refugees accused of being terrorists, the Court underlined that the non-refoulement principle under Article 3 is absolute.652 The norm allows no space to ‘weigh the risk of ill-treatment against the reasons put forward for the expulsion’.653 Thus, regardless of a state’s margin of appreciation on rulings of deportation concerning non-nationals posing a threat to the state – deportation will be a violation of Article 3 in any circumstances when there is substantial ground to believe that the non-national will be subject to inhuman treatment. The Court also emphasised that the non-refoulement principle prevails over the national security interest, even in cases where the non-national has a link to a terrorist organisation.654 What a ‘link to a terrorist organisation’ means is difficult to unpack. However, it can certainly have a broad meaning and encompass a membership with a terrorist organisation. Thus, cases where the individual has a link to a terrorist group falls under the umbrella of the human rights non-refoulement principle. Exclusion matters where the applicant is a member of or engages with a terrorist group should have the same normative outcome. In other words, neglecting the human rights approach and the absolute norm of the non-refoulement principle is not justifiable based on membership with a terrorist organisation.

4.6 Concluding Remarks
Asylum seekers who are subject to the exclusion provision, but still per se meet the criteria of the refugee definition, are inevitably placed in a limbo situation as undesirable yet unreturnable. This illustrates the contradiction inherent to the 1951 Refugee Convention. It aims to guarantee protection to all those who flee

650 These cases also highlight the importance of conducting an ‘inclusion before exclusion’ proceeding, as it contributes with valuable facts in relation to the non-refoulement principle under human rights law.
651 ECtHR, Chahal v. The United Kingdom.
652 Interestingly, see a recent Swedish criminal case, Swedish Criminal District Court, B 1069-23, Judgment 6 July 2023, where the Court convicted a person who had fled due to fear of persecution in Turkey, for terrorist crime, with deportation sentencing due to his involvement with the PKK movement and other criminal offences committed. Because of the factual circumstances addressed in his asylum case, the Migration Agency pointed out the obstacles to executing the deportation and the absolute character of Article 3 ECHR (implemented in the Swedish Alien Act, Chapter 12 Section 1); Further on the absolute nature of the right to be protected from torture and degrading treatment, see, for instance, UN Human Rights Committee, ‘Consideration of Reports: Concluding Observations on Canada’, UN doc CCPR/C/79/Add.105 (7 April 1999), para. 13: ‘[t]he Committee is concerned that Canada takes the position that compelling security interests may be invoked to justify the removal of aliens to countries where they may face a substantial risk of torture or cruel, inhuman or degrading treatment’ (emphasis added); Tapia Paz v Sweden, UN doc CAT/C/18/D/39/1996 (28 April 1997) para 14.5.
653 See ECtHR, X v. Sweden case, paras. 46 and 55.
654 See in particular ECtHR, K.I. v France case, para. 119.
persecution, including fugitive criminals, but also to guarantee protection only for the limited number of persons who deserve refugee status and protection. Thus, exclusion from refugee protection means that a person *ipso facto* falls outside the normative framework of both the Refugee Convention, the Protocol and the mandate of the UNHCR. This means that the host state has no obligation to let the excluded person remain within its territory and take advantage of the welfare system provided by the state, as the Refugee Convention is not applicable. Further, this also means that the individual cannot find protection under the *non-refoulement* principle pursuant to Article 33(1) of the Refugee Convention. Thus, Article 1F has many negative consequences for the individual who has been excluded from refugee protection. On the one hand, the individual is protected from being deported to a place where he or she would be subjected to persecution. On the other hand, the individual will remain in the host state, which has no duty to consider the positive rights of the Refugee Convention. Likewise, the excluded person may be treated as a serious criminal within the asylum state. Thus, the consequences of the exclusion provision are severe and have serious repercussion to the individual concerned, who is denied a wide range of social, economic, cultural, civil and political rights.

Nonetheless, there is an apparent protective element from international human rights law within exclusion cases. These rights protect the excluded person from being deported to a territory where he or she would face inhuman treatment or torture. This is a positive outcome of the interaction between the bodies of law. However, from a critical perspective, the absolute obligation of the *non-refoulement* principle under human rights law also creates the limbo situation that the excluded asylum seeker encounters. This is not to say that we should disregard or diminish the importance of the *non-refoulement* principle and the protection it provides to the individual who falls outside the refugee regime. However, we should be aware of the other side of that coin and underline how the complementary input of international human rights law cannot be seen as a wide safety net. In fact, the norms under human rights law only protect the excluded person from being expelled to a country where he or she would face serious human rights violations. Other forms of human rights protection cannot be guaranteed. It is always more beneficial to be recognised as a refugee in the refugee legal system than to be an undeserving refugee enjoying only protection from deportation to dangerous territories. Exclusion from refugee protection is far more damaging than having limited basic rights under international human rights law. The critical issues of an exclusion decision are still severe and cannot be sufficiently and easily resolved by applying the *non-refoulement* principle under human rights law.

A common principle usually addressed in the framework of exclusion is the proportionality principle. Interestingly, the balancing test in the exclusion assessment could be applied from either perspective. It could be an assessment measure to guarantee that the interpretation of the exclusion clauses is restrictive, given the
interest to maintain the protection-oriented approach. It could also create ambiguity within the refugee status determination with differentiation based on ‘the level’ of persecution. As observed in the analysis, the question of balancing between an exclusion crime and fear of persecution has been debated, with no settled consensus. As some actors argue for use of a balancing test and others against it, the conclusion one can make is that there is no recognised obligation to conduct a balancing test in Article 1F. In exclusion cases related to heinous crimes causing harmful consequences, the fear of persecution will not exceed the seriousness of the crimes. Thus, despite the observed support for using a balancing test for ‘serious non-political crimes’, the proportionality test is likely to be rejected when exclusion cases involve terrorist crimes. There is no offence of this type that would allow the asylum seeker to be granted refugee protection. However, the outcome of the balancing test in the field of refugee law is different from that of the balancing test in human rights law. In light of the language in human rights law and the absolute nature of the non-refoulement principle, there is a) no support to pursue a balancing test, and b) the interest to protect national security cannot prevail over the right to be protected from torture, degrading or inhuman treatment or punishment. Thus, even in cases concerning exclusion based on terrorist offences, the human rights approach is present and ensures that rights of absolute character are not violated.
PART III: THE ANALYSIS OF THE EXCLUSION AND CRIMINAL EVIDENTIARY STANDARDS IN THE EXCLUSION PROCESS
5. The Procedural Framework of ‘Serious Reasons for Considering’

Based on substantive knowledge about the exclusion provision per se — and in association with terrorism, this chapter delves into the procedural aspects of the exclusion provision and most specifically the understanding of the wording ‘serious reasons for considering’. The overall analysis in this chapter covers central procedural principles that I argue are important to consider and maintain in the interpretation and application of Article 1F. Focusing on certain principles and assessment procedures could be a stepping stone in the process of reaching a coherent and consistent interpretation of the exclusion provision. This chapter outlines the textual reading of ‘serious reasons for considering’ as it is understood in state practices. Therefore, the chapter describes how the exclusion provision’s evidentiary standard is interpreted and presented. Further, the chapter includes a normative analysis of how to approach the current procedural issues related to Article 1F according to international treaty norms.

5.1 Introduction

Through the wording ‘shall not apply’, the exclusion provision reveals its mandatory nature in ensuring that only those who are ‘deserving’ of refugee protection enjoy it.\(^\text{655}\) The effect of Article 1F is to limit the scope of application ratione

personae and exclude those who seek refugee status but have allegedly committed an excludable crime. The excluded persons become ipso facto excluded from refugee status and refugee protection, i.e., all rights and benefits pursuant to Articles 2–34 of the Refugee Convention. Even though ‘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’, the consequences of Article 1F are inevitably grave and create severe adversity for the individual affected.

According to the UNHCR, the exclusion clauses must be interpreted restrictively and applied with great caution. The European Council on Refugees and Exiles (ECRE) has made an equivalent statement, with an additional proposal. Interestingly, the ECRE speaks in favour of finding a common interpretation of the exclusion standard of proof, to decrease discrepancies and increase consistency in application of the exclusion provision. Due to the serious consequences of exclusion, the ECRE argues that the threshold of ‘serious reasons for considering’ should be high.

656 The Grand Chamber of the CJEU confirmed, in the CJEU: Joined Cases C-391/16, C-77/17 and C-78/17 M v Ministerstvo vnitra, X v Commissaire general aut apatrides et aux apatrides, Judgment, 14 May 2019, para. 76, that the exclusion provision is exhaustive and that no further grounds for exclusion can extend beyond what follows from Article 1F of the 1951 Refugee Convention.


658 Ibid. See further instruments containing the drafters’ discussions on the purposes of the exclusion provision, for instance, UNHCR, Executive Committee Meetings, ‘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, UN Doc. A./CONF.2/SR.24, 17 July 1951, pp. 4–11 (for instance, statements of M. Herment, Belgium and Mr Hoare, UK).


The element of persecution and the serious risk that the applicant may face upon deportation to their home country makes evaluation of the exclusion provision more demanding. The diversity in the understanding and application of the exclusion provision across jurisdictions further adds to this complexity. Given the distinct interpretation and application of the exclusion provision per se and its relation to the refugee definition norm, in conjunction with the increasing interest in protecting national security and territorial borders, the exclusion provision is now in an uncertain place. The following section describes how the exclusion standard of proof ‘serious reasons for considering’ is interpreted in different jurisdictions.

5.2 The Evidentiary Understanding of ‘Serious Reasons for Considering’

In general, the textual meaning and threshold of ‘serious reasons for considering’ is not a familiar evidentiary standard in most domestic jurisdictions or in other areas of law.662 With some guidelines available, the UNHCR emphasises that the exclusion provision should be applied cautiously and restrictively, due to the humanitarian objective of the Refugee Convention. The unique purpose of Article 1F to function as an exception to refugee protection, and the serious consequences that an exclusion decision trigger should not be forgotten.663 In other words, the evidentiary standard of Article 1F should be high enough to ensure that those who are deserving of humanitarian protection are not deprived thereof.664 As national authorities have the discretion to interpret and examine the exclusion provision, the standard test of Article 1F is performed in different ways. It is obvious that ‘serious reasons for considering’ is subject to diverging interpretation.665 In the absence of guidelines and a clear definition in the Refugee

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Illustrating this further with state practice, New Zealand, for instance, has made a contested interpretation of exclusion. While the state, on the one hand, recognises the exclusion standard as being placed below the ‘balance of probabilities’ standard, the authorities, on the other hand, require the evidence to be ‘compelling and credible’ to satisfy the standard of proof. In Canada, for example, the Supreme Court has stated that the exclusion standard of proof ‘requires something more than mere suspicion’ but that exclusion need not be ‘based on proof beyond a reasonable doubt nor on the general civil standard of the balance of probabilities’. Through this reasoning, the Supreme Court of Canada recognised the test ‘above mere suspicion’ established in the case of R (JS (Sri Lanka)) case. The UK Supreme Court explained the understanding of ‘serious reasons for considering’ in the following way:

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666 Even the drafting history of the Refugee Convention is silent on the purpose of including ‘serious reasons for considering’ as an evidentiary standard and the meaning of the phrase, see Bliss, 2000, p. 115; Rikhof, 2012, p. 109.
667 However, there are some scholars who support a reading of ‘serious reasons for considering’ to be almost equivalent to the criminal conviction standard, see, for instance, Gilbert, Geoff, ‘Current Issues in the Application of the Exclusion Clauses, in Refugee Protection in International Law’, p. 470: “Serious reasons for considering” that the applicant has committed a crime or is guilty of an act within Article 1F must, therefore, at least approach the level of proof necessary for a criminal conviction of the individual.’ (emphasis added), in: Türk, Volker, Nicholson, Frances, and Feller, Erika, Refugee Protection in International Law – UNHCR’s Global Consultations on International Protection, Cambridge University Press, 2003.
668 UNHCR, Background Note on the Application of Article 1F, para. 107.
669 Ibid; See further, UNHCR Handbook, para. 149: ‘Formal proof of previous penal prosecution is not required. Considering the serious consequences of exclusion for the person concerned, however, the interpretation of these exclusion clauses must be restrictive’; Bliss, 2000, pp. 115–116.
674 R(JS)(Sri Lanka) v Secretary of State for the Home Department, [2010] UKSC 15; The test ‘more than suspicion or conjecture’ has been firmly established in common law tradition. For scholarly contributions, see Bliss, 2000,
Clearly the Tribunal in *Gurung* […] was right to highlight ‘the lower standard of proof applicable in exclusion clause cases’ – lower than that applicable in actual war crimes trials. That said, ‘serious reasons for considering’ obviously imports a higher test for exclusion than would, say, an expression like ‘reasonable grounds for suspecting’. ‘Considering’ approximates rather to ‘believing’ than to ‘suspecting’ […] inclined to agree it sets a standard above mere suspicion. Beyond this, it is a mistake to try to paraphrase the straightforward language of the Convention: it has to be treated as meaning what it says.675

Interestingly, some jurisdictions substitute the meaning of ‘serious reasons for considering’ with ‘reasonable grounds to believe’. On this note, the Federal Court of Appeal (Canada) stressed in the *Charkaoui* case that ‘serious reasons for considering’ ‘requires more than suspicions […] more than a mere subjective belief on the part of the person relying on them. The existence of reasonable grounds must be established objectively, that is, that a reasonable person placed in similar circumstances would have believed that reasonable grounds existed’.676 Additionally, the Supreme Court of Canada has in previous exclusion cases stated its position regarding the level of evidence that is required in the exclusion provision. For example, in *Ezokola*, the Supreme Court of Canada recognised the substantive element of ‘serious reasons for considering’ and how this dimension required *substantively sufficient* evidence to justify the application of exclusion.677 Other common law countries, such as Australia, interpret the exclusion standard to be applicable when there is ‘strong evidence of the commission of the crime’.678 In this context, evidence that is not ‘tenuous or inherently weak or vague’ and points to

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675 R(JS)(Sri Lanka) v Secretary of State for the Home Department, para 39; See also *Al-Sirri v Secretary of State for the Home Department*, para. 75: “Serious reasons” is stronger than “reasonable grounds” … “Considering” is stronger than “suspecting”. In our view it is also stronger than “believing”. It requires the considered judgment of the decision-maker’; New Zealand came to the same conclusion as the UK regarding reading the exclusion standard for what it says. See, *Tamir X v Refugee Status Appeals Authority* [2009] NZCA 488, paras. 77 and 79 where the Court of Appeal pointed out that: ‘adding glosses by analogy with civil litigation or criminal prosecution simply confuses matters’.; *Arquita v Minister for Immigration and Multicultural Affairs* [2000] FCA 1889, para. 56: ‘The expression “serious reasons for considering” means precisely what it says. There must be reason, or reasons, to believe that the applicant has committed an offence of the type specified. That reason or those reasons must be “serious”’; For a scholarly analysis, see, further, Kapferer, 2000, pp. 207–211; Rikhof, 2012, p. 110; Holvoet, 2014, pp. 1043–1044.

676 *Charkaoui v Canada (Minister of Citizenship and Immigration)* [2004] FCA 421, para. 103 cited in Rikhof, 2012, p. 110 n 32; *Mugesera v Canada (Minister of Citizenship and Immigration)*, para. 114: ‘In essence, reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information.’; See also Bliss, 2000, pp. 115–116; Holvoet, 2014, pp. 1042–1043.


678 *Arquita v Minister for Immigration and Multicultural Affairs*, para 67.
more than merely ‘suspicion’ would suffice as ‘strong evidence’.679 However, the asylum authorities are not required to ‘make a positive or concluded finding about the commission of [the] crime’.680

Other countries, such as Sweden, interpret the standard of proof as below the threshold the criminal conviction standard, but higher than a ‘balance of probabilities’.681 Swedish and Belgian asylum authorities are quite similar in their assessment proceedings. In both jurisdictions, the burden of proof rests upon the decisions-makers to justify that there is clear, credible and reliable evidence that there are ‘serious reasons for considering’ that an applicant knowingly committed or substantially contributed to an offence.682

In some jurisdictions, the level ‘serious reasons for considering’ is lower than the evidentiary standard in civil disputes.683 For instance, courts in the United States have compared the standard of exclusion with the threshold established in probable cause hearings, which generally have a low threshold.684 In contrast, the US authorities require ‘clear, unequivocal and convincing evidence of complicity’685 if facts indicate that the individual has allegedly committed a crime.686

The Netherlands pursues another approach to the exclusion evidentiary standard and is reluctant to compare it to other domestic evidentiary standards. Further, Dutch authorities, defining themselves as ‘no safe haven’ for excluded persons,687

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679 Ibid., para 63.
680 Arquita v Minister for Immigration and Multicultural Affairs, para. 52; See also Rikhof, 2012, p. 110; Holvoet, 2014, p. 1044.
683 Zagor points out the danger of superficial administrative decision-making due to the serious consequences of excluding an individual from refugee status and protection. According to Zagor, most common law jurisdictions have set ‘the serious reasons for considering’ as a low standard of proof, see Zagor, Matthew, ‘Persecutor or Persecuted: Exclusion under Article 1F(A) and (B) of the Refugees Convention’, 23 UNSW Law Journal 164, 2000, pp. 168–170.
687 Many other jurisdictions identify as ‘no safe haven states’, (e.g., Belgium and Spain). Likewise, the concept of ‘no safe haven’ is used in the context of universal jurisdiction of international core crimes. See scholarly contributions on this subject, e.g., Langer, Máximo, ‘Universal Jurisdiction is Not Disappearing – The Shift from “Global Enforcer” to “No Safe Haven” Universal Jurisdiction’, 13 Journal of International Criminal Justice 1, 2015; Langer, Máximo, and Eason, Mackenzie, ‘The Quiet Expansion of Universal Jurisdiction’, 30 European Journal of International Law 779, 2019. The main position argued in both articles is that universal jurisdiction is far from decreasing or ‘falling’ off the radar. In fact, the number of prosecuted cases of international crimes has grown. Thus, the phenomenon of universal jurisdiction is peaking due to several factors, such as adoption
do not apply a reverse burden of proof in exclusion cases. Again, though elements of exclusion procedures are recommended by the UNHCR, which most jurisdictions are inclined to follow, the discretion in conducting proceedings will depend on the practices of the host state. Generally, Dutch authorities are more in favour of placing the burden of proof in exclusion cases on the individual concerned ‘to refute the allegations contending that he or she was responsible directly or indirectly for the commission of international crimes’.688

Furthermore, some jurisdictions are vague in presenting domestic interpretations of the exclusion standard in a useful way. France is an example of this. In the absence of clear statements on how the exclusion standard is applied, an example which has often been referenced when describing the French practice is a famous exclusion case where the French Council of State overruled a lower tribunal that required a more stringent test for the exclusion standard. However, the French Council of State decided to exclude the applicant on the basis that he had been mentioned in a report of an international commission of inquiry on human rights violation in Rwanda and a Rwandan list of genocide suspects, without explaining which standard it had applied or that should be applied.689

Interestingly, Germany stands on its own, having adopted a different wording of the exclusion standard. Instead of incorporating a phrase equivalent to ‘serious reasons for considering’, the German legislation has a ‘good reason’ standard of proof. Still, the amount of evidence that would be sufficient to justify the ‘good reason’ standard of proof seems to be similar to the threshold of Article 1F. Thus,
German exclusion proceedings also require clear and credible evidence that an individual has committed a crime.690

Summarising the observations made (thus far) of how ‘serious reasons for considering’ is interpreted, one can see that the ‘serious reasons for considering’ can be understood as containing ‘a lower standard of proof than the balance of probabilities’.691 The standard can also be analysed in the context of criminal liability matters, where ‘serious reasons for considering’ can be fulfilled when there is clear, credible and reliable evidence proving that the individual has committed or substantially contributed to the criminal act.692 However, this does not mean that the decision-maker is obliged to present a ‘positive finding that the applicant was guilty of one or more particular crimes’,693 as in confirmation through a national criminal conviction. At the opposite side of the spectrum, ‘serious reasons for considering’ could be viewed as having a rather low standard of proof, where the immigration authorities are not required to ‘find as a matter of fact that [the applicant] was directly involve […] either beyond a reasonable doubt or preponderance of the evidence’694 as the standard of proof in the exclusion clause is supposed to align with the level ‘probable cause’.695

It is clear that the drafting history offers limited guidance for a consistent testing standard. In fact, there is a wider support for allowing states discretion to be flexible on the matter of evidentiary latitude.696 During the negotiations of the 1951 Refugee Convention, the British delegate stated that ‘serious reasons for considering’ was:

too vague to justify an important decision. The choice was difficult: it was necessary either to allow governments to take an administrative decision when a judicial decision was called for, or to run the risk of including … criminals.697

As a result, the drafters agreed on a non-traditional evidentiary standard to mark the benchmark for the exclusion provision. As a result, the risk of adopting

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693 Bliss, 2000, p. 116 (emphasis added).
694 See, for instance, McManus v. INS, [1986] 788 F.2d 591.
697 Statement of Mr. Lequesne of the United Kingdom, 5 UNGAOR, 334th mtg. (4 December 1950), at 390 cited in Hathaway and Foster, 2014, p. 533 n 63.
‘weighing-up evidence’ within exclusion proceedings became limited.698 Nevertheless, though the drafters offered states some measures of evidentiary flexibility in terms of evaluating the facts that may trigger exclusion,699 they never ‘suggested that anything less than clarity about the legal standards justifying exclusion was sufficient’.700

Moving from domestic practice to regional courts, the CJEU approach is worth emphasising. The CJEU does not focus on the linguistics or the balance of test regarding which technical evidentiary term is stronger than the other. Rather, the Court suggests examination of the facts and a case-by-case assessment. Further, the Court focuses on the attribution of individual responsibility to determine whether the threshold of ‘serious reasons for considering’ has been met.701 Thus, the approach pursued by the Court of Justice contains two elements. One focuses on the procedural framework. The other focuses on assessing the merits pointing to individual responsibility.702 In this regard, the CJEU’s two-step approach has been described as a method which ‘offer[s] a reasonably coherent and practical framework of analysis for determining whether there are indeed ‘serious reasons for considering’ that a claimant falls within the terms of article 1F’.703 The CJEU position is, in my opinion, a framework that makes an eminent model. This mainly because it focuses on procedural elements and issue of individual accountability that would ease the process of finding justifying facts that associate the individual to the exclusion crime in question. Furthermore, matters of procedural and criminal responsibility are important to examine in light of general principles and provisions. Thus, they could serve as an assessment structure to use in finding a consistent threshold for ‘serious reasons for considering’. This might be made more achievable by adopting the CJEU’s two-step approach than by focusing on finding coherent linguistic and technical evidentiary wordings. Finding evidentiary words and phrases that have an equivalent meaning would, as I perceive it, be more challenging, abstract and likely lead to fragmentation.

As has been stated, interpretation of the exclusion provision contains many challenging aspects, not only regarding interpretation of the exclusion standard of proof, but also in regard to the many other procedural aspects related to the

698 Hathaway and Foster, 2014, p. 533; The approach of not accepting ‘serious reasons for considering’ below the ‘balance of probabilities’ standard is presented in Bliss, 2000, p. 116: ‘[a] standard any lower than this would inevitably result in the exclusion of persons genuinely deserving protection’. I draw the same conclusion.
699 Hathaway and Foster, 2014, pp. 532–537.
701 See, for instance, CJEU: Joined Cases C-57/09 and C-101/09 Bundesrepublik Deutschland v B and D, Judgment, 9 November 2010; CJEU: Case C-573/14 Commissaire général aux réfugiés et aux apatrides v Mostafa Lounani, Judgment, 31 January 2017; See also UNHCR, Guidelines on International Protection No. 5, para. 26 highlighting the principle that each exclusion case requires individual consideration.
702 McAdam, Goodwin-Gill, and Dunlop, 2021, p. 196.
assessment of exclusion cases. The next part of this chapter analyses the additional procedure-specific matters in depth, to present aspects that could strengthen the procedural elements and certainty of the exclusion clauses.
5.3 The Exclusion Assessment Process

5.3.1 Inclusion Before Exclusion

Assessments of refugee status and the exclusion provision must follow the principle of procedural fairness. This is, undoubtedly, a clear position. What is unclear is the dynamic between the two aspects. For instance, the question of whether there is a structural order of ‘inclusion before exclusion’ remains unanswered. Some jurisdictions have chosen to comply with a ‘inclusion before exclusion’ process, whereas others prefer to consider exclusion before inclusion or even lack a consistent practice in this regard. Additional state practice shows that ‘inclusion before exclusion’ is only relevant when assessing the exclusion category of ‘serious non-political crimes’—as this might require a balancing test. Lastly, some state practice lacks any ‘inclusion before exclusion’ framework or recommends the decision-maker to determine this order, though this is usually not an obligation. However, it might be unnecessary to assess the refugee definition if the evidence of the case clearly qualifies the exclusion provision. This issue has to be determined within the discretion of the receiving state. Relating to this matter, Justice Kirby in the High Court of Australia stated that:

704 Bliss, 2000, pp. 93–108; See also, Singh et al., v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177, where the Supreme Court of Canada addressed the importance of including the general principles of procedural fairness in reviewing the refugee determination claims. The Court stated, inter alia, that the assessment of the refugee definition was consistent with the principle of ‘fundamental justice’ and that ‘[a]t a minimum, the [determination process] should provide the refugee claimant with an adequate opportunity to state his case and to know the case he has to meet.’; See also Malouf v. Canada (Minister of Citizenship and Immigration), [1994] 86 F.T.R. 124, [1995] I FC 537, where the Federal Court of Canada stated that ‘failure on the part of the adjudicators to notify the applicant in an effective and timely way of the fact that it was proposing to rely on Article 1F(b) and provide[] an opportunity’ to ‘present evidence and make representations at any stage of the proceeding’ on the Article 1F issue ‘amounted to a failure to observe a principle of procedural fairness’, cited in Bliss, 2000, p. 101. Bliss presents a comprehensive analysis of the procedural fairness in regard to both the inclusion and the exclusion provision. In his contribution, Bliss presents several principles of procedural fairness which should be implemented when assessing the refugee determination and the exclusion element. For instance, the principles creating the minimum requirement for procedural fairness are ‘an individual determination of the claim for protection; the right to be informed of the nature of the proceedings; the right to an oral hearing or interview; the right to have evidence on which the decision maker intends to rely presented to him or her, and to be given an opportunity to comment on it; right to an interpreter if required; right to assistance; right to written reasons for decision; right to appeal a first instance decision to exclude’, see further, Bliss, 2000, pp. 99–106.

705 Hathaway and Foster, 2014, p. 531: ‘Because exclusion under Art. 1(F) is mandatory bar on access to “the provisions of this Convention”, it is equally applicable to persons seeking recognition of refugee status and to those already recognized as refugees’.

The definition of ‘refugee’ in Art 1A and the exclusions from it in Art 1F are not necessarily intended to be applied sequentially [...] There is nothing in the Convention [...] that forbids the decision-maker saying to the applicant [...] “for the moment we will assume that you would be admitted as a refugee [...] But we want first to determine whether you [are subject to Art. 1(F)]” [...] The Convention is expected to operate in the real world of speedy, economical and efficient decision-making. Where there is a choice between a construction of the Convention that would further decision-making of that character and one that would frustrate those objectives, the former construction should be preferred.715

It is certainly challenging to outline a unified position on how to understand the interrelation between the inclusion and exclusion provision.716 Though the pattern of state practice is not uniform and there is no ‘rigid formula’ or customary

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707 Examples include Sweden and France; See Bliss, 2000, p. 108; UNHCR tends to speak in favour of considering inclusion before exclusion. In exceptional circumstances, exclusion can be assessed without reference to inclusion matters. As UNHCR writes, it might be in cases when '(i) there is an indictment by an international criminal tribunal; (ii) in cases where there is apparent and readily available evidence pointing strongly towards the applicant’s involvement in particularly serious crimes, notably in prominent Article 1F(c) cases, and (iii) at the appeal stage in cases where exclusion is the question at issue’, see UNHCR, Background Note on the Application of Article 1F, para. 100.

708 See, for example, Indra Gurung v Secretary of State for the Home Department, [2002] UKIAT 4870, para. 66: “The argument that “logically” one cannot exclude unless one has first included does not withstand examination. Art 1F states that: “The provisions of this Convention shall not apply to any person with respect to whom …”. It does not state that, having applied the provisions of Art 1A(2), a person is to be excluded. To illustrate by use of the metaphor of a garden gate, it would only be illogical to talk about excluding people from entering through a gate if they were already inside the garden’; González v. Canada (Minister of Employment and Immigration) [1994] 3 F.C. 646; Singh v. Minister for Immigration and Multicultural Affairs [2002] HCA 7.

709 Examples include Belgium, Canada and the UK, see Bliss, 2000, pp. 107–108.

710 Examples include the UK; See Bliss, 2000, p. 107; Zimmermann and Wennholz, ‘Article 1F’, para. 28: ‘at least in cases covered by Art. 1F(b), prior determination on the individual danger of persecution in the sense of Art. 1 A, para. 2, i.e. inclusion, are to be considered mandatory. After all, the treatment likely to be faced on return has to be taken into account when assessing the political character of a crime, as well as in the context of proportionality’, in: Zimmermann, Machts, and Dörschner, The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary, 2011.

711 Examples include the US; See Bliss, 2000, p. 108.

712 Examples include Canada. Although, in general, if the evidence meets the requirement for the standard of proof in Article 1F, the inclusion assessment is rarely conducted prior to the exclusion decision, see Bliss, 2000, p. 108.


714 Hathaway and Foster, 2014, p. 531.

715 Minister for Immigration and Multicultural Affairs v. Singh, HCA 7, para. 87.

international principle requiring a specific order of assessment,717 the order that favours procedural fairness should ideally be the basis. This mainly to ensure that the object and purpose of the Refugee Convention are maintained. I believe this would be furthered by an ‘inclusion before exclusion’ procedure. For this reason, I do not agree with the argument presented by Kirby, focusing on the efficiency of asylum cases. Though having an efficient asylum process is important, it is even more important to have a certain, fair, and duly assessed proceeding in order to maintain the objectives of the Convention and the relevant provisions.

Therefore, I believe that maintaining the link between the inclusion and exclusion provision and adopting a holistic ‘inclusion before exclusion’ structure would enable an asylum seeker to get a complete asylum assessment in accordance with procedural fairness, and have her/his rights guaranteed. Neglecting the effect of enforcing an ‘inclusion before exclusion’ proceeding and overlooking essential claims and evidence presented by the asylum seeker could amount to a violation of the object and purpose of the entire Refugee Convention.718 This is particularly relevant as the ‘exclusion clauses are an exception to the general Convention focus on protection’.719 The exclusion provision already faces several issues and challenges, especially when associated with concepts lacking a universal definition. In such cases, failing to respect the language of the provision as a norm excluding from the main rule – to gain universal humanitarian protection – would be a problematic development for the refugee regime. In and of itself, the position of Article 1F as an exception rule to the humanitarian protection of the Refugee Convention indicates that it cannot overrule the predominant object and purpose representing the international refugee regime.720

Further, ‘inclusion before exclusion’ would also underlines that the two clauses are not mutually exclusive. By performing a complete refugee status determination assessing the circumstances for inclusion before exclusion would most likely ensure that Article 1F is applied only to those undeserving of refugee protection. Given this, I argue in favour of considering a ‘inclusion before exclusion’ procedure, as it marks a clear distinction between persecution (related to Article 1A(2)), on the one hand, and prosecution (related to Article 1F), on the other. Additionally, this order would also diminish the possible risk of quickly labelling refugees

717 UNHCR, Guidelines on International Protection No. 5, para. 31: ‘The exceptional nature of Article 1F suggests that inclusion should generally be considered before exclusion, but there is no rigid formula’; Li, 2017, p. 193.
as criminals or terrorists.\textsuperscript{721} Further, it would uphold the fundamental humanitarian objective as the leading position within the refugee regime.

In conclusion, the purpose of Article 1F should not be abused as a shortcut by immigration authorities to avoid their obligations under the Refugee Convention and exclude asylum seekers from the possibility of gaining international protection as a matter of course.\textsuperscript{722} The UNHCR has emphasised that ‘the applicability of the exclusion clauses should be considered only after the decision-maker is satisfied that the individual fulfils the criteria for refugee status’.\textsuperscript{723} The UNHCR’s statement underlines the need for national authorities to adopt an assessment process of ‘inclusion before exclusion’, to ensure that the well-founded fear of persecution is reflected in both the inclusion and exclusion clauses. In my view, this would also serve the purpose of attaining the principles of credibility, legal certainty and procedural fairness in every asylum case.\textsuperscript{724} Thus, even if the wording of the inclusion or exclusion provision is silent on this matter, the contexts,
objects and purposes of Articles 1A(2) and 1F can be interpreted as in favour of conducting an ‘inclusion before exclusion’ procedure. The next part addresses some central procedural principles, analysing the elements in the exclusion proceedings that are relevant to consider for the purpose of upholding the humanitarian objectives. This further strengthens the relation between international refugee law, human rights law and criminal law.

5.3.2 Central Principles: Burden of Proof, Presumption of Innocence and Benefit of the Doubt

Normally, the burden of proof is on the applicant to justify their claim for international protection. However, in the case of the exclusion provision, the burden of proof shifts to the host state. This has been clarified by the UNHCR, stating that:

In asylum procedures generally, the burden of proof is shared between the applicant and the State (reflecting the vulnerability of the individual in this context). As several jurisdictions have explicitly recognised, however, the burden shifts to the State to justify exclusion under Article 1F. This is consistent with the exceptional nature of the exclusion clauses and the general legal principle that the person wishing to establish an issue should bear the burden of proof.

Hence, it is not the applicant’s responsibility to present evidence to avoid being subjected to the exclusion provision. In other words, the asylum seeker is supposed to present circumstances supporting his/her claim for international protection, not present circumstances to avoid exclusion from protection. Thus far, the burden of proof falls within the responsibility of the decision-maker, who is charged with performing a ‘clear and convincing evidence’ evaluation regarding

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the ‘commission of international crimes or serious non-political crimes’. However, this structure makes the application of the exclusion provision even more complex. Suddenly, it is the state (i.e., the Migration Agency) that carries the burden of proof and functions similar to those of a ‘prosecutor’, to justify that there are ‘serious reasons for considering’ that an applicant has committed a crime enshrined in the exclusion clauses. However, this is one of many elements that highlights how and why the exclusion provision is unique in the scope of the Refugee Convention. In fact, placing the burden of proof within the state’s domain has been endorsed by various scholars and national jurisprudence. Using this order also makes sense, as an exclusion determination is a critical decision inflicting serious consequence upon the individual. Said that being said, there are few circumstances where there is a need to impose a reversed burden of proof and apply the so-called ‘rebuttable presumption of excludability’. Even under those circumstances, it should be applied cautiously, as the main rule is still that the burden of proof rests with the state, even in situations where the applicant has been indicted by an international criminal court or tribunal or has remained as a senior member of a repressive government or violent group. However, in those circumstances, a reversed burden of proof can be imposed upon the individual.

The removal of the burden of proof from the individual in exclusion cases originates from a well-recognised principle underpinned by international human rights law and criminal law – namely, the ‘presumption of innocence’. Applying the ‘presumption of innocence’ principle in the context of exclusion is justified for three main reasons. First, and as highlighted above, the exclusion proceedings (although not actual criminal proceedings) have a quasi-criminal nature. Despite belonging in the field of administrative law, the assessment of exclusion is based on deciding if there is ‘serious reasons for considering’ that an applicant has committed or been guilty of international or serious non-political crimes. This leads me


731 UNHCR Guidelines on International Protection No. 5, paras. 19 and 34.

to the second point, the notion of examining individual criminal responsibility related to the excludable crime. Furthermore, as the issue concerns accountability for criminal acts — the individual asylum seeker should not be held responsible and declared a criminal without all the relevant and credible facts and evidence being evaluated.\(^\text{733}\) In support of this, it is worth highlighting the words of Lord Justice Sedley, who stressed the following in a relevant case:

> Until the Home Secretary has produced evidence capable of amounting to serious reasons for considering that an individual comes within one of the art. 1F categories, there can be no foundation for denying him such protection as the Convention would otherwise afford. In this simple sense [...] there will be a presumption of innocence in art. 1F proceedings.\(^\text{734}\)

To clarify my position: the ‘presumption of innocence’ in exclusion cases may certainly have taken inspiration from the criminal framework, but the intention is still not to apply the evidentiary standard from criminal trials. As stated earlier, the evidentiary standard in exclusion cases is not supposed to reach the ‘beyond reasonable doubt’ standard in criminal cases. This applies equally to the use of the ‘presumption of innocence’. Thus, the ‘presumption of innocence’ in the exclusion context is not supposed to imply that every potential doubt could qualify the presumption and prevent exclusion. It is rather aimed to be used to ensure that refugees are perceived as refugees until clear and credible evidence proves the opposite.

Furthermore, another principle that deserves mention is the ‘benefit of the doubt’. In general asylum proceedings, the benefit of the doubt is usually given when all the available evidence has been reviewed and there is no doubt about the applicant’s individual credibility. The conditions for the benefit of the doubt in a refugee status determination process should also apply in exclusion cases.\(^\text{735}\) This principle is important in the context of exclusion, particularly because of the serious consequences and the detrimental effects that an incorrect exclusion decision could have, in conjunction with the harmful outcome of the exclusion provision itself. Recognising the ‘presumption of innocence’ principle in exclusion proceedings speaks in favour of using the ‘benefit of the doubt’.\(^\text{736}\) Two

\(^{733}\) Li, 2017, p. 204.  
\(^{734}\) Yasser Al-Sirri v Secretary of State for the Home Department [2009] EWCA Civ 222, para 27; See also McAdam, Goodwin-Gill, and Dunlop, 2021, p. 196 n 220 with reference to the Conseil d’État sharing a similar position: ‘when noting that the evidence provided serious reasons for considering that the claimant had committed a serious crime, notwithstanding the presumption of innocence from which he benefited’.  
\(^{736}\) Bliss, 2000, pp. 112–113; See also a recent case relating to national security, ECHR, K.I. v. France, Application No. 5560/19, Judgment, 15 April 2021, at para 139 where the Court underscores the importance of why asylum seekers should be given the benefit of the doubt: ‘Owing to the special situation in which asylum-seekers often
central concepts related to the ‘benefit of the doubt’ principle in asylum cases are the notions of credibility and reliability. These are analysed further in the next section.

5.3.3 The Concepts of Credibility and Reliability

Credibility and reliability are two concepts strongly linked in evidential assessment procedures. Both terms exist in several legal fields and are used in various stages of legal cases. For instance, these concepts can relate to aspects concerning the evaluation of the admissibility of evidence, facts or statements presented by the individual (assessing the individual’s credibility). There is no doubt that credibility and reliability play an important role in ensuring that cases are assessed in accordance with procedural principles and legal certainty. Despite their significant impact, the terms are defined inconsistently and often used interchangeably. For instance, in the *Kumarac et al.* case, the Trial Chamber stated that:

> Credibility depends upon whether the witness should be believed. Reliability assumes that the witness is speaking the truth, but depends upon whether the evidence, if accepted, proves the fact to which it is directed.

Moreover, in the *Karemera* case, the ICTR Appeals Chamber highlighted that:

> The Appeals Chamber notes that the large majority of the appeal decisions on the issue of admissibility of evidence at trial only refer to the requirement of “reliability”, without explicitly mentioning the requirement of

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738 See interesting case laws cited in Klamberg, 2013, pp. 172–177. Klamberg concludes that ‘[t]hese [judgments] suggest that observational accuracy may be included in the concept of reliability while truthfulness is more associated with the narrower concept, credibility. However, there is no uniform, consistent terminology in case law’. (at p. 177) (emphasis added).

“credibility”. Given the large meaning of the concept “reliability”, the Appeals Chamber considers that the requirement of prima facie reliability indisputably encompasses the requirement of prima facie credibility.740

An analysis of the statements above indicates that ‘credibility’ and ‘reliability’ should be perceived as two separate assessment concepts, yet closely connected.741 As the definitional scope of ‘reliability’ is broad, elements of ‘credibility’ are most likely included therein.742

Nonetheless, as mentioned above, credibility and reliability occur in many different bodies of law. In the context of asylum cases, it is crucial to reach the thresholds of both credibility and reliability. These are central concepts in acquiring refugee protection or facing deportation. However, there are issues concerning the uncertainty in defining the thresholds of credibility and reliability in asylum cases.743

Both credibility and reliability are subject to some unclear notions regarding how they are defined or which factors to rely upon when assessing them, but terminologically, they can be understood as follows: “credibility” denotes the capability of a human to be believed, while “reliability” denotes the capability of a statement to be relied upon.744 Hence, the assessment of refugee status determination focuses on the credibility of the asylum seeker and the reliability of the statements on which the applicant bases their claim.745

It has already been mentioned that international refugee instruments lack explicit procedural criteria. Hence, any term relating to evidential assessment derives from other international instruments. These instruments are used as guidelines

742 Klamberg combines the various definitions of ‘credibility’ and ‘reliability’ mentioned in international criminal procedure cases. He presents a constructed definition stating that ‘[c]redibility may be defined as truthfulness and thus answer the question whether the witness testifies according to or against his/her beliefs, in other words, whether the witness is lying. Reliability is a wider concept which encompasses the concept credibility as well as other issues, including observational accuracy and authenticity.’, see Klamberg, 2013, p. 174. Observational accuracy covers aspects of the witness’s sensory senses, such as vision, hearing, smell, taste and touch. While authenticity entails documentary evidence as authorship and source of a document, see pp. 174–175.
743 In a Swedish context, this position is confirmed in the scholarly contribution, see, for instance, Andersson, Simon, Diesen, Christian, Lagerqvist Veloz Roca, Annika, Seidlitz, Madelaine, and Wilton Wahlren, Alexandra (3rd ed.), Prövning av migrationsärenden: Bevis 8, Norstedts Juridik, 2018, pp. 310–331 contains more analysis about the concepts in the assessment of migration cases, with reference to international instruments and case law.
745 Ibid., p. 608.
when assessing the credibility and reliability of any individual asylum claim.\textsuperscript{746} They are highly valuable, as the assessment of asylum cases usually encompasses only a single source – the applicant’s testimony.\textsuperscript{747} An asylum seeker providing additional evidence is ‘the exception rather than the rule’.\textsuperscript{748}

The shared evidential duties between the asylum seeker, on the one hand, and the decision-maker, on the other, is another condition that makes the assessment process in asylum cases exceptional. The shared burden of proof has been firmly addressed by the UNHCR, stating that ‘the duty to ascertain and evaluate the relevant facts is shared by the applicant and the examiner’.\textsuperscript{749}

Thus, the fact that most asylum cases have the applicant’s story as the only source makes the credibility and reliability assessment fragile, both impacting and impacted by the decision-makers’ discretionary judgment.\textsuperscript{750} It also has an influence on procedural matters such as the standard of proof, the burden of proof, and the benefit of the doubt.\textsuperscript{751} Therefore, clear and defined criteria should be established for the purpose of assessing credibility and reliability and to minimise the risk for misuse of decision-makers’ discretionary judgment. Inspired by the Nabilimana case, the ICTR presented a non-exhaustive list of aspects to consider


\textsuperscript{747} Other factors highlighting the unique framework of asylum cases include that the asylum seeker presents his or her testimony based on his or her own interests. Also, the entire assessment of the asylum claim contains a future-oriented evaluation of whether the applicant would face persecution upon a return to the home country.; See Noll, Gregor, ‘Credibility, Reliability and Evidential Assessment’, pp. 607–609 in: McAdam, Foster, and Costello, The Oxford Handbook of International Refugee Law, 2021.

\textsuperscript{748} UNHCR Handbook, para. 196.

\textsuperscript{749} UNHCR Handbook, para. 196.

\textsuperscript{750} For a critical analysis of the credibility and reliability criteria for asylum seekers and their impact on decision-making, see Noll, Gregor, ‘Credibility, Reliability and Evidential Assessment’, pp. 607–622, in: McAdam, Foster, and Costello, The Oxford Handbook of International Refugee Law, 2021. Noll presents many angles showing why evidential assessment in asylum procedure are problematic. In an attempt to highlight different solutions causing the decision-making in asylum cases to be more certain and justified, he acknowledged that ‘[i]t will take time to properly consider all conceivable options and their consequences.’ However, he concluded with underlining that ‘[a]t the systemic level, though, we have enough information to reject the way evidence and credibility is currently addressed in asylum cases’. (see p. 622).

\textsuperscript{751} Another critical statement made by Noll was that ‘the interaction of the burden of proof, standard of proof, and benefit of the doubt in asylum is vague and logically deficient’, see Noll, Gregor, ‘Credibility, Reliability and Evidential Assessment’, p. 613 in: McAdam, Foster, and Costello, The Oxford Handbook of International Refugee Law, 2021.
when examining credibility,\textsuperscript{752} which immigration authorities also seem to employ when assessing asylum claims:\textsuperscript{753}

\begin{enumerate}
\item ‘considering all the evidence’
\item ‘making clear findings on credibility and providing adequate reasons’
\item ‘basing decisions on significant and relevant evidence and aspects of the claim, and’
\item ‘dealing with contradictions, inconsistencies, omissions, and materiality’
\item ‘relying on trustworthy evidence to make adverse findings of credibility, and’
\item ‘allowing the claimant to clarify contradictions or inconsistencies in the testimony.’\textsuperscript{754}
\end{enumerate}

Moreover, decision-makers can also consider additional sources when performing their evidential duties. For example, decision-makers can access various instruments of country of information reports and expert testimony concerning the home country or on medical or psychological matters.\textsuperscript{755} Although these subsidiary sources may help the decision-maker examine the applicant’s credibility and reliability and gain a deeper understanding of the applicant’s condition, they are not detailed or specific. Their contents are general and of a contextual character, rather than of ‘single events at issue in a particular case’.\textsuperscript{756}

Though several procedural bodies of law have credibility and reliability as central concepts in assessing evidential matters, they also share the same concerns regarding the lack of a uniform definition and a consistent approach concerning the dynamic between them. Nonetheless, judicial bodies and authorities must adopt clear guidelines and factors for assessing the credibility and reliability of an applicant and shared evidence. This is particularly true in international refugee law, where the sharing of evidential duties between the individual and the state authority is a central principle, and where it is a rule rather than an exception that claims contain only an applicant’s testimony.\textsuperscript{757}

\textsuperscript{752} ICTR, Prosecutor v. Nahimana et al (Appeal Judgment), ICTR-99-52-A, 28 November 2007, para 194: ‘This assessment is based on a number of factors, including the witness’s demeanour in court, [the witness’s] role in the events in question, the plausibility and clarity of his testimony, whether there are contradictions or inconsistencies in [the witness’s] successive statements or between his testimony and other evidence, any prior examples of false testimony, any motivation to lie, and the witness’s responses during cross-examination’; See, further, Klamberg, 2013, pp. 172–173.

\textsuperscript{753} McAdam, Goodwin-Gill, and Dunlop, 2021, pp. 624–625.

\textsuperscript{754} Ibid., p. 624.


\textsuperscript{757} For a more theoretical analysis of evaluating evidence as testimony, see Klamberg, 2013, pp. 167 ff.
Following these analyses and the introduction to some procedural principles that are to be found in the criminal law framework, let us now turn our attention to an aspect that makes the exclusion provision quite exceptional. This is the close interrelation with criminal law and the comparable elements that one can identify in these two bodies of law.

5.3.4 The Close Interaction Between Refugee Law and Criminal Law

5.3.4.1 Similarities and Differences

The purpose of a criminal justice system is to protect society from criminal acts, whereas the refugee system aims to protect the life and liberty of victims when the authorities in their home countries have failed to do so. However, the exclusion provision combines the purposes contained in both legal regimes. One Canadian judge explained the foundation of Article 1F as follows: ‘those who are responsible for the persecution which creates refugees should not enjoy the benefits of a Convention designed to protect those refugees.’ Further, the exclusion provision limits the opportunity for fugitive criminals to escape from prosecution and punishment for their crimes by claiming refugee protection.

While a criminal trial focuses on attributing guilt and moral responsibility with the purpose of achieving retribution, incapacitation, rehabilitation and deterrence – a domestic immigration proceeding is not intended to make findings of ‘guilt’ that meet the level beyond reasonable doubt to attribute criminal responsibility. Even where establishing a quasi-criminal investigation and judgment is necessary in an administrative adjudication concerning the exclusion provision, the mandatory element is to meet the level ‘serious reasons for considering’ to justify the application of Article 1F.

Interestingly, the criminal notion of Article 1F, which is inevitably present as the basis for determining exclusion from refugee protection, is built on the exclusion standard ‘serious reasons for considering’ that the applicant has committed the

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759 Pushpanathan v Canada (Minister of Citizenship and Immigration) [1998] 1 SCR 982, para. 63.
760 Hathaway and Foster, 2014, p. 525.
761 See Article 66(3) of the ICC Statute: ‘In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt’.
762 Johnson mentions that denial of asylum or remove in general should be considered as a form of punishment, see Johnson, Kevin R., ‘An Immigration Gideon for Lawful Permanent Resident’, 122 The Yale Law Journal 2394, 2013, pp. 2394–2414.
excludible crime. However, this is addressed in an administrative procedure as opposed to a criminal trial. The main goal of the exclusion decision is to examine whether the asylum seeker is deserving or undeserving of refugee protection – not to ‘establish moral responsibility for the purposes of accountability, retribution, incapacitation, or deterrence’.\textsuperscript{763}

The interaction between criminal law and refugee law in determining whether an applicant has the legal grounds to be recognised as a refugee underlines the fundamental structural differences between the two legal systems, particularly regarding the different degrees of protection provided to individuals on trial or those seeking asylum. The focus within a criminal trial is on the defendant, whereas victims are given the right to participate in the proceedings by testifying as witnesses.\textsuperscript{764} In most cases, the proceedings are also open to the public. However, these circumstances differ between asylum cases and exclusion proceedings. The facts in a specific exclusion case are highly confidential, and thus not disclosed to the public. Furthermore, if the facts in a case indicate that the asylum seeker has committed an exclusion crime within Article 1F, there is no structural framework that enables victims to testify against their alleged persecutor.

5.3.4.2 Exclusion Cases – Criminal Trials in the Scope of Administrative Law?

To some extent, immigration authorities, tribunals and courts deciding on exclusion cases become \textit{ad hoc} criminal courts, using principles from international/national criminal law adapted to a non-criminal context.\textsuperscript{765} It means that immigration authorities need to take provisions applicable within criminal proceedings into consideration when determining exclusion cases. An obvious question, or the elephant in the room, if one prefers metaphors, is – how can assessment of exclusion cases be conducted as a quasi-trial when the exclusion provision belongs in an administrative legal regime? It is certainly true that Article 1F enshrined in the 1951 Refugee Convention is part of administrative law, regulating migration issues and cases. However, what makes the exclusion provision different to other administrative norms within the field of refugee law is that this provision requires an assessment of whether the asylum seeker is responsible for the commission of any of the exclusion crimes mentioned in Article 1F. Thus, the language of Article 1F, although originating in administrative law, contains a buried link to criminal standards.

\textsuperscript{763} Egelman, 2018, p. 469.

\textsuperscript{764} Victims have a statutory right to participate in the proceedings before the International Criminal Court; See International Criminal Court Office of the Prosecutor, ‘Policy Paper on Victims’ Participation’, ICC-OTP 2010, 12 April 2010.

\textsuperscript{765} This applies when determining terrorism as an integral part of Article 1F(a) and (c). Otherwise, reference can be made to domestic criminal law when dealing with cases involving terrorism as a non-political crime under Article 1F(b).
In practice, the immigration institutions operating within an administrative mechanism are required to evaluate the issue of criminal responsibility in relation to the exclusion categories before declaring a person excluded from refugee protection.\textsuperscript{766} Hence, the nature of the exclusion clauses and the assessment required from immigration institutions are quasi-criminal, yet contained entirely in the framework of administrative law.\textsuperscript{767} The normative matter of Article 1F cannot be properly understood without recognising its interaction with criminal law, in spite of its administrative home.\textsuperscript{768} The interaction with criminal law, and the fact that Article 1F imposes serious consequences for the individual concerned,\textsuperscript{769} gives it a quasi-criminal nature, clearly requiring ‘procedural safeguards’ to be enforced with respect to the exclusion provision.\textsuperscript{770}

Even if the immigration courts and tribunals can be described as ‘quasi-criminal’ entities, it is still universally understood that the standard of proof for an exclusion is lower than that detailed in criminal trials.\textsuperscript{771} To demonstrate this, it is worth reciting some state practice emphasising this position. For example, in \textit{Ezokola}, the Supreme Court of Canada observed that the threshold for exclusion should be lower than the criminal burden of proof, because immigration tribunals do ‘not determine guilt or innocence, but excludes […] those who are not bona fide refugees at the time of their claim’.\textsuperscript{772} Moreover, the Supreme Court of

\begin{itemize}
\item \textsuperscript{766} UNHCR Guidelines on International Protection No. 5, para 18; See also Egelman, 2018; Juss, Sarvinder S., ‘The Notion of Complicity in UK Refugee Law’, 12 \textit{Journal of International Criminal Justice} 1201, 2014; Singer, Sarah, ‘Terrorism and Article 1F(c) of the Refugee Convention’, 12 \textit{Journal of International Criminal Justice} 1075, 2014; Examples of relevant exclusion cases shedding light on considering elements of individual responsibility in exclusion cases include Bundesverwaltungsgericht (CJEU 2010) at para 98: ‘any authority which finds, in the course of that assessment, that the person concerned has – like D – occupied a prominent position within an organisation which uses terrorist methods is entitled to presume that that person has individual responsibility for acts committed by that organisation during the relevant period, but it nevertheless remains necessary to examine all the relevant circumstances before a decision excluding that person from refugee status pursuant to Article 12(2)(b) or (c) of Directive 2004/83 can be adopted’. (emphasis added); RJ(SL)/(Sri Lanka) v Secretary of State for the Home Department; Tamil X v Refugee Status Appeals Authority; Ezokola v. Canada (Minister of Citizenship and Immigration); Swedish exclusion cases confirming the matter of examining individual criminal responsibility include MIG 2011:24; 2012:14; MIG 2017:11; MIG 2017:29. If the assessed evidence in the particular exclusion case meets the requirement for a criminal standard of proof and, thus, confirms criminal liability within the merits of criminal law, a substantial penalty or other relevant measures would eventually be imposed.
\item \textsuperscript{767} Bliss, 2000, p. 99.
\item \textsuperscript{768} Egelman, 2018, p. 465.
\item \textsuperscript{769} Who is perceived as both undeserving of refugee protection and unworthy of protection from the non-refoulement principle in refugee law. Thus, the individual faces the tremendous risk of deportation despite fear of persecution, see Bliss, 2000, p. 98.
\item \textsuperscript{771} Egelman, 2018, p. 470.
\item \textsuperscript{772} Ezokola v. Canada (Minister of Citizenship and Immigration), p. 680.
\end{itemize}
Canada commented on the interaction between refugee law and criminal law by observing that ‘the differences between a criminal trial and a [refugee status] hearing are … reflected in – and accommodated by – the unique evidentiary burden […] of the “serious reasons for considering” standard’.

Courts in the UK have also examined the language of the standard of proof of the exclusion provision and found it to be ‘something less than proof on either a criminal standard of beyond reasonable doubt or a civil standard of balance of probabilities’. The Immigration Appeal Tribunal focuses on the wording ‘serious reasons for considering’ to determine ‘the possibility that doubtful events may have taken place’ under a ‘more rounded approach’.

Due to the peculiar phenomenon of using a civil standard of proof in a proceeding equivalent to a criminal setting, the Tribunal noted in the Gurung case that ‘international criminal law and international humanitarian law […] should be the principal sources of reference in dealing with such issues as complicity’. The specific statement referred to by the Tribunal concerned the aiding and abetting liability under the exclusion provision. Despite making reference to several sources of international criminal law, the Tribunal in the same case also made the essential observation that ‘such reference will need to bear in mind the lower standard of proof applicable in Exclusion Clause cases’. However, the Tribunal did not give any further explanation on how adjudicators should consider the different levels of standard of proof and the influence of criminal law as a component in the decision-making process for exclusion. Regardless, the interrelation between the exclusion clauses and criminal law influences the threshold for ‘serious reasons for considering’.

There is no requirement that the decision-maker in asylum decisions uses similar amounts of evidence as in a criminal conviction to justify grounds for exclusion from refugee protection. If the evidence is considered solid, it may confirm uncontested criminal liability. On the other hand, if the facts of the exclusion case suggest a plausible defence under criminal law, it may be difficult to justify there being ‘serious reasons for considering’ to confirm criminal responsibility and exclusion under Article 1F. In this way, criminal law functions as a guiding standard to rely upon in justifying the exclusion provision. In some sense, one could argue that criminal law framework is linked to Article 1F to maintain the credibility of the entire international refugee regime.

773 Ezokola v. Canada (Minister of Citizenship and Immigration), para. 40.
774 Indra Gurung v Secretary of State for the Home Department, para. 95.
775 Ibid., para 95.
776 Ibid., para 109.
777 Ibid.
778 Egelman, 2018, p. 471.
779 Hathaway and Foster, 2014, p. 536.
780 Ibid., p. 538.
However, the fact that the exclusion clauses increase the tension between dual processes and the encouragement to consider assessment measures from a separate legal field may shed light on more complex matters. For instance, this might make the exclusion provision more difficult to interpret and apply, making the legal matter more vague.\textsuperscript{781} Given the challenges inherent to the exclusion assessment as a quasi-criminal framework, there is a need to ensure that procedural fairness is guaranteed and maintained through the safeguards provided to the asylum seeker. These matters are examined in the next section of this chapter.

5.4 The Principle of Procedural Fairness and the Exclusion Provision

This section takes its point of departure in a range of international and regional human rights instruments that cover the elements of procedural principles and rights. It starts with outlining the human rights norms associated with procedural matters. This is followed by an analysis of how the addressed international standards can be used as a complementary mechanism in highlighting the procedural safeguards and rights to be ascertained in the exclusion process, in light of systemic integration and the evolutionary interpretation.

The fact that we have a comprehensive international refugee system with provisions on who is a refugee and who is undeserving of refugee protection but lack established rules of procedure might come as a surprise to many. In fact, procedural principles cannot be found in either of the two international refugee instruments. However, this does not mean that decision-makers operate outside of principal rules on procedural fairness when assessing the refugee definition or the exclusion provision. Certifying procedural fairness is essential in every legal system.\textsuperscript{782} It is described as the ‘principle of principles’, shedding light on the legal determination process ‘concerning the rights or interests of an individual’.\textsuperscript{783} This is due to the remarkable consequences that an individual may suffer from the exclusion provision. The uncertain understanding of ‘serious reasons for considering’ and the recommendation to adopt a restrictive interpretation approach to the provision, as it an exceptional norm, makes the notion of procedural fairness more important than usual. Ultimately, procedural safeguards must be used to ensure that those deserving of humanitarian refugee protection receive it. Thus,

\textsuperscript{781} For a critical analysis of a regime interaction between international refugee law and international criminal law, see, in general, Egelman, 2018.

\textsuperscript{782} Comparing the procedural fairness principle across different legal traditions reveals that the common law countries usually approach procedural fairness as an overlapping principle which ‘draws from the concepts of natural justice and due process’. Civil law countries, on the other hand, generally support the principle and emphasise its substantial value in civil and criminal proceedings., see Bliss, 2000, p. 94.

\textsuperscript{783} Ibid., p. 93.
even if the wording of the exclusion provision lacks reference to procedural elements, the object and purpose and context of the provision support the use of procedural safeguards in the exclusion assessment.

The element of procedural fairness is addressed in several international and regional instruments. Significant provisions covering the principle of procedural fairness include Article 14 of the ICCPR – ‘all persons shall be equal before the courts and tribunals.’ Article 13 of the ICCPR, referring to ‘an alien lawfully in territory’ is another central provision. According to this provision, the individual concerned ‘may be expelled [from that territory] 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 have his [or her] case reviewed and be represented for the purpose before the competent authority [...]’. In the context of international human rights instruments, several regional instruments, such as the ECHR, European Union legislation, the American Declaration on the Rights and Duties of Man, and the African Charter on Human and Peoples’ Rights, have established a main rule of procedural fairness within their frameworks.

Awareness of the crucial elements that must be assessed in asylum cases and the vulnerable position the individual is facing by not knowing whether international refugee protection can be provided inevitably brings procedural principles into the context of the Refugee Convention. Supporting a contrary approach would amount to a failure by the state to observe its treaty obligation and act in good faith. As commented by the UNHCR, ‘the right to seek asylum [embodied in the Universal Declaration of Human Rights] […] requires that individual asylum-

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784 Examples of procedural fairness relevant in criminal proceedings, which can generally be implemented into administrative processes, are ‘the right to a fair hearing by an independent and impartial [court], the rights to be informed of the nature and cause of the charge against him or her, the right to adequate time and facilities to prepare a defence, the right to legal assistance if s/he does not have sufficient means to pay, the right to free assistance of an interpreter and the right to seek review of a conviction’, see Bliss, 2000, p. 94.

785 Article 6 of the ECHR, stating that ‘[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’. An interesting comparison is that the right to ‘fair trial’ in the context of ECHR has usually been approached in narrow terms and not accepted as a provision that is supposed to be applied in immigration processes, see n 10 in Bliss, 2000, at p. 95, referring to cases supporting this position.


787 The 1948 Inter-American Commission on Human Rights (IACHR) American Declaration of the Rights and Duties of Man, 2 May 1948, Article XVIII highlights the ‘right to resort to the courts to ensure respect for legal rights.’

788 Article 7(1) of the ACHPR states that ‘every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force […]’.

789 Bliss, 2000, pp. 94–95.

790 Ibid., pp. 95–96.
seekers be given access to fair and efficient procedures for the determination of their claims'.

Hence, the procedural fairness requirement can be seen as the principle protecting the asylum seeker’s claim for protection, which must be assessed in accordance with the object and purpose, and in good faith with respect to the treaty obligations enshrined in the Refugee Convention and its Protocol.

5.4.1 ‘Procedural Safeguards’ from the Inclusion Clause

Procedural safeguards serve to protect the assessment procedure and ensure that the central procedural rights are provided. Interestingly, through time and practice, the refugee determination process has come to include many procedural rights. With respect to the procedural rights established in a refugee status determination, the rights mentioned below have been modified into an exclusion context as well:

1. ‘individual consideration of each case,’
2. ‘opportunity for the applicant to consider and comment on the evidence on the basis of which exclusion may be made,’
3. ‘provision of legal assistance,’
4. ‘availability of a competent interpreter, where necessary,’
5. ‘reasons for exclusion to be given in writing,’
6. ‘right to appeal an exclusion decision to an independent body and’
7. ‘no removal of the individual concerned until exhaustion of all legal remedies against decision to exclude.’

UNHCR, Executive Committee Meetings, ‘Note on International Protection’, EC/48/SC/CRP.27, 25 May 1998, para. 15; See also UNHCR Executive Committee Conclusion conclusions in ‘No. 8 (XXVIII) Determination of Refugee Status (1977)’ underlining some minimum procedural requirements that must be guaranteed in asylum proceedings, such as providing the asylum seeker with the necessary information about the procedure to be followed, ensuring that an interpreter is available and enabling the asylum seeker to appeal the asylum decision, see UNHCR, ‘Conclusions adopted by the Executive Committee on the International Protection of Refugees: 1975 – 2009 (Conclusion No. 1 – 109)’, December 2009, p. 9.

Bliss, 2000, pp. 95–96; Acting in good faith is underpinned by Article 26 of the 1969 Vienna Convention on the Law of Treaties (VCLT), entered into force 27 January 1980, stating that ‘[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith’.

In relation to the exclusion procedure, see, for instance, UNHCR Background Note on the Application of Article 1 F, paras 112–113: ‘Exclusion should not be based on evidence that the individual concerned does not have the opportunity to challenge’ (at para. 112); UNHCR Guidelines on International Protection No. 5, para 36: ‘Secret evidence and evidence considered in camera (where the substance is also concealed) should not be relied upon to exclude.’


In addition, procedural rights such as the confidentiality of an exclusion procedure and the right to an oral hearing are also essential in an exclusion procedure. The right to a trial without undue delay is perhaps not highly important in a refugee status determination, but central in an exclusion assessment context. Having established the identified procedural safeguards in a refugee status determination – which should also be applied in an exclusion assessment – let us now delve into a critical analysis of how the procedural safeguards from international human rights and criminal law come into play in the exclusion context. The following section will also review why they are important and how the procedural rights in international standards can be applied to the understanding of exclusion from refugee protection.

5.4.2 Procedural Rights within the Scope of Article 1F

The legal framework making up the foundation of procedural safeguards (aligned with the principle of procedural fairness) comes from the right to ‘fair trial’, enshrined in human rights and criminal law instruments. Reference to ‘fair trial’ and procedural rights can be found in Articles 10, and 11 UDHR, Articles 6 and 13 ECHR, Articles 13 and 14 ICCPR, Article 21 ICTY Statute, Article 20 ICTR Statute and Article 67(1) ICC Statute.

These provisions, in particular Article 6 ECHR, Article 14 ICCPR, Article 21 ICTY, Article 20 ICTR and Article 67(1) ICC Statute are relevant to transfer into an exclusion context due to the many components that are comparable with

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796 UNHCR, Procedural Standards for Refugee Status Determination under UNHCR’s Mandate, pp. 182–183.
798 Li, 2017, p. 232; See relevant provisions in the context of a trial proceeding, Article 67(1)(c) of the ICC Statute; Article 21(4)(c) of the 1993 Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY Statute), entered into force 25 May 1993; Article 20(4)(c) of the 1994 Statute of the International Criminal Tribunal for Rwanda (ICTR Statute), entered into force 8 November 1994; Article 14(3)(e) of the ICCPR; Article 6(1) of the ECHR.
799 For more analysis about ‘procedural fairness’ with reference to other regional instruments including the concept, see Bliss, 2000, pp. 93–95.
criminal standards. Specific rights related to the objectives of procedural safeguards, such as ‘the prevention of an extended time of uncertainty for the person concerned’ and ‘securing the legal system’s effectiveness and credibility’ are crucial in an exclusion assessment. Other procedural rights to consider are, for instance, ‘the information on the nature and cause of the charge against the accused’ which could be equated to the right to be informed of any exclusion matters against the applicant. Furthermore, the applicant who may face an exclusion decision does not have an explicitly stated right to an adequate possibility to prepare for a defence, but can certainly enjoy this right through the guarantee of legal assistance and an interpreter. The right to have a conviction reviewed can also be integrated into an exclusion process.

However, linking procedural rights from human rights law in exclusion cases might be called into question as several of the mentioned norms, in particular Article 6 ECHR and Article 14 ICCPR, relate to matters of ‘criminal charges’ or ‘civil rights’. The reason that Article 6 ECHR and Article 14 ICCPR are highlighted is that these two norms contain comprehensive legal framework of procedural rights that have an impactful and necessary effect for the accused in criminal law proceedings. One can wonder how these norms can possibly be considered, as issues of ‘civil rights’ and ‘criminal charge’ are not correlated with the exclusion provision, which is part of an administrative framework. However, there are some valuable aspects hiding in the language of Article 6 ECHR and Article 14 ICCPR that can potentially, in light of a normative analysis, be relevant to consider when interpreting Article 1F.

Illustrating this further, the reasoning developed by the ECtHR in terms of Article 6 ECHR has not been resulted in a strict distinction between criminal charges, civil rights or administrative proceedings. This was further elaborated by

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801 Li, 2017, p. 234; See, further, ECtHR, Stögmüller v. Austria, Application No. 1602/62, Judgment, 10 November 1969, p. 35, para. 5.


803 See Article 67(1)(a) of the ICC Statute; Article 21(4)(a) of the ICTY Statute; Article 20(4)(a) of the ICTR Statute; Article 14(3)(a) of the ICCPR, Article 6(5)(a) of the ECHR.


805 See relevant provisions, Article 26 of the ICTY Statute; Article 25 of the ICTR Statute; Article 14(5) of the ICCPR; Article 13 of the ECHR; Gilbert, Geoff, ‘Exclusion and Evidentiary Assessment’, p. 166, in: Noll, Proof, Evidentiary Assessment and Credibility in Asylum Procedures, 2005; It is, however, important to bear in mind that not all procedural safeguards contained in the mentioned international norms can be related to the exclusion process. One clear example is the right to a public hearing. In most cases, the exclusion proceeding encompasses confidential facts and evidence and a public hearing could cause more harm than good to the applicant; See also Li, 2017, p. 235.

806 The analysis is inspired by Li’s reasoning in Li, 2017, pp. 230–235.
the ECtHR in the first landmark case – *Maaouia v. France* – on the applicability of Article 6 ECHR in the context of expulsion of aliens. Qualifying the expulsion order as a ‘criminal charge’ matter, the ECtHR stated that:

> [s]uch orders, which in most States may also be made by the administrative authorities, constitute a special preventive measure for the purposes of immigration control and do not concern the determination of a criminal charge [...].

In addition, the ECtHR seems to have continued to interpret the right to ‘fair trial’ without any clear ‘classification’ of what constitutes a ‘civil rights’ or ‘criminal charge’ concern. Instead, it has devoted attention to the degree of severity that the individual is facing in the ‘penalty’. This perspective is very much equivalent to that in an exclusion framework. Though the exclusion decision is not a criminal sanction *per se*, the outcome of an exclusion verdict does still have severe consequences, comparable with those of criminal standards. Furthermore, treatment of excluded persons is not consistent across jurisdictions. As analysed in the previous chapter, some waiting for deportation can live ‘normally’, with restricted access to the welfare system, whereas others are detained in asylum detention facilities and treated as criminals (with no criminal conviction confirmed). One should not forget that individuals subject to exclusion from refugee protection suffer this fate because immigration authorities have determined that there are ‘serious reasons for considering’ that they have committed serious international or non-political crimes. Thus, some similarities can be seen between a criminal penalty and an exclusion proceeding. This also highlights why components of criminal standards and proceedings can be identified in the exclusion framework. In line with what Li has stated, exclusion decision which can result in conducted expulsion and persecution ‘must, with respect to its severity, be equated with a criminal penalty’. Given the harmful consequences of an exclusion decision and the equivalent component to a quasi-criminal trial framework, the process of exclusion should in so far as possible integrate relevant procedural rights norms such as Article 6 ECHR and Article 14 ICCPR.

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808 ECtHR, *Engel et al. v. The Netherlands*, Application No. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, Judgment, 8 June 1976, para. 82; Interestingly, there are some procedural rights that are not explicitly mentioned in Article 6 ECHR, but instead have been established due to the ECtHR jurisprudence. An example of this is the right of ‘procedural equality to an adversarial trial, a reasoned decision or effective participation’. This procedural right is equally relevant to a refugee as an individual subject under Article 6 ECHR, see *Li*, 2017, pp. 230–235; See relevant case laws, ECtHR, *Neumeister v. Austria*, Application No. 1936/63, Judgment, 27 June 1968, p. 39, para. 22; ECtHR, *Ruiz Mateos v. Spain*, Application No. 12952/87, Judgment, 23 June 1993, para. 63; ECtHR, *Van de Hurk v. The Netherlands*, Application No. 16034/90, Judgment, 19 April 1994, paras. 56–57; ECtHR, *Steel and Morris v. The United Kingdom*, Application No. 68416/01, Judgment, 15 February 2005, paras. 59, 62.
810 *Li*, 2017, p. 234.
Undoubtedly, the vulnerable position that an applicant may face through the gravity of an exclusion decision requires a high level of procedural protection and procedural fairness. As stated by Li: ‘[T]he threats of human rights violations upon exclusion make it absolutely vital to equip asylum seekers under exclusion assessment with beneficial basic rights applicable in criminal proceedings’. This has already been emphasised in the analysis resulting in a caution on considering human rights law to be a safety net. Thus, there are compelling arguments for considering the consequences of exclusion cases: asylum seekers subject to exclusion from refugee status are placed in a vulnerable situation, and with limited protection under human rights law. Notions such as ‘complementary protection’ under human rights law or access to a broad catalogue of human rights are not the reality for the excluded asylum seeker. The general narrative is that the excluded person, as previously mentioned, ends up in a limbo, where he/she is unreturnable because of the risk of persecution, but is also undesirable, with limited access to the community of the host state. Nor can the person enjoy the broad scope of human rights provided to those recognised as eligible to receive refugee protection. In respect to this, like Li, I believe that the notions of the right to a fair trial and the procedural rights enshrined in Article 6 ECHR, Article 14 ICCPR, Article 21 ICTY, Article 20 ICTR, and Article 67(1) ICC should in so far as possible be transferred to the exclusion context.

Certainly, the intersection between refugee law, human rights and criminal law sheds light on both substantive and procedural matters. The substantive rights have been covered in previous chapters and are to a certain extent addressed in the next chapter, in relation to criminal standers. As this chapter focuses on procedural matters, the analytic observations show how the interaction between international refugee law, human rights and criminal law is realised. In fact, through the complementary rules and principles of international human rights and criminal law standards, this regime interaction can arguably be perceived as supporting the interpretation of the exclusion provision, intensifying and protecting the procedural rights within exclusion decisions. Thus, in light of systemic integration and the evolutionary interpretation approach, the recognised human rights and criminal law standards can arguably be applied as relevant norms to consider in the interpretation of Article 1F. They can also be viewed as international norms to apply with an impact on Article 1F (which is associated with a legal regime

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812 Li, 2017, p. 235 (emphasis added).
813 Li, 2017, p. 230: ‘Whereas a public hearing is not envisaged at refugee status determination, the remaining parts are at least implicitly proscribed in refugee status/exclusion assessment procedures. A public hearing is not crucial in exclusion proceedings and may even be detrimental to the refugee fearing persecution. Therefore, the absence of these otherwise guaranteed procedural rights is not to the disadvantage of the refugee and would not deprive him of important procedural safeguards’.
that lacks a clear procedural basis), building a foundation that protects the procedural safeguards necessary in exclusion cases. Having discussed the concept of procedural fairness in relation to relevant international norms and standards, and how these norms can be associated with Article 1F to strengthen the procedural safeguards in the exclusion provision under refugee law, the next matter to discuss is another significant procedural issue: the notion of evidence and how to evaluate it. The next section focuses on this and includes an analysis of how to approach and evaluate evidence in exclusion cases, in the context of a legal regime that is weak on procedural language.

5.5. Evidence in Exclusion Procedures
The fact that neither the 1951 Refugee Convention nor the 1967 Protocol includes explicit elements for the assessment of evidence when determining refugee status does not mean that this is entirely arbitrary. The Refugee Convention does not place any formal obligation upon states to determine refugee status, but it also does not allow states ‘to withhold rights from persons who are in fact refugees because status assessment has not taken place’. This originates from the initial framework of the refugee determination, which is a declaratory process, not constitutive. This means that a person who is a refugee shall enjoy the rights contained in the Refugee Convention regardless of if the national authority has recognised their refugee status or processed the lodged asylum application. It is therefore important, as stated by the UNCHR Executive Committee, that governments guarantee that asylum seekers are not subject to ‘rejection at frontiers without access to fair and effective procedures for determining [their] status and protection’. The consequences of this could be serious damage and infringements of the non-refoulement principle. The procedural framework is important in

815 Hathaway, 2005, p. 185 (emphasis added). See also UNHCR Handbook, para. 189: ‘It has been seen that the 1951 Convention and the 1967 Protocol define who is a refugee for the purposes of these instruments. It is obvious that, to enable States parties to the Convention and to the Protocol to implement their provisions, refugees have to be identified. Such identification, i.e. the determination of refugee status, although mentioned in the 1951 Convention (cf. Article 9), is not specifically regulated. In particular, the Convention does not indicate what type of procedures are to be adopted for the determination of refugee status. It is therefore left to each Contracting State to establish the procedure that it considers most appropriate, having regard to its particular constitutional and administrative structure’. (emphasis added).
816 See UNHCR Handbook, para. 28: ‘A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee’; see also Hathaway, 2005, pp. 184–185.
817 See UNHCR, *Conclusions Adopted by the Executive Committee on the International Protection of Refugees*, at p. 128. Executive Committee Conclusions No 85 (1998) and No 99 (2004) focuses on the need to
ensuring that refugees are not rejected at frontiers, but the procedural elements
are similarly essential in the process of identifying the excluded refugee.

Acknowledging the lack of detailed requirements in the 1951 Refugee Convention
on how to assess evidence, the next section will provide a review of how the
UNHCR, scholars and domestic courts have interpreted this matter.

5.5.1 The Central Principle of ‘Clear and Credible Evidence’

With a restrictive interpretative approach towards ‘serious reasons for consider-
ing’, several jurisdictions and international actors, including the UNHCR, are
united in adopting a ‘clear and credible evidence’ threshold in Article 1F. Even if
the evidentiary level is not the same as for a criminal conviction, the threshold
still requires ‘clear and convincing evidence that a crime has been committed by
the individual before finding the person to be excluded’.818 This has previously
been stressed by the UNHCR, emphasising that ‘[i]n order to satisfy the standard
of proof under Article 1F, clear and credible evidence is required’.819 This posi-
tion has also been echoed by international refugee law scholars, highlighting
that the ‘serious reasons for considering’ must rely on ‘affirmative judgement based
on evidence that is both clear and convincing’.820 For this reason, the general
threshold of ‘more than suspicion or conjecture’ cannot be considered as satis-
fying ‘serious reasons for considering’. Given the current challenges within the

2019; See also Hathaway and Foster, 2014, p. 535, stating that the ‘duty not to approach exclusion on the basis of
less than clear and convincing evidence is a critical safeguard’; See also Rikhof, 2023, pp. 131–142: ‘with the
only consensus being that the standard does not reach the criminal level of beyond reasonable doubt and that
in terms of contents, the evidence has to be credible, clear and objective no matter what level of standard is
used’.

819 UNHCR Guidelines on International Protection No. 5, para. 35; UNHCR Background Note on the Appli-
cation of Article 1F, paras. 107–108; For some jurisprudence, see, for instance, Magezura v. Canada (Minister of
Citizenship and Immigration), para 114; Lai Cheong Sing, et. al., v. Minister of Citizenship and Immigration [2005] FCA

Refugee Convention and the complexity surrounding interpretation of Article 1F, a low standard for assessing the evidence for exclusion would – in my view – not benefit the credibility and legitimacy of the refugee regime and its humanitarian objective.\footnote{Hathaway and Foster, 2014, p. 534: ‘in line with recognition by an increasing number of senior courts that the “serious reasons for considering” standard should be construed independently and in light of the Convention’s specific challenges, we believe that the “more than suspicion or conjecture” evidentiary threshold is far too low’.} When assessing the evidence, the evaluation should, therefore not be placed below the threshold of ‘clear and convincing evidence’. Based on the reasoning underlined in scholarly analysis and central domestic exclusion cases, I too believe that evidence below the ‘clear and convincing’ requirement would be difficult to justify in relation to the exclusion provision.\footnote{Hathaway and Foster, 2014, p. 535; See, further, \textit{Al-Sirri v. Secretary of State for the Home Department}, para. 75: ‘The evidence from which [serious] reasons are derived must be “clear and credible” or “strong”’.}

\subsection*{5.5.2 Examples of Evidence}

It is important to keep in mind that the ‘serious reasons for considering’ addresses matters related to questions of \textit{fact}. The central steps of the exclusion provision – such as defining the excludable crime, examining individual responsibility and matters of exclusion from responsibility – must nonetheless be examined within the context of the relevant \textit{law}. As clarified by the Canadian Federal Court: ‘[T]he legal criteria are not satisfied if what is established is that there are serious reasons for considering that the act or omission could be classified as a crime against humanity or a war crime. \textit{It must be established that, in law, it definitely was}’.\footnote{Sivakumar v. Canada [1993] action No. A-1043091 (emphasis added), cited in Bliss, 2000, p. 116 n 107.} Hence, as ‘serious reasons for considering’ deals with questions of facts, there should ideally be an illustrative list of evidence that can support the level of the standard test. To paraphrase Bliss: focusing on the \textit{matter of evidence} as the guiding tool for reaching a consistent level of the standard test in Article 1F is far more valid and efficient than focusing on different phrases to describe and define the meaning of ‘serious reasons for considering’.\footnote{Bliss, 2000, pp. 116–117.} However, issues related to credibility indicators, such as an asylum seekers behaviour, action, and activities, the right to be heard, personal interviews, external sources, such as experts and written documents, country of origin, validation of evidence, such as identity papers, judgments, access to information, legal assistance and representation, et cetera, are all relevant in the assessment of exclusion cases.\footnote{For more on procedural elements in migration cases, see European Union Agency for Asylum, Asylum Reports 2022, \url{https://euaa.europa.eu/asylum-report-2022} [last accessed 26 September 2023] and 2023, \url{https://euaa.europa.eu/asylum-report-2023} [last accessed 26 September 2023]; For those interested in the scholarly analysis of procedural elements in migration cases, see, for instance, Part IV ‘Access to Protection and International Responsibility-sharing’ in: in: McAdam, Foster, and Costello, The Oxford Handbook of International Refugee Law, 2021; For those interested in the procedural framework in migration cases in the Swedish context, see, for example, Meyerson, Annkatrin, \textit{To Believe or Not to Believe – Is that the Question? A critical study of...} 219
given the different legal systems, immigration rules, interest, values and possible evidence to consider – covering every procedural element and evidence becomes challenging. I have been inspired by Bliss’s presentation of evidence generally associated with exclusion cases. According to Bliss, the evidence presented below can be valuable to consider:

a) ‘credible confession by the asylum seeker of involvement in excludable crimes’;

b) ‘verified and legitimate conviction of an excludable crime’;

c) ‘indictment by an international tribunal’;

d) ‘other clear and convincing evidence’.

Now, these evidence criteria cover many procedural matters and sometimes have a lower threshold than the exclusion provision itself. However, the aim is using these criteria as guidelines to know what sorts of fact and evidence are required for the scope of ‘serious reasons for considering’. Nonetheless, though these examples of evidence can be sufficient and persuasive for the applicability of ‘serious reasons for considering’, each form of evidence in the individual exclusion case must be examined completely. Without any exceptions, decision-makers must in each exclusion case substantially evaluate and examine the precision, credibility and relevance of the evidence presented for a potential exclusion outcome.

In the next section, the different forms of evidence are described further and analysed in relation to the exclusion standard.

5.5.2.1 ‘Credible confession by the asylum seeker’

Confession of committing an excludable crime is usually considered a sufficient form of evidence to justify exclusion from refugee protection. This was initially stated by Grahl-Madsen, highlighting that ‘[t]he person’s own confession […] may suffice’. However, what can be noted in Grahl-Madsen’s statement is that a confession by an asylum seeker cannot be confirmed as reliable evidence of fact in every exclusion case. The reference to the wording ‘may suffice’ should be
emphasised, as a confession associated with exclusion may be defective. For instance, being unaware of the consequences, an applicant may use confession of having committed a crime for the purpose of overstating his/her need for refugee protection. One cannot deny that some asylum seekers might be forced to confess to certain acts they are innocent of (leaving aside the reasons why this might happen). Equally, as stated by Grahl-Madsen – a position I also find compelling – “if a person is able to establish his innocence, there is clearly no reason why he should be denied status as refugee”. Overall, a confession from an applicant should be approached cautiously as a form of evidence as they are not always credible and may contain false statements.

5.5.2.2 ‘Conviction of an excludable crime’
As previously mentioned, the ‘serious reasons for considering’ does not require that the asylum seeker has been convicted of the excludable crime for the standard to be achieved. Nonetheless, conviction of an excludable crime may be used as a form of evidence in an exclusion case. In those scenarios, the decision-maker must pursue an in-depth inquiry to ensure that the conviction is legitimate. Not all criminal proceedings follow the rules and principles of international law. In some cases, prosecution may be used as a harmful act of persecution. For that reason, it cannot always be used as clear and credible evidence. Therefore, only when a decision-maker can confirm that the criminal conviction is legitimate can such evidence be used as a sufficient basis to exclude from refugee protection.

5.5.2.3 ‘Evidence of indictments, charges, and allegations’
The requirement to assess all the evidence includes evidence concerning indictments, charges and allegations. This form of evidence usually relates to crimes of ‘serious non-political’ character or criminal convictions, where this type of evidence may be utilised for the purpose of prosecution. Therefore, the decision-

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830 Bliss, 2000, pp. 117–118. As important note to address is that oral evidence presented by witnesses and equated actors is not considered as admissible and credible evidence for the standard of proof in Article 1F, see at p. 117; See also the UNHCR, ‘The Exclusion Clauses: Guidelines on their Application’, para. 11: ‘[T]he applicant’s own confession, the credible and unrebutted testimonies of other persons may suffice to establish serious reasons for considering that the applicant should be excluded. However, ordinary rules of fairness and natural justice require that an applicant be given the opportunity to rebut or refute any accusations. An applicant who casts reasonable doubt on the “serious reasons for considering” his or her application should not be excluded from the benefits of refugee status’.
831 Bliss, 2000, p. 118.
maker must evaluate whether the referred indictment, charges or allegations which associate the asylum seeker with a criminal offence are legitimate and admissible.

Another aspect that should be kept in mind is the differing standards of proof concerning indictments and exclusion. As the evidentiary standards for indictments and charges are at a lower level than 'balance of probabilities', the mere fact of an indictment or charge will not constitute “serious reasons for considering”.

Whereas indictments from domestic criminal jurisdictions should be used cautiously, indictments from international courts and tribunal are more acceptable. The reason is that the inquiry performed by prosecutors in the second case generally 'require[s] significant evidence of involvement in international crimes before an indictment is issued'.

5.5.2.4 ‘Other sources of clear and convincing evidence’

‘Other sources of clear and convincing evidence’ encompass a broad range of different instruments from the UNHCR, reports from governments, human rights NGOs or the UN, and information from various international, regional, or domestic organisations and authorities. The instruments addressing evidence relating to the exclusion provision or specific country information relating to an allegation of an excludable crime vary in terms of credibility and legitimacy. Therefore, only in cases where a decision-maker can confirm that the instruments included in the assessment procedure meet the level of ‘clear and convincing evidence’ can the instruments be claimed as admissible for the ‘serious reasons for considering’ requirement.

Another aspect worth mentioning is ‘secret evidence’. This sort of evidence may normally appear in cases where the asylum seeker is accused of terrorist crimes. In general, the issue of secret evidence appears in relation to both exclusion and expulsion as national security cases are challenging to examine and are not covered within the scope of this study. However, some central sources and statements that add further clarification on this matter are worth highlighting. The ECtHR stressed early on in *Chabal v. United Kingdom* that:

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832 Ibid., pp. 118–119.
833 Ibid., p. 119.
834 Ibid., p. 119.
835 Ibid., p. 120.
The use of confidential material may be unavoidable where national security is at stake. This does not mean, however, that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved […] 836

In the context of Swedish practice, for instance, secret evidence is strictly confidential and is usually assessed and evaluated by the Intelligence Service. Often, immigration decision-makers, judges and asylum seekers are denied access to such evidence.837 Thus, regardless of the interest in not terminating an investigation or inquiry of highly confidential information, evidence of a ‘secret nature’ is not sufficient to provide ‘serious reasons for considering’. A host state’s interest in protecting national security and complying with provisions on confidentiality will not take precedence over the requirement to ensure procedural fairness of an asylum seeker’s rights and interest. Consequently, I would argue that relying on ‘secret evidence’ to justify exclusion could breach several procedural rights, such as ‘the right of an individual to be informed of the evidence against him or her, to be heard, to be given reasons for a decision, and to be able to seek review of a decision’.838 Therefore, exclusion decisions should not be based on secret evidence or evidence in which the substance is masked. Relying on such evidence would have a negative impact on the individual concerned, who would not be able to challenge sensitive evidence that could have severe consequences. Though it is not prohibited to base exclusion decisions on secret evidence, the argument I am making – in light of what has been addressed in previous scholarly

836 ECtHR, Chahal v. The United Kingdom, Application No. 22414/93, Judgment, 15 November 1996, para. 131; See also Hathaway’s observations on the Malaysia’s expulsion of Tamil refugees based on terrorism concerns (referencing Human Rights Watch, ‘Sri Lanka: Refugees Returned from Malaysia at Grave Risk’ (27 May 2014), available at https://www.hrw.org/news/2014/05/27/sri-lanka-refugees-returned-malaysia-grave-risk (last accessed 9 October 2023)): ‘relying on secret evidence and with no process or opportunity whatever to answer those charges – would be unlikely to meet the bar of Art. 32(2)’, see Hathaway, James C. (2nd ed.), The Rights of Refugees under International Law, Cambridge University Press, 2021, p. 840.


838 Bliss, 2000, p. 123.
analysis and by the UNHCR\textsuperscript{839} – is the following. For the purpose of guaranteeing the procedural safeguards and fairness for an individual subject to an exclusion proceeding, it is vital to assess exclusion cases using evidence and facts which the applicant can comment on, challenge or clarify. In other words, the procedural rights should be provided and established to the largest extent possible when conducting an exclusion process, even if the applicant is suspected of having committed a terrorist crime or similar offence. Though there are valid reasons to withhold some forms of evidence to protect national security interest, as rightfully stated by the UNHCR – ‘such interest may be protected by introducing procedural safeguards which also respect the asylum-seeker’s due process rights’\textsuperscript{840}. An equivalent position can be found in the \textit{Chahal} case, where the ECtHR clarified that ‘there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice’\textsuperscript{841}. Thus, even in situations when there might be a need to balance an individual’s procedural rights against national security interests, the due process of procedural rights should not be neglected. Likewise, conducting exclusion procedures without disclosed evidence would, as I perceive it, fall short in providing several procedural rights to the individual concerned and might not justify an exclusion decision.

In conclusion, including a framework of procedural rights in the exclusion context would improve interpretation and understanding of ‘serious reasons for considering’ in alignment with procedural fairness. The principle of procedural fairness is critical not only for the individual asylum seeker’s rights and interests, but also ‘an important protection against further attempts by States to weaken the protection obligations to which they have agreed under the 1951 Convention’\textsuperscript{842}. This section has discussed the relevant procedural safeguards and principles in light of the general treaty interpretation rule, systemic integration and the evolutionary approach in the exclusion context. The next relevant issue to investigate is the question of evaluating evidence in exclusion cases. A theoretical analysis of this matter is provided in the following section, which is followed by some concluding remarks.

\begin{footnotes}
\item[839] Ibid.; UNHCR, Background Note on the Application of Article 1F, paras. 112–113; UNHCR, Guidelines on International Protection No. 5, para. 36.
\item[840] UNHCR, Background Note on the Application of Article 1F para 113; UNHCR, Guidelines on International Protection No. 5, para. 36.
\item[841] ECtHR, \textit{Chahal v. United Kingdom}, 1996, para. 131.
\item[842] Bliss, 2000, pp. 131–132.
\end{footnotes}
5.6 Evaluation of Evidence

5.6.1 Why it is Important

Confirming if the standard of proof is met can be done through evaluation of evidence. This is related to both standards of proof and burden of proof. The process of evaluating evidence presented in the individual case enables decision-makers and judges to examine the probative value of the evidence relevant to the case. This is also why evaluation of evidence is important for the decision-making authority to use as a yardstick to determine if the standard of proof in the legal matter is met.843

Further, evaluation of evidence clarifies the distinctive dimensions of facts and the law. On the one hand, ‘[t]he law determines which types of facts give rise to rights and duties’,844. On the other hand, the facts presented in an individual case ‘are not themselves created by the law but exist independently of the law’.845 Interestingly, evaluation of evidence and the standard and burden of proof are contrasting aspects. While evaluation of evidence focuses on the facts of the case, the aspect of deciding the standard and burden of proof refers to a legal matter. Thus, the standard and burden of proof are determined by norms, primarily in the statutory framework. Evaluation of evidence, on the other hand, is defined as an epistemological issue.846

Evaluation of evidence in relation to the assessment of exclusion is a challenging issue to examine. The reason is the non-existent procedural framework in the international refugee instruments, which has led to a broad discrepancy in the domestic systems investigating exclusion matters. Because of this, there is no consistent and coherent method for the procedural steps and evaluation of evidence within the international community. This is an inevitable consequence of not having binding rules or guidelines on these matters.

With this in mind, the purpose of this study is not to analyse the descriptive theory of evaluation of evidence – in other words, how courts actually process the evaluation of evidence – or draw conclusions on how decision-makers and judges should evaluate evidence according to state practice.847 The reason is the broad discrepancy in state practices, which makes it challenging to find a common

844 Klamberg, 2013, p. 156.
845 Ibid.
846 Ibid., pp. 158 and 160.
framework. As the central issue of this study is understanding the exclusion provision in accordance with international standards, the aim is instead to present an analysis of important systematic and theoretical elements of evaluating evidence in international criminal law proceedings. One might question if international criminal standards should be considered in relation to the exclusion provision, which has an administrative nature and is applied at domestic level. How can two separate fields of law with distinct objectives interact? In fact, that is what makes the exclusion provision so unique. It not only represents a provision that is a part of an administrative framework – it also exists at the intersection with criminal law standards. Not only does Article 1F refer directly to criminal acts, there are several points justifying why the interaction between international refugee law and criminal law is necessary when investigating the exclusion provision.

First, Article 1F(a) referring to international crimes states that an asylum seeker shall not be provided refugee protection if he/she ‘has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes’. With a direct reference to ‘as defined in the international instruments drawn up to make provision in respect of such crimes’, the exclusion provision invites the international instruments that define international crimes to provide further assistance on these definitions and how to examine matters within a criminal procedure, e.g., determine criminal responsibility.

Second, the Roundtable Discussion highlights the need for interpreting the exclusion provision in light of an evolutionary approach and consider other standards from international bodies of law, such as international criminal law. Additionally, according to UNHCR guidelines emphasising justification of excluding an asylum seeker from refugee protection, the decision-maker must establish individual criminal responsibility in relation to at least one of the exclusion crimes mentioned in Article 1F. Furthermore, the modes of liability in relation to the commission of the exclusion crimes follows the language of criminal law, as the asylum seeker subject to Article 1F can be excluded due to either having committed the crime ‘or [having] made a substantial contribution to the commission of the criminal act, in the knowledge that his or her act or omission would facilitate the criminal conduct’. Even complicity in terms of indirect commission of a criminal act can suffice to justify exclusion from refugee protection, for example, through instigating, aiding and abetting (terms relevant in the language of criminal law).

Exclusion from refugee protection is part of an administrative procedure, yet it entails an assessment of ‘serious reasons for considering’ that the person has committed one of the exclusion acts. Hence, assessment of Article 1F would not suffice if the criminal law aspects were ignored completely. Criminal law is more
‘equipped’ in legal matters concerning crime, criminal responsibility and criminal evidentiary analysis. With respect to this, many scholars support the idea of interpreting ‘serious reasons for considering’ in light of criminal law standards (ideally international law), as the exclusion provision builds its rationale materia on the issue of whether an asylum seeker has committed an international crime, a serious non-political crime, or acts contrary to the purposes and principles of the United Nations. Thus, including the framework of international criminal law when evaluating evidence of exclusion is a step towards a coherent and consistent procedure. The same goes for protecting the principles of restrictive interpretation, procedural fairness, and legal certainty in the individual exclusion case. As regards the theoretical analysis of evaluating exclusion evidence, the following section sheds light on the idea of introducing the notion of ‘robustness’ into the context of exclusion proceedings.

5.6.2 Robustness and the Exclusion Standard of Proof

Exclusion cases should be investigated in a sufficient manner, with an adequate examination of the facts and evidence presented. The concept deals of ‘robustness’ deals with the collection of evidence, while the matter of evaluating the standard of the investigation focuses on the question of how much evidence should be collected before proceeding with the evaluation of evidence.\(^848\) In cases where ‘the standard of adequate investigation is met, the evidence is robust’.\(^849\) If evidence is declared to be robust, including additional evidence in such cases would not change the probative value of the evidence.\(^850\)

However, discussing robustness in relation to probative value is not consistent in legal scholarship. For example, Lindell and Diesen proclaim that the concept of robustness should be distinguished from the question of probative value. Therefore, they should ‘not be measured in the same dimension’.\(^851\) According to them, in cases where there are deficiencies in robustness, the probative value of evidence can remain unchanged. Others argue that ‘robustness directly affects the combined probative value of the evidence’.\(^852\) Though there are different standpoints on how to approach the concept of robustness, the distinction is


\(^{849}\) Klamberg, 2013, p. 155. Other words that have been used, such as ‘comprehensiveness’, ‘resilience’ or ‘massiveness’, mean relatively similar things, see Klamberg, 2013, pp. 154–155.

\(^{850}\) Ekelöf, Edelstam, and Heuman, 2009, pp. 187–189; Klamberg, 2013, p. 155; See further analysis on the relation between the concepts ‘robustness’, ‘massiveness’ and ‘comprehensiveness’ in regard to the different levels of graveness in criminal prosecutions, see Andersson, 2016, pp. 205–209.


\(^{852}\) Klamberg, pp. 155–156.
likely to be distorted. Diesen even describes ‘robustness’ in contradiction with his own statement referenced above. In another analysis, he argues that ‘the standard of an adequate investigation, and thus robustness, relates to the amount of evidence that should be collected before an evaluation of evidence is possible’.

What matters, in the end, is that robustness is a component of evidence, that in one way or another is attached to the process of evaluating evidence.

Given the analysis above, could the concept of ‘robustness’ be appropriate to consider when examining the exclusion standard of proof? Interestingly, the answer is yes. Although literature is silent on the relationship between ‘robustness’ and ‘serious reasons for considering’, I argue for the possibility to consider the theoretical framework of ‘robustness’ when assessing the standard of ‘serious reasons for considering’. Much like criminal proceedings, assessment of exclusion cases concerns a collection of evidence and the investigation of criminal responsibility. Though the types and the amount of evidence required in exclusion decision differ between different jurisdictions, the inclusion of evidence to support that there are ‘serious reasons for considering’ that an asylum seeker has committed a serious international or domestic crime is inevitable. Thus, no exclusion decision can be justified without any form of evidence, at least according to the limited guidance addressing procedural matters.

As argued by Ekelöf with co-authors, ‘there should be an agreement that [robustness] should be taken into account as the court decides on criminal matters’. Given the fact that the whole assessment of the exclusion provision evolves into an investigation of whether the applicant has allegedly committed a serious crime, the evidence must be robust before declaring the individual excluded from refugee protection. The evaluation of evidence in exclusion cases must guarantee that nothing in the case points towards guilt. Also, each piece of evidence pointing towards accountability for an exclusion crime must be taken into account. In other words, ‘serious reasons for considering’ is to be considered met when no additional evidence would change the probative value of the submitted evidence. Thus, if there are gaps in the assessment procedure or potential evidence supporting a plausible defence, the exclusion proceeding cannot be considered complete or adequate to qualify ‘serious reasons for considering’.

Furthermore, the applicant must be given the benefit of the doubt. This indicates that robustness may affect the probative value in exclusion cases. However, as argued above, it does not matter if and how it affects the probative value – the essential point is that it cannot be ignored in either criminal or exclusion proceedings. Standing firm on the concept of ‘robustness’ would ensure that the

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853 Diesen, 1994, p. 102; Klamberg, 2013, p. 156 (emphasis added); Andersson, 2016, pp. 204–205.
855 Ibid., p. 188; See also Klamberg, 2013, p. 156.
evidence in exclusion cases is clear and credible, as required for the standard of ‘serious reasons for considering’.856

5.6.3 The Method of Evaluation of Evidence and the Importance of Judges Providing Reasons

In the context of international criminal law, the leading position at international tribunals and courts has been to weigh all the evidence presented in light of the principle of ‘free evaluation of evidence’. This recognised principle, originating from the civil law jurisdiction, enhances the elements of fact-finding precision, ‘to improve the defendants’ lot’.857 Hence, considering ‘free evaluation of evidence’ has been justified as adequate.858

However, with a critical reading of the principle, there are some weak spots worth addressing. One main issue is that the ‘free evaluation evidence’ may create an opening for decision-makers and judges to assess evidence based on their personal preferences. To decrease the risk of personal preferences being applied when evaluating evidence, the decision-making authority should rely on what is recognised as the general theory of knowledge (known as epistemology).859 This theory focuses on the nature, scope and sources of knowledge. In practice, this would mean that a decision-making authority must recognise knowledge that may fall outside the traditional legal discourse, even though evaluation of evidence is normally a matter of procedural law.860

However, answering the question of how to apply the method of evaluating evidence in accordance with the theory of knowledge is challenging,861 mainly because this relates to traditional legal questions, such as standard of proof. This is not an epistemological issue. However, adopting the method of evaluating evidence can be relevant for many reasons. First, it can guide judges and other decision-making authorities so they do not risk evaluating evidence based on their subjective beliefs. It can also help ensure that every judgment has an objective

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856 See, further Andersson, 2016, pp. 206–207.
858 See further analysis on how certain rules in the ICC Rules of Procedure and Evidence present specific principles of evidence which may be interpreted as an exception to the principle of ‘free evaluation evidence’, Klamberg, 2013, p. 157.
859 Epistemology is a branch within the discipline of philosophy.
861 As presented in the scholarly work, there seems to be a division between two notions of methods – the statistical probability calculus methods and the psychological or cognitive methods. For further analysis, see Diesen, 1994, p. 9; Ekelöf, Edelstam, and Heuman, 2009, pp. 160–161; Klamberg, 2013, p. 158.
Thus, methods of evaluation can provide an insight into how judges reasoned in their evidence assessment and function as safeguards against cognitive biases, negligence, and arbitrariness. Even if international courts, such as the ICC and the ECtHR, have stated that there is no requirement to answer and comment upon each argument or piece of evidence, there is still a shared position that the courts should present the reasons for their decisions.

Thus, to ensure that no exclusion decisions are based on personal preferences and a lack of objective basis, using a method for evaluating evidence and including a requirement of reasoning statements to check against the decision-maker’s intuition is important for legal certainty and to safeguard the exclusion provision.

5.7 Concluding Remarks

Decades after the Refugee Convention entered into force, the interpretation of ‘serious reasons for considering’ remains inconsistent. Various examples of how ‘serious reasons for considering’ is interpreted and understood highlight how the exclusion provision falls short in aspects of the quality, quantity and type

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862 Li, 2017, p. 240: ‘[…] individuals having “committed crimes” resulting from negligence are neither undeserving nor risk bringing the refugee system into disrepute’.

863 Klamberg, 2013, pp. 158–159, presenting why a reasoned opinion is valuable: ‘First, others than the court may make their own assessment whether the evaluation of evidence was correct. Second, the requirement that the judge has to put in writing how he or she has evaluated the evidence may function as a filter of self-scrutiny to make sure that what was discussed and decided during deliberation will stand. Third, with the reasoned opinion the parties may understand how the court has evaluated evidence and whether they should appeal or not’.

864 See, for instance, relevant provisions in international criminal instruments containing the obligation to include reasoned opinions in the judgments, Article 26 of the 1945 Charter of the International Military Tribunal (IMT Charter) - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (“London Agreement”), 8 August 1945; Article 17 of the 1946 International Military Tribunal for the Far East Charter (IMTFE Charter), 19 January 1946; Article 23(2) of the ICTY Statute; Article 22(2) of the ICTR Statute; See also the ICTY and ICTR Rules of Procedure and Evidence (RPE): ICTY RPE, 14 March 1994, IT/32; ICTR RPE, 29 June 1995 (original version). Both ad hoc Tribunal’s RPE had final amendments in 2015 – Rule 98ter (C) of the ICTY RPE; Rule 118 (B) of the ICTR RPE; Article 74(5) of the ICC Statute; See relevant international criminal law cases on this matter: ICTY, Prosecutor v. Anto Furundžija (Appeal Judgment), IT-95-17/1-A, 21 July 2000, for example, paras 68–73; ICTR, Prosecutor v. Alfred Musumba (Appeal Judgment), ICT-6-13-A, 16 November 2001, para. 18; ICTY, Prosecutor v Kaprelić et al. (Appeal Judgment), IT-95-16-A, 23 October 2001, para. 39; ICTY, Prosecutor v. Kravčič et al. (Appeal Judgment), IT-98-30/1-A, 28 February 2005, at para 23; ICTY, Prosecutor v. Halilović (Appeal Judgment), IT-01-48-A, 16 October 2007, para. 128; See relevant cases from ECtHR, Van de Hurk v. The Netherlands, para. 61; ECtHR, Ruiz Torija v. Spain, Application No. 18390/91, Judgment, 9 December 1994, para. 29.

of evidence required for exclusion decisions. As already mentioned, the international community interprets the exclusion standard with differing outcomes. Some jurisdictions interpret ‘serious reasons for considering’ as an evidentiary threshold closer to that of a criminal conviction (e.g. The UK and the UNHCR), whereas others apply a low evidentiary standard that is simple to reach (e.g. The Netherlands and France). Yet other jurisdictions are somewhere in between and interpret ‘serious reasons for considering’ as closer to the ‘reasonable grounds to believe’ standard than the ‘mere suspicion’ threshold (e.g., Canada and Sweden).866

Further, the discrepancy is reflected in the quality and substance of evidence required to justify exclusion. In the absence of any guidance on procedural matters in the Refugee Convention, national decisions-makers rely on broad variety of evidence: everything from inquiry reports, governmental lists, media, and NGO reports have been considered adequate to qualify Article 1F.867

Procedural safeguards are immensely important in every assessment procedure, perhaps particularly in bodies of law that lack reference to procedural terms in their instruments. The exclusion provision is an example of this. The wording of Article 1F and the international refugee instruments in general do not contain any elements of a clear procedural framework. However, guidance can be found in the object and purpose of the Refugee Convention and the exceptional nature of the exclusion provision as a norm limiting the humanitarian purpose of the regime. This requires that a high procedural framework is established for the purpose to protect any applicant undergoing an asylum procedure.868

Without explicit procedural conditions, a contextual reading of the exclusion provision highlights the idea of transferring the established procedural rights in the refugee status determination to the exclusion proceeding. The assessments of inclusion and exclusion are, as mentioned above, closely linked to evaluating the merits of a refugee claim from every angle, in line with the object and purpose of the refugee instruments. Furthermore, the consequences of not qualifying as a refugee or being excluded from refugee protection are similarly sensitive.869 The detrimental consequences of an exclusion decision, depriving the person from refugee protection and placing him or her outside the refugee legal framework, could be said to argue for ‘the strictest procedural safeguards’.870

869 Ibid., pp. 299–300.
870 LCHR, ‘Safeguarding the Rights of Refugees under the Exclusion Clauses’, p. 337; See, further, Li, 2017, p. 230; Türk, Nicholson, and Feller, ‘Summary Conclusions: exclusion from refugee status, expert roundtable,
Lastly, to guarantee the legal certainty and procedural fairness of exclusion cases, each assessment must meet the standard of adequate and credible investigation, where all the required measures must have been used before applying Article 1F. Furthermore, the vagueness in how to approach and interpret key elements, like the standard of proof, highlights the need to introduce specific standards for decision-makers to apply in order to examine the exclusion provision with procedural fairness, legal certainty and coherency. Instead of drawing attention to the meaning of the terminology, to mirror similar wordings, an optional approach could be to align the exclusion evidentiary standard with the higher threshold for the standard of proof used in other fields of law. As an additional measure, an illustrative list of evidence required to justify the application of the exclusion clauses could be established. Given the specific character of Article 1F and the guidance to interpret the provision restrictively, it should be clear that the ‘serious reasons for considering’ extends far beyond the ‘balance of probabilities’ standard. As argued by Bliss: ‘[a] standard any lower than this would inevitably result in the exclusion of persons genuinely deserving protection.’ In addition, given its quasi-trial nature, the exclusion provision – in this regard equivalent to a criminal proceeding – cannot be finalised without evaluating all the relevant evidence. The evaluation of evidence relates to a broad spectrum of issues, such as the amount of evidence that should be collected, how to evaluate the evidence, how to conduct and pursue interviews, if additional inquiries are needed, et cetera. Therefore, inspiration from criminal doctrine in exclusion investigations should not be limited to the definition of crimes or modes of liability. It should also be part of the evaluation of evidence of exclusion from the lens of ‘robustness’.

With account taken of the broad discrepancy in the assessment of exclusion and reading of the evidentiary standard ‘serious reasons for considering’, this chapter has discussed how the framework of international human rights and criminal law, while respecting the administrative nature of Article 1F, could serve the provision to reach a level of consistency. It has also shown how application of crucial procedural conditions and safeguards would impose the high evidentiary threshold necessary due to the harmful consequences of an exclusion decision.

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871 Bliss, 2000, pp. 115–120.

872 The proposed position to not accept ‘serious reasons for considering’ below the ‘balance of probabilities’ standard is presented in Bliss, 2000, at p. 116: ‘A standard any lower than this would inevitably result in the exclusion of persons genuinely deserving protection.’ I agree with this conclusion.

873 Ibid.
6. Should the Language of International Criminal Law be Integrated into the Context of Exclusion from Refugee Protection?

Whereas Chapter 5 covered the research sub-question about ‘serious reasons for considering’, this chapter aims to analyse the systemic integration between international refugee law and criminal law. It contains a normative analysis of how, given the interpretive tools presented in this thesis, the language of criminal evidentiary standards can be transferred into the understanding of exclusion from refugee protection. Here, note the word ‘transfer’. The aim of this chapter and the overall project is to examine how the international criminal standard can support and add further clarification for a coherent interpretation of Article 1F. The ambition is not to use international criminal standards to replace the language, objective and framework of Article 1F. The chapter covers further aspects related to this analysis, such as whether international or national criminal law should be considered when assessing the exclusion clauses and how to approach the issue of ‘individual criminal responsibility’ within the framework of the exclusion provision. Importantly, as this chapter emphasises, these bodies of law may have comparable elements. However, they are two separate regimes with distinct frameworks and legal bases. Thus, this chapter will highlight how the dissimilarity should be respected, but also, where and how the notion within the exclusion provision can bridge the interaction between international refugee law and international criminal law.

6.1 Introduction

The language of international criminal law can be seen in the framework of Article 1F. The reference to international criminal law is to some extent revealed in the wording of Article 1F, although not explicit in the wording of the provision as a whole. Article 1F(a) excludes an asylum applicant from obtaining refugee status if there are ‘serious reasons for considering’ that the applicant has ‘committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provisions in respect of such crimes’. Article 1F(a) is one of the clauses referring most closely to international criminal law.

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874 Article 1F(a) of the 1951 Convention Relating to the Status of Refugees, entered into force 22 April 1954, 189 UNTS 137.
law, through the reference made to international instruments regarding international crimes. Article 1F(a) overlaps with Article 1F(c), which excludes an applicant when there are ‘serious reasons for considering’ that the applicant is ‘guilty of acts contrary to the purposes and principles of the United Nations’. Article 1F(b), which concerns individuals who have ‘committed a serious non-political crime’ before entering the country of refuge, makes no reference to international instruments. Nevertheless, principles of international criminal law are still relevant to the application of ‘serious non-political crimes’, which makes the interaction between the exclusion provision and criminal law important to consider. In particular, ‘serious non-political crimes’ must meet the threshold of ‘seriousness’ of a specific crime recognised by several jurisdictions. Endorsing a consistent approach across jurisdictions regarding what sorts of crimes are ‘serious’ means that these ‘serious non-political-crimes’ contain an ‘international meaning’ across the international community as a whole.

As already pointed out in Chapter 5, there are both similarities and differences between international refugee and criminal law. Though asylum and criminal procedures are considered to be ‘state-governed’, they differ in that the asylum procedure falls in the context of administrative standards, rather than criminal standards. They also differ in their consequences. While the asylum procedure is an administrative decision declaring whether refugee status is granted or not, the criminal procedure involves a trial followed by a judicial decision on whether or not the person is held criminally responsible for the alleged crime(s). These two areas of law differ also in the fact that they are rooted in distinct principles and purposes. The impact of criminal law on assessment of refugee status has been criticised as having critical implications for the substantive rights of the individual claiming to have a need for refugee protection. Another aspect is that criminal and refugee law serve different societal purposes. Transferring criminal standards to the determination of exclusion in refugee law might reveal the noticeable incompatibilities between the two legal systems, but also the similarities which make the two regimes possible to integrate. Overall, it is crucial to respect, maintain and apply the lines along which these two fields of law can be integrated and where they need to be kept separate. With this in mind, interesting question to discuss further include why and how international criminal standard can be portrayed in the exclusion context. This is particular interesting in respect to the evident differences existing between the fields of law. These issues are discussed in the next section, which covers ‘regime interaction’.

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875 Article 1F(c) of the 1951 Refugee Convention.
876 Article 1F(b) of the 1951 Refugee Convention.
877 Li, Yao, Exclusion from Protection as a Refugee, An Approach to a Harmonizing Interpretation in International Law, Brill-Nijhoff, International Refugee Law Series (volume 9), 2017, p. 2.
878 Ibid.
6.2 Regime Interaction

6.2.1 Position in Favour of Including Criminal Standards

The quasi-criminal feature in the assessment procedure of exclusion cases supports the inclusion of criminal law standards within the framework of Article 1F. With inspiration from Bond, a suggestion on how decision-makers can approach the dimension of including criminal principles when interpreting the exclusion provision can be based on the following steps:

1. Identify and assess the physical components of the claimant’s contribution to a relevant international crime (actus reus);
2. Identify the nature of the claimant’s knowledge and intent (mens rea);
3. Assess the applicability of potential defences; and
4. Determine whether a mechanical application of existing international criminal law would lead to an exclusion that is contrary to the object and purpose of the Refugee Convention.  

The reason why I find Bond’s identified criteria compelling is that they highlight the concrete steps encompassing critical elements important for the exclusion provision. The framework consists of questions that are important to answer in order to deal with the complexity of the interaction between international refugee law and criminal law – namely how to assess matters of criminal responsibility and exclusion from criminal accountability within a field of law that deals with entirely different substantive concerns. Bond’s proposal provides the tools necessary to take into account in order to demonstrate how systemic integration can be applied as a basis for finding an understanding of Article 1F in accordance with international law. Even more crucially, Bond’s proposal indicates how the rules and principles of criminal law can serve as international standards to draw upon when interpreting the exclusion provision. I will examine and discuss this further in the remainder of this chapter. The criminal law standard could serve as a complementary model to take inspiration from, and help to ensure that criminal standards are not used to justify exclusions from refugee protection that infringe the object and purpose of the Refugee Convention.  

I have underlined that the contribution of criminal law to the exclusion context should not be made at the cost of disregarding the object and purpose of the Refugee Convention. With respect to this, though Bond’s criteria are useful, it is crucial to include further criteria that strengthen the language of the object and purpose of the

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881 Bond, 2013, pp. 73–76; See further, Li, 2017, pp. 239–240; 246–247: ‘Conversely, the integrity of asylum would not be harmed if persons who played a minor role in Article 1F CSR51 crimes still enjoy protection and are surrendered to criminal proceedings after having been acknowledged as refugee’. (at p. 247).
Convention. These would include aspects of procedural safeguards and principles, such as ‘the presumption of innocence’ and ‘benefit of the doubt’. In proposing a slightly reviewed version of Bond’s model, I would argue for the need to include criteria that observe procedural rights and principles that are enshrined in international human rights and criminal law.

There is support for the application of principles and norms from criminal law in the interpretation and assessment of the exclusion provision. For instance, several scholarly works present insightful contributions in analysing the option of transferring criminal evidentiary standards into the meaning of ‘serious reasons for considering’. Further support of an integrated approach to Article 1F can be found in the legal instruments. For example, in the EU Qualification Directive, the reference to applying criminal law standards when interpreting ‘serious reasons for considering’ can be observed through a contextual reading of Article 12(3). With respect to Article 12(2), this sub-paragraph mentions that ‘[p]aragraph 2 applies to persons who incite or otherwise participate in the commission of the crimes or acts mentioned therein’. Unpacking this, the contextual reading stipulates exclusion for commission of, incitement to or participation in the crimes. In certain ways, this invites the principles and norms of criminal law to be applied when interpreting the terms of Article 1F. The question here is if it is international or domestic criminal law that decision-makers should consider. This is examined further in the next section.

882 Kingsley Nyinah, Michael, ‘Exclusion Under Article 1F: Some Reflections on Context, Principles and Practice’, 12 International Journal of Refugee Law 295, 2000, p. 300; Bond, 2013, pp. 19, 46–78; Hathaway, James C., and Foster, Michelle, The Law of Refugee Status, Cambridge University Press, 2014, pp. 536, 572: ‘[…] because the text of Art. 1F(a) makes clear that refugee law should follow, not lead, on the substance of relevant international criminal law, exclusion ought not to be ordered unless there is a general consensus in contemporary international criminal instruments regarding both the affirmative elements of the relevant crime, and applicable defenses.’; ‘The European Council on Refugees and Exiles (ECRE), ‘Position on Exclusion from Refugee Status’, March 2004, PPI/03/2004/Ext/CA, paras. 36–39; The support for examining the exclusion evidentiary standard in accordance with actus reus and mens rea elements has also been stated in domestic jurisprudence. See also, the R(JS)(Sri Lanka) v Secretary of State for the Home Department case where the UK Supreme Court stated that ‘[o]f course, criminal responsibility would only attach to those with the necessary mens rea (mental element)’, R(JS)(Sri Lanka) v Secretary of State for the Home Department [2010] UKSC 15, at para. 36.


884 EU Directive 2011/95/, 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’, 13 December 2011, L337/9, (EU Qualification Directive), Article 12(2) is equated with the wording of Article 1F.

885 Both Article 12(2) and (3) of EU Qualification Directive.
6.2.2 Should International or Domestic Criminal Standards be Used?
The central question is whether the application of criminal law standards should derive from international criminal law or domestic criminal law. Based on the language of Article 1F, the exclusion provision in fact relies on both. The clauses referring to exclusion due to the international core crimes (i.e., crimes against peace, crimes against humanity and war crimes) and acts contrary to the purposes and principles of the United Nations inevitably rely on international criminal law. However, the situation is different with respect to Article 1F(b). ‘Serious non-political crimes’ links more to domestic crimes as it refers to ‘common’ crimes as justified reasons to exclude.

Nevertheless, relying on international criminal law when interpreting Article 1F(b) is possible and relevant for several reasons. First and foremost, international criminal law standards should be applicable to the entire scope of the exclusion provision. Otherwise, the exclusion provision might be interpreted inconsistently and with a limited guarantee of basic procedural rights and justice for the individuals concerned. Second, the excludable crimes of Article 1F(b) must be of a ‘serious’ character. This has been stated to conform with what the international community considers to be a ‘serious crime’. Third, principles and norms for individual criminal responsibility or procedural matters make up a general framework applicable in both international and national criminal law. Thus, relying on international criminal law would increase procedural safeguards in the assessment procedure. It is therefore important that the assessment of Article 1F(b) take account of as many international documents as possible (e.g., multinational extradition treaties) in order to establish an international interpretation of exclusion due to ‘serious non-political crimes’. This would yield a consistent approach for Article 1F as a whole.

In light of the analysis presented in this thesis, the dynamic between international refugee and criminal law can be considered evidential. However, there must be a balance between the bodies of law due to the expected differences. In the section below, the differences and similarities between the two fields of law are examined further.

6.2.3 A Balanced Regime Interaction between International Refugee Law and International/National Criminal Law
The figure below illustrates that the exclusion provision (Art. 1F) contains parts of both international refugee law and international/national criminal law. This section further describes this model.

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886 Li, 2017, p. 164.
The relationship between Article 1F and criminal law does not necessarily mean that criminal law suppresses the principles and rules of refugee law. The interaction between the bodies of law should be balanced, with the norms, principles, and objectives of both regimes standing in harmony with each other.\textsuperscript{887} To minimise the risk of a broad interpretation of an unfamiliar standard of proof, such as ‘serious reasoning for considering’, the interpretation of Article 1F should take criminal law standards into account.

However, the integration of norms and principles from the criminal law framework must be approached with some limitations as the objectives of refugee law and criminal law differ greatly.\textsuperscript{888} The fundamental pillar within the refugee law context is to provide humanitarian protection, not to assess matters of criminal complicity and penal measures. That is the focus within the criminal law context. Therefore, encouragement to interpret the exclusion provision in light of criminal law should be given with full awareness of the merits necessary in an asylum procedure. This means that although criminal law standards should be applied in an administrative asylum context, one must not overlook the fact that decision-makers in asylum procedures function as adjudicators, not as criminal judges. They are familiar with is civil law standards, not criminal principles and norms.\textsuperscript{889} Further, the purpose is not to ‘integrate meanings from different areas that are meant to serve different concrete objects and purposes in different contexts’.\textsuperscript{890}

Where there are differences between the norms and principles of refugee law and criminal law with respect to exclusion, the outcome that is most beneficial for the refugee should prevail.\textsuperscript{891} We are still dealing with a provision within refugee law – a body of law serving to provide humanitarian protection with the \textit{non-refoulement} principle as its cornerstone. Further, the refugee regime is linked to the notion of persecution, not prosecution. More specifically, the exclusion provision is about safeguarding the humanitarian objectives from being utilised by underserving refugees – not protecting host states from refugees causing threat against

\textsuperscript{887} Li, 2017, p. 152.
\textsuperscript{888} Rikhof, 2012, p. 490.
\textsuperscript{889} Li, 2017, p. 152.
\textsuperscript{890} Ibid, p. 161.
\textsuperscript{891} See also, ibid, p. 342.
national interest. Still, this should not be taken to mean that criminal law standards should outweigh the values and principles of the exclusion provision. Instead, the similarities between the bodies of law should be taken into account, to approach a coherent and consistent interpretation of Article 1F, while the differences should be retained in matters where the fields of law are mismatched.

Having discussed the notion of regime interaction between refugee law and criminal law, and the importance of building a bridge between the bodies of law despite their differences – the next important matter to examine is how to approach and understand the notion of individual (criminal) responsibility in the exclusion framework. This is what the following section focuses on.

6.3 Individual (Criminal) Responsibility

6.3.1 Forms of Liability

The structure of ‘serious reasons for considering’ encompasses two aspects: the evidentiary and substantive role. Both roles of ‘serious reasons for considering’ have a close interaction to criminal law, though from different standpoints. While in the evidentiary element, ‘the “serious reasons” standard is generally understood to be a means of accommodating the practical constraints of access to less evidence than is normally available in a criminal trial’, the ‘substantive matter […] requires that exclusion decisions be based upon settled norms of international criminal law’. In other words, if there are well-established facts and evidence supporting that the individual has met the standard of criminal liability for the excludable act, then exclusion from refugee protection becomes justified. Thus, to exclude an asylum seeker from refugee protection, the elements justifying the applicant’s contribution to the excludable crime need to be proven. The phrases ‘has committed’ and ‘guilty of’ in Article 1F are reference to the process of assessing the grounds for individual responsibility.

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893 Ibid.

894 Ibid.


896 Gilbert, Geoff, ‘Current Issues in the Application of the Exclusion Clauses, in Refugee Protection in International Law’, p. 471: ‘Although a status determination hearing can never replicate a criminal trial, exclusion is only justified where there is strong evidence that the applicant has committed a crime under Article 1F(a) or (b) or is guilty of an act contrary to the purposes and principles of the United Nations – there needs to be high proof
criminal responsibility in the exclusion context raises several questions. This study presents a normative analysis on how to approach criminal responsibility in the exclusion assessment, given its administrative nature. The intention is not to delve deeply into the language of criminal responsibility by discussing it in relation to all relevant forms of liability or how the concept of criminal responsibility is examined in international versus domestic criminal system. This section will cover the forms of criminal liability identified as appropriate in the assessment of the exclusion provision, and focus on central concepts relevant for this study, such as ‘personal contribution’, ‘criminal responsibility related to membership of a terrorist organisation’, and ‘exclusion from criminal responsibility’. As emphasised in the research question, the investigation will be influenced by the language of international criminal law. This part of the analysis is inspired by Bond’s proposed framework, mentioned at the beginning of this chapter. It will also consider how the four-step criteria can be adopted in accordance with relevant criminal standard and principles. However, this normative analysis will be limited based on the scope of this thesis.

A recommendation often referred to in the assessment of criminal responsibility within the exclusion procedure is paragraph 18 of the UNHCR Guidelines on International Protection, which reads:

For exclusion to be justified, individual responsibility must be established in relation to a crime covered by Article 1F. . . . In general individual responsibility flows from the person having committed, or made a substantial contribution to the commission of the criminal act, in the knowledge that his or her act or omission would facilitate the criminal conduct. The individual need not physically have committed the criminal act in question. Instigating, aiding and abetting and participating in a joint criminal enterprise can suffice.\footnote{\textit{Of individual criminal responsibility}. (emphasis added), in: Türk, Volker, Nicholson, Frances, and Feller, Erika, \textit{Refugee Protection in International Law – UNHCR’s Global Consultations on International Protection}, Cambridge University Press, 2003.}

The statement above points to the many relevant aspects worth highlighting. It stresses the importance of a substantial contribution to the commission of the crime. Nevertheless, substantial contribution does not mean that the crime must have been committed by the individual concerned. The person is subject to Article 1F can be held responsible through other forms of participation. What is

\footnote{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, para 18; Examples of domestic cases referring to this UNHCR statement, see, for instance, \textit{R(J)(Sri Lanka)} v Secretary of State for the Home Department, para. 14; \textit{Ezokola v. Canada} (Minister of Citizenship and Immigration), [2013] SCC 40, para. 76; Swedish exclusion cases, MIG 2017:11, section 2.6 of the judgment; MIG 2017:29, section 3.2 of the judgment.}
clear is that a liability assessment has to be performed, and that the *actus reus* and *mens rea* element must be fulfilled. Individual responsibility can arise through other chains of contribution, such as aiding and abetting.

To clarify, the reference to criminal accountability of the excludable crime does not have the same wording throughout the exclusion provision. Exclusion categories (a) and (b) refer to ‘has committed’, while (c) refers to ‘has been guilty of’. Nevertheless, the reference to ‘criminal liability’ in Article 1F(c) does not entail a higher threshold of culpability ‘or even as requiring an actual pronouncement of guilt by a competent body’. Hence, ‘has been guilty of’ means the same as ‘has committed’, enshrined in the exclusion categories of international crimes and ‘serious non-political crime’.898

Article 1F encompasses both direct participation and indirect participation in relation to the allegedly exclusion crime. An international norm relevant to apply when assessing the matter of participation in an excludable crime has been Article 25 of the ICC Statute.899 This provision has many interesting aspects. First, the concept of ‘commission’ of the crime encompasses various forms of complicity. It could be either direct, joint or indirect participation, *e.g.*, instigating, planning, ordering or aiding and abetting.900 Even elements of incitement or attempts to commit a heinous crime are included.901 A textual reading of the concept ‘commit’ in Article 25(3)(a) also emphasises both active commission of a crime and an omission liability (the duty to act).902

Concerning the forms of liability in relation to the exclusion crimes, Zimmermann and Wennholz comment that ‘there only have to be serious grounds to believe that a contribution to one or more of the crimes referred to was made


901 For instance Article 23(3)(e) and (f) of the The 1998 Statute of the International Criminal Court, entered into force 1 July 2002 (ICC Statute).

and that no grounds for excluding criminal responsibility are present’. Thus, the triggering of Article 1F can be based on elements that point to the individual’s own contribution to the crime – and as long as nothing speaks in favour of excluding criminal accountability. Therefore, attempts, conspiracies, command and superior responsibility are to be recognised as participation modes within the scope of Article 1F. ‘Indirect participation’ can only be at hand in the case of joint criminal enterprise, complicity or aiding and abetting. Emphasising this further, the UNHCR writes:

committed, or made a substantial contribution to the commission of the criminal act, in the knowledge that his or her act or omission would facilitate that criminal conduct. The individual need not physically have committed the criminal act in question. Instigating, aiding and abetting and participating in a joint criminal enterprise can suffice […] Criminal responsibility can normally only arise where the individual concerned committed the material element of the offence with knowledge and intent.

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904 For a comprehensive analysis of individual criminal responsibility and modes of liability in the context of exclusion, see, for instance, Kingsley Nyinah, 2000, pp. 299–300; Zimmermann and Wennholz, ‘Article 1F’, paras. 48–49, in: Zimmermann, Machts, and Dörschner, The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary, 2011; Rikhof, 2012, pp. 185–287; Bond, 2013, pp. 58–71; Li, 2017, pp. 239–274. More explicitly about superior responsibility and exclusion, see p. 253 where Li states: ‘Since superior responsibility is only relevant if no form of individual criminal responsibility is incurred for the same crimes, it will hardly constitute the major mode of liability triggering exclusion. Wherever a case occurs that is discussed with controversy within jurisprudence and doctrine, we should avoid relying on superior responsibility.’ Related to this statement is the observation made by Li confirming that Article 25 ICC Statute is lex specialis (individual criminal responsibility) with respect to Article 28 ICC Statute (superior command responsibility) (see p. 250 n 396 with reference to ICC and ad hoc tribunals’ case law); Rikhof, Joseph, Exclusion and Refoulement, Irwin Law Inc., 2023, pp. 269–424; UNHCR, Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, 4 September 2003, para 51: ‘In general, individual responsibility, and therefore the basis for exclusion, arises where the individual committed, or made a substantial contribution to, the criminal act, in the knowledge that his or her act or omission would facilitate the criminal conduct’; UNHCR, Expert Meeting on Complementarities between International Refugee Law, International Criminal Law and International Human Rights Law: Summary Conclusions, July 2011, paras. 48–51


906 UNHCR, Guidelines on International Protection No. 5, paras. 18, 21 (emphasis added); UNHCR, Background Note on the Application of Article 1F, paras. 50–63; See, further, Ramírez v. Canada (Minister of Employment and Immigration), [1992] 2 F.C. 306, 311, where the Court highlighted that ‘[N]o one can commit international crimes without personal and knowing participation’. (see MacGUIGAN J. ‘Reasons for Judgment’, section I); See also Li, 2017, p. 258, stating that ‘[t]he basic criticism that JCE does not find support in customary international law and that JCE III possibly violates the principle of culpability, is especially problematic for the exclusion assessment’, (emphasis added); McAdam, Jane, Goodwin-Gill, Guy S., and Dunlop, Emma (4th ed.), The Refugee in International Law, Oxford University Press, 2021, p. 197.
As a result, in exclusion cases, evidence needs to support that the individual has in some way contributed to the actual crime in order to justify a link between the applicant and the exclusion crime.\(^{907}\) As observed in *Ezokola*, one needs examine the facts to ‘determine whether there was a voluntary, significant, and knowing contribution to a crime or criminal purpose’.\(^{908}\) Consequently, as highlighted by Gilbert and Bentajou, it is important to bear in mind that:

> [g]iven the lack of agreement and the complexity of the issue 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 […] it must be interpreted restrictively, namely, *in favour of the applicant for refugee status*.\(^{909}\)

However, because of the unique character of the exclusion crimes and the recognition of terrorism as an offence that can trigger the exclusion provision, one must include some reflections on the framework of transnational criminal law. This is relevant as serious non-political crimes or acts contrary to the purposes and principle of the United Nations have a transnational character. Crucially, if the liability terms ‘committed’ and ‘guilty of’ within Article 1F are supposed to have the same meaning, the legal instruments that are considered may differ.\(^{910}\) Further, there is still no international definition of terrorism – the closest we can


\(^{908}\) *Ezokola v Canada (Citizenship and Immigration)*, paras 84 and 91–92 (emphasis added). To illustrate this further, the Supreme Court of Canada defined a list of included factors in the assessment procedure: ‘a voluntary contribution to the crime; a significant contribution; a knowing contribution; an individual’s position or rank in the organization; how long the individual was a member, particularly after becoming are of the organization’s crime or criminal purpose: the method by which the individual was recruited and any opportunity which he or she may have had to leave.’; Other relevant domestic cases, see, for instance, *S (i.e. 5 "exclusion" certificate - process)* Sri Lanka *v. Secretary of State for the Home Department*, [2013] UKUT 00571, paras 91, 98–99; *The Attorney-General (Minister of Immigration) v. Tamil X and Anor*, [2010] NZSC 107, para 70, where the Court confirmed elements of liability pursuant in Articles 25 and 30 of the ICC Statute to be considered when examining ‘complicity’ as a ground for individual responsibility.; *CJEU: Joined Cases C-57/09 and C-101/09 Bundesrepublik Deutschland v B and D*, Judgment, 9 November 2010, paras 61–63; *CJEU: Case C-573/14 Commissaire général aux réfugiés et aux apatrides v Mostafa Lounani*, Judgment, 31 January 2017, paras 74–78; See also McAdam, Goodwin-Gill, and Dunlop, 2021, pp. 205–206.


come to an ‘international’ crime of terrorism would be through its codification in transnational criminal law. This is important also in relation to modes of liability, where there might be reason to consider the provisions in transnational criminal instruments, if international criminal law is delimited from offering any further normative support. If this were the case, suppression treaties that deal with aspects of terrorism as a criminal offence and the modes of liability could be relevant to examine.  

Here, it should be stated that describing all the different stages and providing a complete list of criminal liability in each terrorism suppression treaty goes beyond the scope of this study. This is also the case as regards investigation of the interaction between refugee law and transitional law. I will briefly mention a few relevant instruments that could possibly, based on the language of Article 1F, be considered when international criminal law is limited.  

Like Rikhof, I believe that transnational criminal law could be the relevant and appropriate legal framework to consider when the language of international criminal law is confined in the assessment of exclusion cases based on terrorism.  

With this in mind, a suppression treaty worth highlighting is the 2010 Beijing Convention and its Protocol. In addition to the modes of criminal liability addressed in other suppression treaties, the 2010 Beijing and the Protocol covers liability forms such as:

- attempt,
- organises,
- directs,
- participates as an accomplice
- assisting after the fact (added form of liability),
- conspiracy (added form of liability),
- common purpose,


For an overview of the different stages and forms of complicity that the suppression treaties include, see Rikhof, Joseph, ‘Complicity in Exclusion for Terrorist Crimes’, pp. 152–154, in: Simeon, Terrorism and Asylum, 2020.

Ibid., p. 173.

In comparing the different forms of involvement in criminal conduct, one can see that several of the forms of complicity listed above are also underpinned in Article 25(3) of the Rome Statute. Both instruments also include extended forms of liability that are absent from the other document. The Rome Statute points out incitement in limited circumstances,\(^{916}\) and soliciting, inducing,\(^{917}\) and command/superior responsibility\(^{918}\) as types of participation. The 2010 Beijing Convention and Protocol, on the other hand, contains organising, assisting after the fact, conspiracy and threat as forms of liability.\(^{919}\) The distinct forms of involvement are not aligned between the mentioned instruments. In general, a cautious approach should be used, so as \textit{not} to extend the forms of liability in every exclusion case relating to terrorism.

6.3.2 Grounds for Excluding Individual (Criminal) Responsibility

Before concluding that there are ‘serious reasons for considering’ that the applicant shall be excluded from refugee protection, the grounds for excluding individual criminal responsibility must be examined.\(^{920}\) It is essential to consider the basis of ‘excluding from criminal responsibility’ before giving the final verdict in Article 1F – interestingly, this part of the exclusion procedure can be seen as associated with the principle of ‘benefit of the doubt’. This can shed light on how the conception of ‘benefit of the doubt’ serves as a reminder to uphold the humanitarian objectives of the refugee system.

The provisions related to matters of defence from criminal responsibility are found under Articles 31–33 of the ICC Statute. The defences mentioned include ‘mental disease or defect’, ‘involuntary intoxication’, ‘self-defence’, ‘mistake of fact and some mistakes of law’, ‘duress’ and ‘circumstances of superior orders’.

A common defence category in exclusion cases is ‘duress’. According to Article 31(1)(d) of the ICC Statute, ‘duress’ means:

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\(^{915}\) The 2010 Beijing Convention, Articles 1(3), 1(4), and 1(5); The 2010 Beijing Protocol, Articles 1(2), 1(3), and 1(4); See also, Rikhof, Joseph, ‘Complicity in Exclusion for Terrorist Crimes’, p. 154, in: Simeon, Terrorism and Asylum, 2020.

\(^{916}\) See Article 25(3)(e) of the ICC Statute limited only for genocide.

\(^{917}\) See Article 25(3)(b) of the ICC Statute. Furthermore, soliciting was originally mentioned in the 1937 Terrorism Convention.

\(^{918}\) See Article 28 of the ICC Statute. However, command responsibility/superior responsibility is included in the 2006 International Convention for the Protection of All Persons from Enforced Disappearance, entered into force 23 December 2010, Article 6(1)(b).


a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be: (i) made by other persons; or (ii) constituted by other circumstances beyond that person’s control.

An example of this could be when a terrorist organisation has seized control over a part of a state territory and forced people residing there to provide goods, supplies and services to maintain the ideology of the terrorist organisation. In these circumstances, there could be grounds for excluding certain acts conducted for the benefit of the terrorist group from individual criminal responsibility. Thus, duress as a defence mechanism under Article 31(1)(d) of the Rome Statute could apply to a broad range of criminal terrorist association – from factual circumstances linking to aiding and abetting the commission of the terrorist crimes, to providing material support and facilities to terrorist organisations.921

Further, in exclusion cases, the applicant would have to present the relevant duress circumstances necessary to defend against any claim that there are ‘serious reasons for considering’ that he or she has committed a crime. The decision-maker, on the other hand, would have to argue from the position that duress conditions are not applicable.922 Any ‘evidential equivalence’ presented in the assessment procedure must speak in favour of the applicant.923

The framework of international criminal law enables the refugee system to use supplementary substance to promote the evidentiary assessment and legal certainty of the exclusion cases. This restricts Article 1F from being applied if international criminal law does not affirm a criminal offence or if there are plausible defences to consider.924 In claiming that there are ‘serious reasons for considering’ that an applicant has conducted an exclusion crime, the assessment of responsibility must first ‘confirm […] established grounds for a relevant form of criminal liability – based on consideration of both the actus reus and […] mens rea […] recognized at international law’.925 In addition, if ‘defence is plausible under an authoritative international criminal instrument, it cannot be said that there are serious reasons for considering the individual to “have committed” a relevant

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923 McAdam, Goodwin-Gill, and Dunlop, 2021, p. 205.
924 Hathaway and Foster, 2014, p. 572.
crime, and hence to be excluded from refugee status’.926 Lastly, the defence category corresponding most to the factual circumstances of the exclusion case must be applied.927 To paraphrase both judicial authorities and scholars in this field: ‘Article 1F may reflect a “unique evidentiary standard”, but this does not justify “a relaxed application of fundamental criminal law principles”’.928

Moving on with analyses of individual criminal responsibility in the main subject area related to terrorism, which this study focuses on, the section below investigates how to apply the international criminal responsibility standards in cases concerning association with a terrorist organisation.

6.3.3 The Framework of Individual (Criminal) Responsibility in Relation to Membership of a Terrorist Organisation

The fact that ‘mere membership’ in a group that has allegedly committed crimes of an international nature may infer a presumption of complicity – a substantial line between ‘has committed’ and ‘mere knowledge’ of the violent act(s) and the ideology of a specific criminal group must be settled. As ‘has committed’ signifies that the individual participation requirement is fulfilled, it ‘clearly indicates that the presence of serious reasons to consider involvement in the form of participation in specific acts could be inferred’. For its part, the ‘mere knowledge’ element, which means ‘awareness of general criminal objectives of organizational structures in which an applicant may have taken part, cannot per se serve to establish complicity’.

As emphasised above, individual association with a criminal act can occur in several ways. Similarly, accountability for an exclusion crime can be based on various modes of liability.930 In terms of investigating criminal responsibility based on

927 See, for example, a recent Swedish exclusion case decided by the Swedish Migration Court of Appeal on the issue of excluding from individual criminal responsibility in accordance with Article 31.1(c) of the ICC Statute. The Migration Court of Appeal decided that the content of the case was not sufficient to exclude the applicant from criminal responsibility. There were therefore ‘serious reasons for considering’ that the applicant had committed war crimes pursuant to Chapter 4, paragraph 2(b)(1) and 2(c)(1) of the Swedish Alien Act (equivalent to Article 1F(a) of the 1951 Refugee Convention), UM 15330-22, 18 April 2023, p. 8.
membership of a terrorist organisation, inspiration can be found in the landmark case *JS (Sri Lanka)*. The *JS (Sri Lanka)* judgment is a familiar case in issues concerning complicity based on membership of a terrorist organisation.\(^{931}\) Support for the Court’s reasoning and analysis can be found in both scholarly contributions and state practices.\(^{932}\)

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931 In this case, the decision-maker claimed the *actus reus* to be related to the ‘voluntary membership and command responsibility’ within a violent organisation committing war crimes and crimes against humanity. The *mens rea* linking to the standard of proof was that there were ‘serious reasons for considering’ that the claimant was involved and had knowledge about the activities performed by the LTTE, see *R(JS)(Sri Lanka) v Secretary of State for the Home Department*, [2010] UKSC 15; See also Juss, Savinder S., ‘The Notion of Complicity in UK Refugee Law’, 12 Journal of International Criminal Justice 1201, 2014, p. 1203.

932 Singer, Sarah, *Terrorism and Exclusion from Refugee Status in the UK: Asylum Seekers Suspected of Serious Criminality*, Brill-Nijhoff, Queen Mary Studies in International Law (volume 18), 2015, p. 139; Hathaway and Foster, 2014, pp. 579–586; Juss suggests that the concepts of ‘individual responsibility’, ‘individually responsible for the crime’ and ‘otherwise participate in the commission of crimes’, referred to in the context of exclusion from refugee protection, should have a unified threshold of complicity defined as ‘a sufficient level of participation on the part of the individual to fix him with the relevant liability’, see Juss, 2014, pp. 1201–1202, 1211, 1216 (Juss’s suggestion is further mentioned and analysed below in the section ‘Serious reasons for considering’ and ‘substantial grounds to believe’); See, further, *Ezokola v. Canada (Minister of Citizenship and Immigration)*, at paras. 3 and 7: ‘Guilty by association, however, is not one of them . . . [C]omplicity arises by contribution’ and at para. 68 underlining more in depth that ‘while the various modes of commission recognized in international criminal law articulate a broad concept of complicity, individuals will not be held liable for crimes committed by groups simply because they are associated with that group, or because they passively acquiesced to the group’s criminal purpose. At a minimum, complicity under international criminal law requires an individual to knowingly (or, at the very least, recklessly) contribute in a significant way to the crime or criminal purpose of a group’; See also an earlier Canadian case settling this approach, *Jose Rudolfo Moreno and Edith Francisco Parada Sanchez v. Minister of Employment and Immigration*, [1994] 1 FC, see section ‘1. Guilt by Association’: ‘It is well settled that mere membership in an organization involved in international offences is not sufficient basis on which to invoke the exclusion clause.’; In sharp contrast, mere membership or association in any form with an organisation that engages in terrorist activities is sufficient for the qualification of the exclusion provision in the US, see, for example, *Khan v. Attorney General*, [2009] 584 F.3d 773; *Attorney General v. Humanitarian Law Project*, [2010] 130 S.Ct. 2705; See also Fullerton, Maryellen, ‘Terrorism, Torture, and Refugee Protection in the United States’, 29 Refugee Survey Quarterly 4, 2010, p.16 stating that ‘everyone is ineligible for asylum who even once gave material support (for example, a meal) to any organization (two people, organized or not) which has a subgroup or allied group that engages in terrorist activity (intends or threatens to use a weapon or explosive to inflict substantial property damage). Lending a bicycle to Nelson Mandela when the African National Congress was an outlawed anti-apartheid organization would have constituted material support to a terrorist organization. Providing rice today to some of the groups that oppose the military dictatorship in Burma is deemed engaging in terrorist activity’; In overall, one needs to bear in mind that criminalising membership of a terrorist organisation is not a uniformed practice amongst the international community. For scholarly comparative analysis on the issue of membership of a violent group in the context of exclusion, see for instance, Kapferer, 2000, pp. 211–212; Rikhof, 2023, pp. 300–302, 305–407, 443–540, 577–588.

The *JS (Sri Lanka)* case centres on a Sri Lankan Tamil. At the age of 10 years, the respondent became a member of the Liberation Tigers of Tamil Eelam (LTTE). Already at the age of 11 years, he was a member of the LTTE's Intelligence Division. He was promoted to a range of positions within the organisations over the course of many years. From the age of 18 years, the respondent held authoritative roles such as chief security guard and other leadership positions. In 2007, the applicant arrived in the UK and applied for asylum based on the facts that he would face persecution in Sri Lanka due to his race and membership of the LTTE organisation. The Secretary of State rejected his asylum application and excluded him from refugee protection based on 1F(a) of the Refugee Convention.

In the court’s proceedings, the UK Court of Appeal and Supreme Court relied strictly on the elements of criminal liability enshrined in international criminal doctrine. According to the Supreme Court, it was important to acknowledge ‘the only one true interpretation of Article 1F(a) and the idea of finding the autonomous meaning of Article 1F(a) in international rather than domestic law’.

Given this, the ICC Statute, as described by Lord Brown, is ‘the most comprehensive and authoritative statement of international thinking on the principles that govern liability for the most serious international crimes’ and should, therefore, be the ‘starting point’. Relying on this statement, it is possible to argue that Article 1F can be interpreted in accordance with international criminal standards. Additionally, to achieve a coherent interpretation of the exclusion provision, integration with rules and principles enshrined in other international bodies of law should be made with respect to all exclusion categories. Therefore, the idea of ‘only one true interpretation’ should encompasses the entire exclusion provision, not only one particular exclusion category.

Interestingly, the Supreme Court linked the requirement of *actus reus* and *mens rea* pursuant to Article 25(3) and Article 30 of the ICC Statute with the relevant exclusion clauses in the EU Qualification Directive. The Court argued that Articles 12(2) and (3) of the EU Qualification Directive were necessary to highlight, as the clauses ‘[provide] a common standard for the application of the Refugee Convention’s requirement across [the EU’s Member States]’. Where Article 12(2)

933 R*(JS)(Sri Lanka)* v Secretary of State for the Home Department, para. 2.
934 Ibid., paras. 8–9; See also *The Attorney-General (Minister of Immigration)* v. Tamil X and Anor, para. 27 where the Supreme Court of New Zealand stated that ‘the starting point [is] the Rome Statute of the International Criminal Court which [makes] specific reference to crimes against humanity and [sets] out principles of international criminal liability.’; Emphasising this further, see, for instance, Juss, 2014, p. 1205, stating that ‘[t]his judgment rendered by the Supreme Court provides a leading example of how the requirements of both *actus reus* and *mens rea* were drawn from the international criminal law, that is, the provisions of the ICC Statute’. (emphasis added).
935 R*(JS)(Sri Lanka)* v Secretary of State for the Home Department, para. 14, see also paras 9–13, 33 and 36: ‘Article 12(3) does not, of course, enlarge the application of article 1F; it merely gives expression to what is already well understood in international law. This is true too of paragraphs (b), (c) and (d) of article 25(3) of the ICC Statute,
reiterates the wording of Article 1F(a), Article 12(3) is more closely linked to terrorist crimes and membership through the wording ‘applies to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein’.936

The Court of Appeal and the Supreme Court rejected excluding refugees merely on the fact of membership of a violent organisation that was ‘predominately terrorist in character’. This position originated in a decision – the Gurung doctrine – which emerged in the aftermath of the 9/11 terrorist attacks. The Gurung decision was based on a dynamic approach of including international criminal law instruments and case laws in examining issues of complicity.937 Hence, the method of integrating international criminal law and refugee law in assessing the issue of complicity based on excludable crimes was already established before the JS (Sri Lanka) case.938 However, what separates the Gurung case from the JS (Sri Lanka) case concerns the issue of complicity based on membership of a violent organisation.

In the Gurung case, the immigration tribunal stated that:

it would be wrong to say that an appellant only came within the Exclusion Clauses if the evidence established that he has personally participated in acts contrary to the provisions of Art. 1F. If the organisation is one or has become one whose aims, methods and activities are predominately terrorist in character, very little more will be necessary.939

Thus, the central point of the tribunal’s reasoning was that voluntary member of a violent group that was ‘predominately terrorist in character’ was sufficient for each of which recognises that criminal responsibility is engaged by persons other than the person actually committing the crime (by pulling the trigger, planting the bomb or whatever) who himself, of course, falls within article 25(3)(a)’ (at para. 33).

936 R(JS)(Sri Lanka) v Secretary of State for the Home Department, para. 14. In the same paragraph, the Supreme Court of Canada acknowledged the German Federal Administrative Court’s interpretation of 12(3) in BVerwG 10 C 48.07, and echoed the position that ‘the person seeking protection need not have committed the serious non-political crime himself, but he must be personally responsible for it. This must in general be assumed if a person has committed the crime personally, or made a substantial contribution to its commission, in the knowledge that his or her act or omission would facilitate the criminal conduct […] Thus this principle covers not only active terrorists and participants in the criminal sense, but also persons who perform advance acts in support of terrorist activities.’ (emphasis added); For a further analysis, see Juss, 2014, pp. 1203–1206.

937 Indra Gurung v Secretary of State for the Home Department, [2002] UKIAT 4870, para 34: ‘In deciding such issues as complicity we will need to look more and more to international criminal law definitions.’

938 In the Gurung decision, the tribunal recognised the regime interaction between Article 1F and international criminal law and international humanitarian law, see Indra Gurung v Secretary of State for the Home Department, para 109.

939 Indra Gurung v Secretary of State for the Home Department, para 105 (emphasis added).
exclusion. Consequently, the tribunal advocated for exclusion from refugee protection in the absence of evidence that proved the individual’s personal contribution in the terrorist crime. According to the tribunal, their conclusion was a response to modern-day terrorism, as the ‘terrorist acts of key operatives are often possible only by virtue of the infrastructure of support provided by other members who themselves undertake no violent action’. Moreover, the tribunal’s position seems to have relied heavily on the UNHCR’s statement from the 2001 document ‘Addressing Security Concerns’:

Where, however, there is sufficient proof that an asylum-seeker belongs to an extremist international terrorist group, such as those involved in the 11 September attacks, voluntary membership could be presumed to amount to personal and knowing participation, or at least acquiescence amounting to complicity in the crimes in question.

On the other hand, declaring individual responsibility based on voluntary membership of an organisation that was ‘predominately terrorist in character’ was dismissed in the JS (Sri Lanka) case. Instead, the Court required a thorough assessment, considering the rules on modes of liability underpinned in international criminal doctrine, before making a decision on exclusion based on membership of terrorist organisations. For instance, the Court of Appeal referenced the ICTY’s definition of joint criminal enterprise, stating that:

in order for there to be joint enterprise liability, there first has to be a common design which amounts to or involves the commission of a crime provided for in the statute. The actus reus requirement for criminal liability is that the defendant must have participated in the furtherance of the joint criminal purpose in a way that made a significant contribution to the

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940 Indra Gurung v Secretary of State for the Home Department, para 106; Singer, 2015, pp. 127–128.
941 UNHCR, ‘Addressing Security Concerns Without Undermining Refugee Protection – UNHCR’s Perspective’, 29 November 2001, Rev.1, para. 18 (emphasis added); Indra Gurung v Secretary of State for the Home Department, para 105; However, see Gilbert, Geoff, ‘Current Issues in the Application of the Exclusion Clauses, in Refugee Protection in International Law’, p. 471 in n 222, criticising the approach taken by the UNHCR in the aftermath of the 9/11 events. Establishing a principle of rebuttable presumption of individual responsibility based on association to an ‘extremist international terrorist group’ is, according to Gilbert, ‘unnecessary, potentially ambiguous, and difficult to justify when one is looking at a restriction on human rights’. in: Türk, Nicholson, and Feller, Refugee Protection in International Law – UNHCR’s Global Consultations on International Protection, 2003.
942 See for instance, Rf(S)/Sri Lanka) v Secretary of State for the Home Department, para. 7 with reference to Toulson LJ’s reasoning (in para 123), stating that: ‘The fact that he was a bodyguard of the head of the intelligence wing […] shows that he was trusted to perform that role, but not that he made a significant contribution to the commission of international crimes or that he acted as that person’s bodyguard with the intention of furthering the perpetration of international crimes’.
crime’s commission. And that participation must have been with the intention of furthering the perpetration of one of the crimes provided for in the [Rome] statute.943

The Court’s statement underscored the elements of an ‘active member’ of an organisation ‘devoted exclusively to the perpetration of criminal acts’,944 as opposed to ‘voluntary member’ of an organisation that is ‘predominantly terrorist in character’.945 Thus, the central point that the Supreme Court highlighted was the level of participation. As remarked by Lord Kerr: ‘One needs [...] to concentrate on the actual role played by the particular persons, taking all material aspects of that role into account so as to decide whether the required degree of participation is established.’946 Given this, the JS (Sri Lanka) case did, as observed by Singer, ‘set a much higher standard of complicity required to give rise to exclusion under Article 1F, particularly in relation to membership of a “terrorist organisation”’.947 Through this reasoning, the Court set a standard for a ‘restrictive approach’ and protected the framework of Article 1F from broad applications based on a presumption of individual criminal responsibility.

Even if the Gurung doctrine used a low level of criminal complicity based on membership of a terrorist organisation, the tribunal did emphasise a subtle undertone to assess the individual’s personal awareness of engaging in the group. The immigration tribunal highlighted that:

whilst complicity may arise indirectly, it remains essential in all cases to establish that the appellant has been a voluntary member of such an organisation who fully understand its aims, methods, and activities, including any plans

943 See R(JS)(Sri Lanka) v Secretary of State for the Home Department [2009] EWCA Civ 364, paras. 95, 104, 119; Interestingly, the Court of Appeal relied on joint criminal enterprise, as opposed to the ‘personal and knowing participation’ standard which has traditionally been the liability formed applied by state practice in the context of exclusion; See also R(JS)(Sri Lanka) v Secretary of State for the Home Department [2010], paras 10 and 15, referring to ICC and ICTY Statute’s provisions on individual criminal responsibility. In contrast, see also para 34, where the Supreme Court acknowledges that the ICTY liability provisions are ‘notably wide, appreciably wider than any recognised basis for joint enterprise criminal liability under domestic law’; See, further, Singer, 2015, p. 136.

944 Singer, 2015, pp. 136–137.

945 See also MIG 2009:19 (Swedish migration case), where the Migration Supreme Court declined an asylum application due to association with a terrorist organisation. The Court highlighted the inevitably active role that the applicant had in the violent group; See also other migration cases, e.g., MIG 2021:6 where the Migration Supreme Court rejected an application of family reunification as the facts of the case proved that the applicant both had connections to and was contributing to the crimes committed by the terrorist organisation; MIG 2007:40 concerned a citizen application which was declined as the applicant was associated with an organisation included on the EU terrorist list; See, further, Gilbert, Geoff, ‘Current Issues in the Application of the Exclusion Clauses, in Refugee Protection in International Law’, p. 471, in: Türk, Nicholson, and Feller, Refugee Protection in International Law – UNHCR’S Global Consultations on International Protection, 2003.

946 R(JS)(Sri Lanka) v Secretary of State for the Home Department, para. 55 (Lord Kerr).

947 Singer, 2015, p. 137.
it has made to carry out acts contrary to Art. 1F. Thus for example it would be wrong to regard the mere fact that an appellant has provided a safe house for LTTE combatants as sufficient evidence that he has committed an excludable offence. If, however, he has transported explosives for LTTE combatants in circumstances where he must have known what they were to be used for, there may well be a serious IF issue.948

Analysing the tribunal’s statement, the correlation made between the mental element and the individual’s personal contribution indicates that there must be some level of personal association to the crime that extends beyond the ‘mere membership’ factor.949 As stated by Lord Brown: ‘[T]he nature of the organisation itself is only one of the relevant factors in play and it is best to avoid looking for a “presumption” of individual liability, “rebuttable” or not’.950 In support of this, although membership of a terrorist organisation may trigger the interest of invoking the exclusion provision, using membership as the single factor should not be sufficient for the application of the exclusion clauses. Therefore, I too argue for the significance of identifying a personal contribution to the criminal act allegedly committed by the terrorist organisation before determining on exclusion from refugee protection.

Following this analysis of individual criminal responsibility and what sort of legal rules and principles should be considered in the assessment of determining if there are ‘serious reasons for considering’ that the individual has committed or guilty of a crime, the next section dives deeper into an evidentiary analysis of how interpretation of Article 1F can be pursued in light of international criminal standards. Due to the absence of further guidance on how to understand the exclusion evidentiary standard, the section includes an investigation of whether the criminal evidentiary standard can be transferred into the language of exclusion, to reach a consistent and coherent threshold for the ‘serious reasons for considering’ standard.

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948 Indra Gurung v Secretary of State for the Home Department, para. 108. (emphasis added).
950 R(JS)(Sri Lanka) v Secretary of State for the Home Department, para. 31. (emphasis added).
6.4 Evidentiary Analysis of ‘Serious Reasons for Considering’ and Criminal Proceeding Standard(s)

6.4.1 General Observations

Defining the ultimate threshold of ‘serious reasons for considering’ is not an easy task. It is difficult to find a confirmed and consistent approach for where the exclusion standard should be placed. Furthermore, the ‘serious reasons for considering’ standard is the subject of a range of reasonings and opinions rather than a unified understanding. This is mainly due to the unfamiliar phrase ‘serious reasons for considering’. The wording of the exclusion standard does not give any indication on if one should aim for absolute certainty or if mere suspicions can be sufficient. Without a connection to a known and familiar evidentiary standard in criminal procedure, knowing where to draw the line is not easy. Still, unpacking the actual terms of ‘serious reasons for considering’ reveals a depth of meaning. While the term ‘serious’ speaks in favour of a high threshold, the term ‘considering’ leans in the opposite direction. Although the standard does not require a decision-maker to strive for evidence justifying ‘beyond any reasonable doubt’ – it is still essential to reach a level of ‘more than merely possible that the person falls under the exclusion clause’.

In light of this, a suggested threshold for Article 1F could be to place ‘serious reasons for considering’ somewhere in between ‘certainty’/‘evidently’ and ‘mere probability’. Thus, the standard of proof in Article 1F would lie close to criminal law standards. This would ensure that the clause satisfies the restrictive interpretation method and requires a higher standard of evidence to justify accountability to any of the listed exclusion crimes. Article 1F could strike a balance between two standards of extremes in refugee and criminal law, while still maintaining the validity of both legal regimes.

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953 Interestingly, compared with other evidentiary standards, the evidentiary standard enabling extradition has been described as too low for exclusion cases, see Fitzpatrick, Joan, ‘The Post-Exclusion Phase: Extradition, Prosecution and Expulsion’, 12 International Journal of Refugee Law 272, 2000, pp. 284–285.


956 Li, 2017, pp. 153–154. The method to place ‘serious reasons for considering’ between the standard of ‘certainty’ and ‘mere probability’ is what German constitutional law refers to as ‘practical concordance’. As explained by Li: ‘[…] practical concordance requires that both rights are balanced so that they equally gain the
Even if the international community does not stand in agreement regarding how close the standard should be to criminal conviction, some distinct positions can be identified. According to UNHCR’s requirement of a thorough assessment of the exclusion provision, the evidence must undoubtedly reach a certain level that extends beyond ‘mere suspicion’. Rather, it falls within the scope of ‘clear and credible’ or ‘clear and convincing’. Evidence relating to previous penal prosecutions, national indictments or convictions has not been declared as required to include for the purpose of establishing ‘serious reasons for considering’. Most possible recognition. Neither of the rights shall be restricted to such an extent that would render it moot.


On the other hand, the humanitarian purpose of the Refugee Convention can argue for adopting a high threshold for ‘serious reasons for considering’. This would ensure a legitimate safeguard for applicants not being excluded on low measures. Further, a high threshold for ‘serious reasons for considering’ would be in line with the guidance to interpret the provision restrictively. This would help ensure that only those who have committed heinous crimes are excluded from refugee protection. Otherwise, as stressed by Hathaway and Foster, ‘the ethical foundation of refugee law would more likely be threatened by expelling someone facing the real chance of being persecuted at home on the basis of no more than unsettled legal norms, or where a defense is viable’.

6.4.2 The Contrast Between the Exclusion Evidentiary Standard and the Criminal Conviction Standard

In respect of the two components within the exclusion standard, namely the evidentiary and the substantive aspects, scholars have presented compelling analyses of the equal importance of the two elements of ‘serious reasons for considering’. The evidentiary and substantive aspects are closely associated and not designed to establish an isolated test for the purpose of the exclusion clauses. Hathaway and Foster convincingly argue that:

[b]ecause the evidentiary standard is not free-standing, but rather asks whether there are serious reasons to believe that a given person “has committed” or “has been guilty” of a crime, the threshold test read as a whole is not just about the sufficiency of evidence. Rather, it requires a judgment that the evidence adduced is substantively sufficient relative to the elements of the crime at issue.

To achieve a demanding standard for the exclusion provision, the evidentiary and substantive matter in alignment with the ‘clear and convincing evidence’ rule pro-

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962 UNHCR, Background Note on the Application of Article 1F, para. 107.
963 As further commented by Zimmermann and Wennholz, ‘Article 1F’, para. 47: ‘A mere balance of probabilities is to be considered too low a threshold. Simple suspicions are not sufficient; serious reasons from which a substantial suspicion arises are to be considered a minimum requirement, given the wording if the provision “serious reasons” […] as well as its character as an exception which, by virtue of general rules of interpretation, should be narrowly construed.’; see Zimmermann and Wennholz, ‘Article 1F of the Refugee Convention’, in: Zimmermann, Machts, and Dörscnner, The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary, 2011; See also R(Ar(Lanka) v. Secretary of State for the Home Department, para. 39: “serious reasons for considering” obviously imports a higher test for exclusion than would, say, an expression like “reasonable grounds for suspecting”; Bliss, 2000, p. 116.
964 Li, 2017, p. 211.
965 Hathaway and Foster, 2014, p. 537. (emphasis added).
966 Ibid., p. 534.
tects the exclusion provision from arbitrary application. This maintains a structured and coherent interrelation with relevant bodies of law, and safeguards the entire object and purpose of the international refugee instruments. It should also be kept in mind that ‘[w]hile the drafters afforded states some measure of evidentiary flexibility in identifying the facts in relation to which exclusion would be considered, they at no time suggested that anything less than clarity about the legal standards justifying exclusion was sufficient.’

Though the wording ‘to exclude persons whose admission as a refugee would threaten the continuing viability of the protection system’, the intention presented by the drafters was rather focussed on its ability to decrease the ‘potential […] risk to the systemic integrity of refugee law on important standards of domestic and international criminality.’ Thus, ‘serious reasons for considering’ serves to sustain the objective of the exclusion provision, while ensuring it remains carefully and restrictively applied. Furthermore, the ‘clear and convincing evidence’ requirement, composed by the interaction between international refugee law and international criminal law, provides the necessary steps regarding how to understand and apply ‘serious reasons for considering’ in cases concerning exclusion from refugee protection. Simply put, if the evidence related to exclusion does not satisfying the criteria of ‘clear and convincing evidence’ or if any existing circumstance points to a plausible defence from criminal liability, the threshold of ‘serious reasons for considering’ cannot be considered to have been met.

Given that the evidentiary and substantive terms of ‘serious reasons for considering’ highlights the steps necessary to take for the purpose of determining if the applicant ‘has committed a crime’ or ‘has been guilty of acts’ – the ideal of considering the substantive context of criminal law for the purpose of defining and understanding the criminal offence becomes apparent. However, not all elements within the scope of exclusion from refugee protection mirror the framework of criminal law. While the interrelation between the two legal frameworks has been established and implemented, much remains unclear when one delves deeper into the core merits of the bodies of law. The standards of proof within international refugee law and criminal conviction are not intended to have the same threshold. While the standard of proof to hold an individual responsible for a committed crime must be ‘beyond reasonable doubt’, the requirement within exclusion cases is ‘serious reasons for considering’. Further, there is no requirement that the applicant subject to Article 1F has been convicted of a crime in order to

967 Ibid., pp. 535–536.
968 Hathaway and Foster, 2014, p. 537.
969 Ibid., p. 536.
970 Li, 2017, p. 222.
Therefore, to trigger the exclusion standard, ‘the provision does not require a level of certainty in the sense of a predominant probability or certainty beyond reasonable doubt’. Even if clear and credible evidence is required within the scope of Article 1F, the assessment of the presented evidence regarding a crime in favour would, as Nehemiah Robinson points out, be enough if ‘the relevant country has sufficient proof warranting the assumption of his or her guilt of one of the crimes listed’ within Article 1F.

Consequently, the different thresholds in exclusion cases and criminal cases and the fact that no preceding criminal conviction is required to exclude the person from refugee protection results in a limbo situation. On the one hand, the applicant may be excluded from refugee protection due to sufficient evidence to determine the person as a perpetrator of the excludable crime in Article 1F. On the other hand, the person may be acquitted from criminal responsibility as the presented proof justifying individual responsibility has not met ‘beyond reasonable doubt’ within the context of criminal law. In other words, exclusion deals with attribution of criminal behaviour, regardless of the same criminal behaviour would be adequate to meet the requirement of ‘beyond reasonable doubt’. However, even if the requirement for criminal liability for the relevant crime under Article 1F is lower than in a criminal proceeding, the ‘evidence as has been found to be solid must, overall, conform to established and uncontested grounds for a relevant form of criminal liability’ in the context of international refugee law as well.

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971 See, for instance, UNHCR, Guidelines on International Protection No. 5, para. 35: ‘It is not necessary for an applicant to have been convicted for the criminal offence, nor does the criminal standard of proof need to be met. Confessions and testimony of witnesses, for example, may suffice if they are reliable’. (emphasis added); Eziokwala v. Canada (Minister of Citizenship and Immigration), para. 38: ‘A refugee hearing is not a criminal trial before an international tribunal. International criminal tribunals render verdicts for some of the most serious crimes in the international legal order. In contrast, the Board makes exclusion determinations; it does not determine guilt or innocence’. (emphasis added).


973 Ibid., para. 47.


976 Hathaway and Foster, 2014 p. 536.

977 Ibid., pp. 536–537; see also Gilbert, Geoff and Bentajou, Magdalena Anna, ‘Exclusion’, p. 719: ‘[W]hile 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’, in: McAdam, Foster, and Costello, The Oxford Handbook of International Refugee Law, 2021.
6.4.3 The Balance of Interest when Determining the Standard of Proof

Determining whether or not the threshold for a standard of proof is met in criminal or civil matters is challenging. First, every legal dispute contains conflicting interests and objectives. Second, when a decision or verdict has been finalised in favour of declaring that the standard of proof is reached, can we be certain and convinced that that was the case? If the assumption is that we cannot confirm anything with absolute certainty, what can be a minimum level of acceptable error, if any? And, would this have any impact on the standard and burden of proof as a whole? These questions are usually analysed in light of the ‘decision theory’ approach. According to this approach, the inconvenience resulting from erroneous decisions must be considered. As declared in the literature, such inconvenience affects both the individual and ‘may also have a negative social utility in terms of the legitimacy of a legal system’.

The ‘decision theory’ addresses the balance between the risk of error and teleological considerations with respect to the standard of proof. In the context of a criminal proceeding, the balance would entail weighing the risk that an innocent person is held accountable for a crime against the interest of convicting criminal offenders and protecting the public from perpetrators. A similar approach can be found in the context of the exclusion provision. Here, the risk of the innocent asylum seeker being excluded from refugee protection is balanced against the objectives to protect the integrity of the refugee legal system and the national borders from ‘undeserving refugees’ committing serious crimes.

As highlighted in other sections of the thesis, the exclusion clauses frame the dynamic between the host state’s attempt to protect its borders and the individual seeking refugee protection. Bearing in mind Article 1F’s critical implications, a standard of proof must be based on an adequate and certain framework. In the criminal law context, the process of determining the threshold and meaning of the standard of proof requires ‘an acceptable balance between the objectives of protecting the community from crime and protecting the innocent from conviction’. To achieve this balance, the evidentiary standard for conviction must be at a high level.

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980 Ibid., pp. 198–199 n 380, for further references. In terms of the complexity of teleological consideration, see p. 199: ‘[…] teleological considerations can theoretically provide a rationale for why the standard of proof should be set high but such considerations are less useful when evaluating the evidence in an actual case.’
981 Ibid., p. 198.
982 Ibid., p. 128.
A similar reasoning and method could be transferred to the determination of ‘serious reasons for considering’ in Article 1F. An acceptable balance must be reached between the interest in protecting host states and the refugee regime from perpetrators committing serious crimes and the interest to protect the asylum seeker from being excluded from protection on illegitimate and unjustifiable grounds. To avoid creating a normative environment where the host state’s interest to protect its community overrules the individual’s desire to gain protection, the required evidentiary standard for Article 1F must be high.983 Another question worth examining is whether the interpretation of the ‘serious reasons for considering’ has evolved to hold a different meaning in relation to terrorism. The following section analyses this further.

6.4.4 The Exclusion Standard of Proof in Relation to Terrorism and National Security Interest

One outcome of the increased attention paid to terrorism and actors posing threats to the global world is the need to adopt security measures and mechanisms to counteract the threat. With the interest of maintaining control over borders and keeping the threat at bay, the link between refugee law and the concept of terrorism has become more established. This is a consequence not only of the many terrorist attacks performed984 but also of the UN instruments adopted, in particular the UNSC Resolutions urging states to deny safe haven to terrorists seeking universal protection. As mentioned above, the UNSC has also been transparent in applying the exclusion provision as a counter-terrorism measure, mainly through the direct reference to the exclusion evidentiary standard.985

As highlighted in Chapter 3, acknowledging terrorists as undeserving of refugee protection became more common in the post-9/11 era. Thus, the language of Article 1F might be considered to encompass several types of perpetrators: serious criminals and terrorists.986 The common agreement is that perpetrators committing international or serious non-political crimes – whether they are labelled

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983 Although several scholars have agreed on the fact that ‘beyond reasonable doubt’ entails the same required standard of proof across the international community, Klamberg interestingly highlights that there has been a difference between common and civil law countries. While common law countries have referred to the principle of ‘beyond reasonable doubt’ for conviction, civil law countries have leaned on the principle of ‘the judge’s innermost conviction’ or ‘free conviction’, see Klamberg, 2013, pp. 128–129.


985 See Chapter 3, section ‘3.3 Integrating Terrorism into the Exclusion Clauses’.

as serious criminals or terrorists – should be prevented from enjoying international humanitarian protection. However, with respect to this evolutionary aspect, one might wonder whether the introduction of terrorist offences as a sufficient exclusion crime entails a different interpretation of the exclusion provision than the other serious international and domestic crimes. Furthermore, some domestic cases shedding light on the balance between humanitarian protection and security interest have declared that, in exceptional cases, the principle of humanity might yield to the interest of protecting national security.\footnote{This has mainly been highlighted in relation to Article 33(2) of the Refugee Convention. See, for instance, the Full Federal Court of Australia stating that Article 33(2) ‘describes the serious conditions that justify the return of a refugee to a place where he or she may face persecution. Article 33(2) and the circumstances within it reflect the balance contained within the Refugee Convention between protection of those who need it, and the legitimate entitlement of Contracting States not to be required to give protection to those who pose a danger to the host State and its people’, see NBMZ v. Minister for Immigration and Border Protection, [2014] FCAFC 38, para. 21; See, further, Hathaway, C. James (2\textsuperscript{nd} ed.), The Rights of Refugees under International Law, Cambridge University Press, 2021, p. 418; See also UNHCR, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Sixteenth Meeting, 23 November 1951, A/CONF.2/SR.16, available at: Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Sixteenth Meeting.} While this may be the case, it is important to highlight that these discussions have usually been raised in the context of balancing humanitarian protection against the exception norm of the non-refoulement principle. However, as terrorism has a close connection to matters of threat and security, it would perhaps not be surprising if claims related to Article 33(2) of the Refugee Convention have impacted the application of the exclusion provision. In fact, this has not always been the case. To phrase this differently, even if the analyses of state practice has revealed that terrorist offences have been more linked under the exclusion categories of Article 1F(b) and (c),\footnote{For further analysis and reference to scholarly contributions, see Chapter 3 'Linking Terrorism to International Refugee Law'.} those analyses has not been completely comprehensive. Nor have they been consistent enough to draw qualifying conclusions regarding a broader application of the evidentiary standard in exclusion cases based on terrorism. One problem is the large diversity in the interpretation and application of Article 1F. There is widespread concern of creating an ‘asylum lottery’. This could, arguably, be stated to be the present reality.

Regardless of this, the link found between the concept of refugees and terrorism could not, in my view, justify an extensive interpretation of the exclusion standard of proof. Thus, the urgent call from Security Council to deny refugee protection to terrorists is not supposed to be treated as a free pass to expand the scope of exclusion from universal protection. In fact, there is no support for imposing a different threshold or meaning of ‘serious reasons for considering’ when assessing exclusion based on terrorism. Further, allowing a broader interpretation
of the exclusion provision to serve an interest that is distinct from the humanitarian objectives of the Refugee Convention would constitute a disregard of the principle of good faith. The fact that the Refugee Convention is a living instrument, which is supposed to evolve in order to respond to the modern legal world, does not amount to a carte blanche to disrespect the humanitarian purpose of the Convention or the objectives of the exclusion provision (to identify the undeserving refugee). Similarly, the general rule of interpretation, systemic integration, the evolutionary approach and the instruments applicable as supplementary means of interpretation do not support a broader interpretation of the evidentiary standard of proof. The catalogue of interpretation rules is aimed to function together to aid identification of the interpretation that enhances the wording, context, object and purpose of the Convention – not to create a wider distinction between the provisions in a treaty or support an interpretation method that would create more ambiguity and uncertainty.

Thus, with reference to the original meaning and objective of the exclusion provision, I argue that the exclusion provision must continue to be interpreted restrictively and applied as a holistic norm. Therefore, regardless of what criminal act triggers the exclusion provision, the evidentiary standard of proof must be sufficiently high in relation to all three clauses and be applied following a thorough assessment procedure. Counter-terrorism measures must not disregard the relevant and necessary international refugee and human rights standards. In other words – with the reasonable argument of aiming to create a harmless, humane and secure world in mind – the measures for combating terrorism, whether within the refugee regime or other fields, must be executed using legitimate means and within the rule of law. In regard to the emphasis on high evidentiary thresholds, the next section delves deeper to the bases for criminal evidentiary standards and examines whether any of the addressed standards of proof can be transferred to the interpretation of ‘serious reasons for considering’.

6.4.5 The Language of Evidentiary Standard(s) in International Criminal Law

In the process of determining the required standard and the meaning of ‘serious reasons for considering’, one approach proposed has been to find inspiration in other evidentiary standards. Having in mind the many challenging matters within Article 1F – in terms of both its intersection with other bodies of law and its severe consequences – the need to find clarity in the interpretation of ‘serious


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reasons for considering’ is perhaps unsurprising. The unpredictable dimension regarding the interpretation of ‘serious reasons for considering’ is based largely on the fear of an ‘asylum forum shopping’ system, where assessment of an asylum seeker’s case may have remarkably divergent outcomes.

With no further guidelines in the travaux as to what ‘serious reasons for considering’ mean or how to interpret the standard of proof, the threshold of ‘serious reasons for considering’ differs between national jurisdictions, both between states in different legal systems (common versus civil law) and between states and international organisations. Thus, decades after the 1951 Refugee Convention and the 1967 Protocol entered into force, how the evidentiary standard in the exclusion provision should be interpreted and what it means remains uncertain.

Even in the context of the exclusion provision, the overall purpose of the Refugee Convention is not supposed to be undermined or neglected to increase the applicability of Article 1F. This argues against a low threshold. According to the guidelines provided by the UNHCR, in case of a clash of interest between the objective of Article 1F and the Refugee Convention as a whole, the latter prevails. To strengthen this position, a scholarly contribution published in the UNHCR’s Global Consultation on International Protection presented an even stricter interpretation approach of the exclusion standard, stating that ‘serious reasons for considering’ ‘must at least approach the evidentiary threshold necessary for a criminal conviction’.990

6.4.5.1 In Relation to the Overall Scope of Article 1F

Though the reference to international crimes and acts contrary to the purposes and principles of the United Nations has an international dimension991 – the elements concerning ‘serious non-political crimes’ should not be used to depart from the threshold of ‘serious reasons for considering’. Despite the division between the exclusion clauses, where international crimes fall within the framework of international criminal law, and ‘serious non-political crimes’ relate more to domestic criminal standards, ‘serious reasons for considering’ shall have the same meaning regardless of the crime. It can be reiterated that neither the drafters or the available instruments provide guidance supporting a differentiation of the evidentiary thresholds of ‘serious reasons for considering’. The standard of proof in Article 1F must, therefore, have the same level throughout and a restrictive approach be used, regardless of if the exclusion act is of international or domestic

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991 See, for example Holvoet, 2014, pp. 1039–1056, presenting his position on the evidentiary standard of international criminal law to be linked to Article 1F(a) of the 1951 Refugee Convention.
As mentioned above, this becomes particularly important in relation to exclusion due to terrorism. Given the divergent definitions and criminalisation of terrorism, adopting different benchmarks for ‘serious reasons for considering’ would only increase the fear of uncertain and unpredictable assessments of the exclusion provision.

Thus, accepting different thresholds for ‘serious reasons for considering’ would further diversify the already divergent interpretation and understanding of the exclusion provision. Additionally, this would threaten the legitimacy and legal certainty of the provision, as national authorities could easily find support to use a particular exclusion clause with a lower threshold to justify exclusion cases. This would fuel ambiguity in exclusion decisions and increase the number of excluded persons placed in limbo. Thus, in order to apply a uniform interpretation of the exclusion provision, evidentiary standards from international criminal law should be used consistently, for the entire provision.993

6.4.5.2 Comparing the Threshold of Evidentiary Standards in Criminal Proceedings

There are three evidentiary standards applicable at different stages of a criminal proceeding. The lowest threshold is ‘reasonable grounds to believe’ (arrest warrant/summons to appear standard)994 and the highest is ‘beyond reasonable doubt’ (criminal conviction standard).995 The ‘substantial grounds to believe’ (confirmation charges standard)996 falls between these two thresholds.

Considering the interrelation between the ICC evidentiary standards ‘reasonable ground to believe’ and ‘substantial grounds to believe’, the latter is obviously higher.997 This was confirmed in Bemba, where the Court stated that the ‘substantial grounds’ standards fall between the ‘beyond reasonable doubt’ and ‘reasonable grounds to believe’ standards.998 Still, like in the standard of ‘reasonable grounds to believe’, there is no consistent analysis of how the confirmation of

992 Although it is related to another evidentiary standard, see Andersson, 2016, pp. 244–250, 255–256, discussing the concern of imposing a differentiation of the threshold of the ‘reasonable suspicion’ standard.
993 For inspiration, see Juss, 2014, p. 1216 suggesting a standard of ‘a sufficient level of participation on the part of the individual to fix him with the relevant liability’ to be uniformly applicable in cases of complicity related to exclusion cases.
994 Article 58(1)(a) of the ICC Statute.
995 Article 66(3) of the ICC Statute.
996 Article 61(7) of the ICC Statute.
997 The ICC ‘confirmation charges’ standard has been defined as an ‘intermediate evidentiary threshold’. This was highlighted in ICC, Prosecutor v. Ntaganda, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, ICC-01/04-02/06, 9 June 2014, para. 9; See also Nilsson, Klamberg, and Angotti, 2023, pp. 157–158.
998 ICC, Prosecutor v. Bemba, Pre-Trial Chamber II, Decision pursuant to Art. 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, ICC-01/05–01/08, 15 June 2009, paras. 27–28.
charges standard should be interpreted and where the threshold should be placed. The guidance that can be used is that the ‘substantial grounds’ standard aims to reach a high benchmark, beyond mere speculation. As confirmed in Lubanga, ‘substantial grounds to believe’ must qualify ‘concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations’.1000

6.4.5.3 Evidentiary Standard of Proof and Evaluation of Evidence
While ‘substantial grounds to believe’ and ‘beyond reasonable grounds to believe’ require a certain level of evidence to reach the standard of proof, ‘reasonable grounds to believe’ is silent on this. Without knowing exactly what type of information the prosecutor must provide before the Pre-Trial Chamber to be able to issue an arrest warrant or a summons to appear, the silence indicates that the prosecutor can include any type of information found to be relevant. This means that the prosecutor is allowed to lean on a variety of materials – including witness statements, forensic evidence and publicly available sources, such as NGO reports and reports from United Nations organs. Hence, the prosecutor can argue that ‘reasonable grounds to believe’ measure has been met if the arrest warrant or a summons to appear can be based on a significant amount of information from a wide variety of statements or publicly available sources and reports, even without a thorough investigation on the ground.1001

This does not necessarily mean that ‘reasonable grounds to believe’ as pursuant in Article 58(1)(a) does not require reliable evidence that links the individual to the crime. In cases concerning the merits of Article 58(1)(a), the prosecutor is obliged to prove that there are ‘reasonable grounds to believe’ that the individual has committed a crime within the jurisdiction of the ICC. As put forward by Holvoet, the prosecutor’s duties under the ‘reasonable grounds to believe’ standard are divided into two elements.1002 First, ‘the prosecutor must be able to prove that there are reasonable grounds to believe that a specific crime under the jurisdiction of the Court has or is being committed’.1003 Second, the prosecutor must show ‘that the person for whom the arrest warrant or summons to appear is sought has committed the specific crimes’.1004 Given these fundamental steps re-

1000 ICC, Prosecutor v. Lubanga, Pre-Trial Chamber I, Decision on the Confirmation of Charges, ICC-01/04-01/06, 29 January 2007, para 39; Also confirmed in, for instance, ICC, The Prosecutor v. Jean-Pierre Bemba Gombo, 15 June 2009, para. 29.
1002 Ibid., p. 1055.
1004 Ibid.
quired in the scope of ‘reasonable grounds to believe’, the evidence must associate the individual with the underlying crime and support ‘the specific mode of liability under which the individual is to be charged’.  

Like the prosecutor issuing an arrest warrant or summons to appear for an international crime, the decision-maker in an exclusion case can rely on a variety of information (e.g., statements, pictures, reports) that he or she believes links the asylum seeker to the identified excludable crime. For instance, in the Ezokola case, the Canadian immigration authorities referred to governmental, non-governmental and media reports to justify the exclusion decision.

With a basis in the discussion and remarks presented so far – the following section contains an in-depth examination of the relevant criminal evidentiary standard with the goal of identifying which one(s) is most suitable to link to the exclusion evidentiary standard.

6.4.6 Criminal Evidentiary Standards and Article 1F: Which is Most Useful for ‘Serious Reasons for Considering’?

The following figure illustrates where the threshold of ‘serious reasons for considering’ should ideally be placed, according to the analysis that follows below.

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1005 Holvoet, 2014, p. 1055; For more commentary on Article 58(1)(a) of the ICC Statute, see, Nilsson, Klamberg, and Angotti, 2023, pp. 98–100; See further, ICC Prosecutor v. Mudacumura, Pre-Trial Chamber, Decision on the Prosecutor’s Application under Article 58, ICC-01/04-01/12, 13 July 2012, para. 19, where the Pre-Trial Chamber clarified that ‘[f]or the standard of issuing an arrest warrant, article 58(1) of the Statute requires that a Chamber need only to be satisfied that there are reasonable grounds to believe that the person committed a crime within the jurisdiction of the Court. The evidence need only establish a reasonable conclusion that the person committed a crime within the jurisdiction of the Court, and it is not required that this be the only reasonable conclusion that can be drawn from the evidence’. (emphasis added).


1007 Inspiration has been taken from, Ekelöf, Edelstam, and Heuman, 2009, p. 85.
6.4.6.1 ‘Serious Reasons for Considering’ and ICC ‘Reasonable Grounds to Believe’

To solve the numerous issues related to the evidentiary standard of Article 1F, one position has been to liken the meaning of ‘reasonable grounds to believe’\footnote{The standard of ‘reasonable grounds to believe’ is mentioned in Article 58(1)(a) of the ICC Statute.} to the language of ‘serious reasons for considering’. Given that the exclusion provision is not intended to be in line with the ‘beyond reasonable doubt’ requirement, the ‘reasonable grounds to believe’ standard, enshrined in Article 58(1)(a) of the ICC Statute, has been a likely candidate to relate to Article 1F. The scholarly analysis highlights a few central arguments supporting this position. First, the general observation is that national authorities do not reject the perception of ‘reasonable grounds to believe’ as having the same meaning as ‘serious reasons for considering’\footnote{See Holvoet, 2014, pp. 1039–1056; See also, Rikhof, 2012, p. 113.}. The drafting history of the ICC Statute sheds light on some revealing details, such as that some delegations argued for using the wording ‘serious reasons for considering’ instead of ‘reasonable grounds to believe’. The fact that the ‘serious reasons for considering’ standard was discussed in the context of the arrest warrant standard when drafting the Rome Statute suggests that the two evidentiary standards are interchangeable in terms of their meanings.\footnote{Holvoet, 2014, p. 1041: ‘Indeed, it is no wonder that during the negotiations leading to the signing of the Rome Statute, some delegations preferred to include the phrase ‘serious reasons for considering’ instead of ‘reasonable grounds to believe’.} Lastly, the evidentiary standards can be considered interlinked based on the possibility to rely on publicly available sources and other types of information.\footnote{Ibid., p. 1050.}

6.4.6.2 ‘Serious Reasons for Considering’ and ICC ‘Substantial Grounds to Believe’

Chamber is ‘thoroughly satisfied that the prosecutor’s allegations are sufficiently strong to commit’\(^\text{1014}\) the suspect for trial. However, the standard does not require evaluation of whether the presented evidence would be sufficient to declare the suspect guilty of the crime.\(^\text{1015}\)

Though the idea of equating the meaning of ‘reasonable grounds to believe’ with ‘serious reasons for considering’ has gained the most support amongst scholars and national jurisdictions,\(^\text{1016}\) I argue for the need to consider the ‘substantial grounds to believe’ threshold in the context of exclusion cases. ‘Substantial grounds to believe’ could help ensure that exclusion cases are restrictively interpreted and maintain the level of thorough investigation and credible assessment procedures. Another argument in favour of drawing upon ‘substantial grounds to believe’ is the feature of allowing both prosecution and defence submissions. Also, the UNHCR argues for approaching more stringent evidentiary thresholds, stating that:

> [...] in order to ensure that Article 1F is applied in a manner consistent with the overall humanitarian objective of the 1951 Convention, the standard of proof should be high enough to ensure that bona fide refugees are not excluded erroneously. Hence, the ‘balance of probabilities’ is too low a threshold.\(^\text{1017}\)

Using the language of ‘reasonable grounds to believe’, the duties that the decision-maker would have in exclusion cases would still enhance the critical elements of clear and credible evidence aligned with modes of criminal liability. By no means would ‘reasonable grounds to believe’ allow these important assessment steps to be ignored. However, ‘substantial grounds to believe’ endorses a higher standard of clear and credible evidence. Further, as confirmed in the \textit{Lubanga} case, the evidentiary standard requires that ‘all the evidence admitted for the purposes of confirmation hearing to be assessed as a whole’.\(^\text{1018}\) With inspiration taken from the threshold of the ‘substantial grounds to believe’ – requiring a certain level of factual and evidential merits and to ensure that all the presented evidence is assessed as a whole before deciding on exclusion from refugee pro-

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\(^\text{1016}\) Holvoet, Mathias, 2014, pp. 1050–1051; For more commentary on Article 61(7) of the ICC Statute, see, Nilsson, Klamberg, and Angotti, 2023, pp. 156–163.


\(^\text{1018}\) UNHCR, Background Note on the Application of Article 1F, para. 107. (emphasis added).

tection would benefit the evidentiary standard of ‘serious reasons for considering’. However, something that speaks against transferring ‘substantial grounds to believe’ into the exclusion procedure would be the lack of support and consistent jurisprudence arguing in favour of this. Still, as Rikhof has stated: ‘If international criminal law is to play a role in the interpretation of article 1F and if the term serious reasons for considering can be given the same meaning as reasonable grounds to believe (which national courts have no difficulty in accepting), then the equation of reasonable grounds with reasonable suspicion might forebode a relaxation of this standard of proof and the evidence required to meet this test’.

Although decision-makers are not required to meet the evidentiary standard confirming charges, the entire process of an exclusion decision can result in declaring an asylum seeker allegedly responsible for the conducted act. Further, the quasi-criminal nature of exclusion proceedings need not be focused on matters that meet the level of ‘reasonable grounds to believe’. The proceedings involve an in-depth examination of an individual’s association with a certain crime and circumstances related to criminal responsibility. However, this is performed outside a proper criminal investigation setting, in an administrative framework. Thus, the excluded asylum seeker is being treated as an accused party, without enjoying the formal rights of the accused. In many cases, an individual who was subject to exclusion can be acquitted in a criminal context for the same crime that qualified the exclusion provision. This is an expected outcome given the two distinct levels of ‘serious reasons for considering’ and ‘beyond reasonable doubt’.

I argue that the interpretation of the exclusion evidentiary standard should, in light of a systemic and evolutionary approach, mirror the threshold of ‘substantial grounds to believe’. This would help achieve procedural fairness, legal

1019 See, for instance, the Swedish exclusion case UM 15330-22, 18 April 2023, where the evidence in the case consisted of two pictures of the applicant holding weapons, and country information invoked by the Swedish Migration Agency. Despite the Migration Court of Appeal clarifying that neither of the countries of information presented by the immigration authority could prove that there was a link between the crimes conducted by the militia group the applicant was a member of and the individual established at a specific time which was of relevance for the case (see p. 6). The Court still decided to exclude the applicant from refugee status (and in this case, also subsidiary protection) based on the pictures and the applicant’s own asylum story (see pp. 7–8). Based on an analysis of the case, additional and further credible evidence should have been required to impose thus, in order to justify the evidentiary standard of ‘serious reasons for considering’.

1020 Li, 2017, p. 222.

1021 Rikhof, 2012, p. 113. (emphasis added).

1022 The interpretation method of systemic integration and evolutionary approach can contribute to developing outcome in the interpretation process. See Singer, Sarah, ‘Terrorism and Article 1F(c) of the Refugee Convention’, 12 Journal of International Criminal Justice 1075, 2014, pp. 1075–1092, for an interesting discussion on how a dynamic and systemic approach to the interpretation of Article 1F (c) has impacted the ‘UK judiciary to develop and refine the meaning of terrorism for the purpose of the provision in a manner which departs from the UK’s broad domestic interpretation of the term’ (at p. 1075).
certainty, and coherency in exclusion cases. Further, it would diminish the opportunity for host states to abuse the exclusion provision as a way to keep asylum seekers outside national borders, placing them in limbo with serious consequences. Given the inconsistent interpretation of the exclusion standard and the fear of furthering the established ‘dangerous asylum lottery’ system, to borrow the words of the ECRE, the evidentiary threshold of ‘substantial grounds to believe’ would in all probability protect the framework of Article 1F. For exclusion crimes to be considered to have a ‘high degree of seriousness’, ‘serious reasons for considering’ should require a ‘high degree of evidentiary threshold’ in order to hold the applicant responsible for his or her participation in the exclusion crime. In line with what was stated by Juss, the purpose should be to impose ‘a sufficient level of participation on the part of the individual to fix him with the relevant liability’ for forms of criminal responsibility. Further, as argued by Juss – an argument I agree with – this should be uniformly considered in all exclusion cases. I would argue that any provisions which contradict this purpose, such as Article 1F, should be deliberately interpreted in uniformity and with a high evidentiary threshold, to uphold the designated position as a humanitarian convention providing universal protection. In arguing for the idea of considering the language of ‘substantial grounds to believe’ in the interpretation of ‘serious reasons for considering’, I stress a reminder that we are dealing with an international treaty of a humanitarian character which provides universal protection. Thus, this normative argument should be measured using international criminal standards as a supporting and complementary legal mechanism. Once again, the purpose is not to diminish the rationale and purpose of international refugee law or the administrative field of law to which it belongs – nor is it to enhance refugee standards’ intersection with matters of criminal prosecution and punishment.

6.4.6.3 ‘Serious Reasons for Considering’ and the Ad Hoc Tribunals’ ‘Reasonable Grounds to Believe’

Having addressed two relevant criminal evidentiary standards in the ICC, I will here move on to analysing the exclusion standard in relation to the ICTY/ICTR indictment standard.

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1025 Ibid., p. 1201.
1026 Ibid., pp. 1201–1216.
1028 Agreeing with the position also addressed by Singer, in Singer, 2014, pp. 1075–1092.
In order for the prosecutor to succeed with an indictment procedure, he/she must, as described in Article 18(4) of the ICTY Statute and Article 17(4) of the ICTR Statute, have a *prima facie* case to prepare an indictment which the Trial Chamber must confirm. Article 47(b) of the *ad hoc* Tribunals’ Rules of Procedure and Evidence (RPE) which introduces the evidentiary standard ‘reasonable grounds to believe’, is linked to the aforementioned norms. This article helps the prosecutor navigate in the *prima facie* case and lists the measures that must be considered in preparing the indictment. Therefore, the ‘*prima facie* case’ and the ‘reasonable grounds to believe’ should be considered as equivalent components in the procedures of indictment. As the *ad hoc* Tribunals’ ‘indictment standard’ is also phrased as ‘reasonable grounds to believe’, one might think that the ICTY/ICTR ‘indictment standard’ is interchangeable with the ICC ‘arrest warrant standard’. However, that is not the case. Despite using equivalent wordings, the evidentiary standards are not compatible – mainly because they hold different meanings and requirements for meeting the evidentiary threshold and are used at different stages of the proceedings. The ICTY/ICTR ‘indictment standard’ could potentially be placed somewhere between the ICC evidentiary standards mentioned above. In relation to the ICC arrest warrant standard, the ICTY indictment standard contain a higher threshold due to its required measures. At the same time, it holds a lower standard than the ICC confirmation charges standard. At the confirmation of charges stage, the submissions of both prosecution and defence must be considered. In general, ‘substantial

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1029 The 1993 Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY Statute), entered into force 25 May 1993, see Article 18(4): ‘Upon a determination that a prima facie case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to a judge of the Trial Chamber’.

1030 The 1994 Statute of the International Criminal Tribunal for Rwanda (ICTR Statute), entered into force 8 November 1994, see Article 17(4): ‘Upon a determination that a prima facie case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to a judge of the Trial Chamber’.

1031 See also ICTY Statute, Article 19(1) and Article 18(1) ICTR Statute: ‘The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a prima facie case has been established by the Prosecutor, he shall confirm the indictment. If not so satisfied, the indictment shall be dismissed’.

1032 The ICTY and ICTR Rules of Procedure and Evidence (RPE): ICTY RPE, 14 March 1994, IT/32; ICTR RPE, 29 June 1995 (original version). Both *ad hoc* Tribunal’s RPE had final amendments in 2015, see Article 47(b) of the ICTY/ICTR RPE: ‘The Prosecutor, if satisfied in the course of an investigation that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal […]’ (emphasis added).


1034 See, for instance, Safferling, Christoph, *International Criminal Procedure*, Oxford University Press, 2012, p. 294. Interestingly, Safferling presents an opposing statement at p. 341, stating the following: ‘Upon closer examination, the prima facie case is quite similar to “reasonable grounds to believe” in Art. 58(1)(a) [of the ICC Statute]’; See also, Li, 2017, p. 218.
grounds to believe’ usually ‘require a tendency towards conviction, even after consideration of contradicting arguments’. Thus, the fact that the ICC ‘confirmation charges’ has to consider the defence argument and refer the contents of the case towards conviction, regardless of the opposing arguments, speaks of a higher standard of proof than the ICTY/ICTR indictment standard, as no defence is present in the prima facie case.

What the ad hoc Tribunals’ ‘indictment standard’ requires is a consistent narrative of the background of the case, followed by credible and comprehensive evidence that encompasses all the relevant elements required for a conviction. As stated in Mladić, the ICTY ‘reasonable grounds to believe’ would be settled in circumstances where ‘a credible case that would (if not contradicted by the defence) be a sufficient basis to convict the accused on the charge’. This would constitute a requirement upon the prosecution to present evidence that would reach a level of sufficiency that could not be contradicted by the defence and would lean towards a conviction – without the defence being addressed at this stage. Thus, the indictment standard has a high threshold, even if it moves between the notions of suspicion and certainty.

According to Li, the main path that would guarantee a high threshold of ‘serious reasons for considering’ is using the language of the ad hoc Tribunals’ ‘indictment standard’. The burden of proof in asylum cases generally falls upon the applicant. However, in exclusion cases, the burden of proof shifts to the immigration authority. Given that an executive exclusion decision closes the gates to benefit from refugee protection, a diligent assessment procedure certifying that no procedural elements are lacking is necessary. Thus, transferring the ICTY/ICTR

\[1036\] Li, Y, 2017, p. 219 (emphasis added).


\[1037\] ICTY, Prosecutor v. Mladić, Decision on Consolidated Prosecution Motion to Sever the Indictment, to Conduct Separate Trials, and to Amend the Indictment, IT-09-92-PT, 13 October 2011, para. 20; See, also, ICTY, Prosecutor v. Karadžić, Decision on Prosecution Motion to Reconsider the Trial Chamber's Decision on the Motion to Amend the First Amended Indictment, IT-95-5/18-PT, 26 February 2009, para. 12.


\[1039\] Li, 2017, pp. 218–219, 222–224. A central distinction between the ICTY indictment standard and confirmation of charges standard is the consideration of the charged person’s evidence. This is only granted in the context of the ICC ‘confirmation of charges’ standard (see p. 223).

\[1040\] Li, 2017, p. 224.

\[1041\] This evidently also concerns the matter of ‘burden of proof’ and ‘rebuttal’. In some jurisdictions, the applicant facing a possible exclusion decision will be granted the opportunity to reply and defend before the final decision is made. In other jurisdictions, this chance to rebuttal might not be granted. Thus, as confirmed by the UNHCR, in situations when the individual has been indicted by an international tribunal, the burden of proof shifts and results in a ‘rebuttable presumption of excludability’, meaning that the individual has to rebut the
‘indictment standard’ into ‘serious reasons for considering’ might be a suitable solution. This would guarantee the elements of procedural rights and set the bar for excluding broad and unclear interpretation of the standard of proof. The *prima facie* case has through jurisprudence gained recognition as having a high evidentiary standard with a requirement to provide an overall consistent content regarding the facts of the case, tied together with credible and comprehensive evidence that is sufficient to support a conviction. Obviously, in a criminal context, this would the prosecutor’s responsibility – equivalently, in the exclusion context, the decision-maker should require a similar amount of credible and comprehensive evidence in order to uphold a high standard of proof concerning the content of the exclusion case. Further, the ICTY/ICTR ‘reasonable grounds to believe’ standard is not strictly aligned with either the lowest or the highest evidentiary standard of the ICC Statute. As mentioned above, the ICTY/ICTR ‘indictment standard’ is located somewhere in between the arrest warrant standard and confirmation of charges standard.

With the analysis above in mind, I argue that ‘substantial grounds to believe’ should ideally be likened to ‘serious reasons for considering’ as the ‘confirmation charges’ require a high standard pointing toward conviction, though still not equivalent to the criminal conviction standard. As the exclusion assessment procedure covers elements of examining whether an asylum seeker ‘has committed’ or is ‘guilty of’ any of the exclusion categories put forward in Article 1F, presenting evidence that could be used in a criminal context for conviction reasons should be the pathway to pursue. This would require the threshold for the exclusion standard to be placed sufficiently high, yet still distinct from the ‘beyond reasonable doubt’. Transferring the language of the ICC ‘confirmation charges’ to the exclusion context would also, I argue, ensure a restrictive interpretation of the provision and safeguard the principles of procedural fairness, predictability and legal certainty when exclusion cases are assessed. Given that this position lacks support from the international community, the second preferable option would be to take inspiration from the *ad hoc* Tribunals’ ‘indictment standard’. In light of the arguments I have addressed in this section, introducing the language of the ICTY/ICTR ‘reasonable grounds to believe’ to the exclusion standard

presumption. Interestingly, as regards terrorism, the UNHCR writes: ‘In the context of action against terrorism, lists established by the international community of terrorist suspects and organisations should not generally be treated as reversing the burden of proof. Unlike ICTY/ICTR indictments, such lists would be drawn up in a political, rather than a judicial, process and so the evidentiary threshold for inclusion is likely to be much lower’.

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1042 Li, 2017, p. 224: ‘The rest for “serious reasons for considering” is met if, again under consideration of the refugee’s submission, the evidence would meet the ICTY indictment standard “reasonable grounds to believe”’.

1042 Li, 2017, p. 107: ‘Given the rigorous manner in which indictments are put together by international criminal tribunals, however, indictment by such bodies, in UNHCR’s view, satisfies the standard of proof required by Article 1F’. 

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would be reliable and appropriate for the framework of Article 1F than using that of the ICC arrest warrant standard.

6.5 Concluding Remarks
The wording of Article 1F – ‘serious reasons for considering’ – is not a familiar concept in international law. This does not mean that ‘serious reasons for considering’ is a unique standard that does not resemble any other evidentiary thresholds. The exclusion provision contains several elements inherited in the criminal law framework and the assessment of exclusion resembles a quasi-criminal setting. Therefore, the merits in criminal law should be integrated with ‘serious reasons for considering’ in so far as possible. Allowing the interpretation of ‘serious reasons for considering’ to approach international criminal standards would enhance the evidentiary threshold, maintaining the level of restrictive interpretation and achieving a potentially coherent interpretation that protect applicants from uncertain and unpredictable exclusion decisions. The argument of having a high threshold for the exclusion evidentiary standard applies in exclusion cases related to terrorist offences. In light of Articles 31(1) and (3) or 32 of the VCLT, there is no argument for imposing a lower standard of proof based on the wording, context, object or purpose of the exclusion provision. In regard to the issue of the largely discretionary interpretation of Article 1F, it is critical to maintain a consistent and demanding benchmark of ‘serious reasons for considering’. This applies even though the interaction between refugee law and criminal law reveals several discrepancies, including the evidentiary standards and the distinct objectives of the legal regimes. Still, drawing closer to criminal law when interpreting ‘serious reasons for considering’ would decrease the risk of broad and arbitrary interpretations.

This chapter has also emphasised the presence of liability forms within the scope of the exclusion provision. In order to qualify the standard of ‘serious reasons for considering’, the asylum seeker must have committed a crime enshrined in the exclusion categories. There are several international instruments, as well as case law, supporting the assessment of individual criminal responsibility in exclusion cases. Thus, the decision-maker is required to examine the actus reus and mens rea elements before excluding an applicant from refugee protection. A central body of law that is suitable as a guide in regard to this is criminal law. In support of the interpretation method of systemic integration and the evolutionary approach – the international criminal standard that I have argued in favour of considering is Article 25 of the ICC Statute. Likewise, I have discussed Articles 31–33 of the ICC Statute as grounds for excluding individual responsibility in relation to the exclusion clauses. In exclusion cases where membership of a terrorist organisation has triggered the procedure of Article 1F, there is a need to identify, evaluate and thoroughly assess the merits of criminal responsibility. This is for
the purpose of presenting a procedurally justified decision that highlights the individual's own contribution to the terrorist group. In regard to this, principles such as 'presumption of individual responsibility' or associating with an organisation that is 'predominately terrorist in character' cannot permit decision-makers to make automatic exclusion decisions based 'only' on voluntary membership. Articles 25(3) and 30 of the ICC Statute have, therefore, been recognised as important to consider in the interpretation of exclusion related to terrorism. There is no established principle that endorses membership of a terrorist organisation as a direct mode of liability for excludable acts. Thus, 'mere membership' is not an established exception to the main rule of assessing the individual's own participation and contribution to the commission of a terrorist crime.

Bearing in mind that the ICC 'reasonable grounds to believe' standard has been accepted in the wording of exclusion, this evidentiary standard would probably be the most realistic threshold to impose for the purpose of reaching a coherent and uniformed interpretation of 'serious reasons for considering'.

Although 'reasonable grounds to believe' is the lowest standard under the ICC Statute, 'the prosecutor still needs to present clear, corroborated and substantive evidence to justify the deprivation of a person’s liberty or to summon him or her to [the ICG]'.

In other words, there are established safeguards to guarantee that 'reasonable grounds to believe' is not applied on unreliable and ambiguous grounds. However, in a ranked order between the 'arrest warrant/summons to appear standard' and the 'confirmation charges standard', the exclusion standard for Article 1F should aim to be closer to 'substantial grounds to believe'. This is mainly due to the severe consequences of the exclusion provision – the need to consider 'concrete and tangible evidence which demonstrates a clear line of reasoning underpinning its specific allegation' must fall within Article 1F. By allowing 'serious reasons for considering' to be modelled on 'substantial grounds to believe' in Article 61(7) of the ICC Statute, the desire of including 'clear and credible evidence' and applying a restrictive interpretation approach in exclusion cases would likely be preserved. If this position is contested, the ad hoc Tribunals' 'reasonable grounds to believe' standard pursuant to Article 47(b) of the ICTY/ICTR RPE, should be used as a minimum threshold for exclusion from

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1042 Holvoet, 2014, pp. 1048–1049. Holvoet further highlights the concept of judicial integration as an encouragement to imply. He states, for instance, that '[j]udicial integration between national decision-makers when interpreting the “serious reasons for considering” standard is hence appropriate because it protects and promote that “core predictability that is essential if law is to perform its functions in society”'. (at p. 1048). He goes on to clarify that the concept of judicial integration 'is not to be equated to total uniformity, which is unrealistic given the complexity and variety of asylum cases. Judicial integration requires that similar factual scenarios and legal issues are treated in a consistent manner across borders'. (at p. 1049) (emphasis added).


refugee protection. This evidentiary standard, while requiring a high level of evidence procedure, is placed somewhere between the ICC ‘arrest warrant/summons to appear’ and ‘confirmation charges’ standards. Furthermore, it could also arguably cultivate a high standard of proof in the contents and procedures of exclusion cases.
PART IV: FINAL CONCLUSIONS
7. Conclusions

In this final chapter, I present my concluding remarks on the matter of exclusion from refugee protection, from an international law perspective and, in particular, with respect to terrorism. Thus, the focus of this chapter is to revisit, interlink and further elaborate the findings of this dissertation.

7.1 The Main Contributions

This study seeks to provide the following contributions to the scholarly field of international refugee law and exclusion. First, it provides a framework relevant for the interpretation of Article 1F in accordance with international norms. Second, it deals with the evidentiary standard, in terms of both the meaning of the exclusion standard – ‘serious reasons for considering’ – and its threshold. Third, it highlights the issue of how to deal with exclusion from refugee protection based on membership of a terrorist organisation. The reason these three contributions are emphasised is that they encompass the central pillars of the research question. Thus, they provide answers to both the main research question and the sub-questions. Therefore, the focus has been on examining the interpretation of the exclusion provision in accordance with international norms, with a particular interest in cases involving terrorism.

As argued in Chapter 1, it is not possible to provide a universally accepted definition of terrorism. I chose to consider terrorist acts as any association with a terrorist organisation, as the definition remains debated, unclear and problematic. Furthermore, examining the evidentiary standard promotes an understanding of the meaning of ‘serious reasons for considering’ and when the threshold is met. Thus, the contributions mentioned above align with a central aim of this dissertation, namely providing the tools for a coherent and consistent interpretation of the exclusion provision in cases concerning terrorism. My arguments as to why this is important to achieve are as follows. First, I argue for the position of viewing international law as a coherent system, with the goal of moving towards uniformity rather than fragmentation. Second, the exclusion provision is contained in an international treaty – it is an international norm, which should be interpreted and applied in accordance with international law and with an inclination to interpret the treaty in good faith. Third, it is for the purpose of creating a consistent, predictable and fair procedure which enhances legal certainty and justice in exclusion cases.
As regards the aim to promote coherence with international standards, the next section underlines and analyses the final conclusions on the interpretation framework supporting the exclusion provision being interpreted in accordance with international law.

7.2 Supporting Interpretation of the Exclusion Clauses in Light of International Standards

As highlighted in Chapter 2, the interest in interpreting the exclusion provision in alignment with other international bodies of law was addressed already at the 2001 Lisbon Expert Roundtable. The intention was clear: '[t]he goal should be towards developing a normative system that integrates the different applicable legal regimes in a coherent and consistent manner'.

Hence, the aspect of integrating other international norms when interpreting the exclusion provision was recognised already in the first instruments discussing the framework of Article 1F.

To restate what has been previously argued, systemic integration is central to an understanding of how international refugee law interacts with other international bodies of law. This interpretation method has not only enabled the exclusion provision to be integrated with other legal regimes, but also enhanced the international meaning of the provision. In this study, I have highlighted that systemic integration ensures that the exclusion provision is perceived as a norm that belongs within the international legal system. It contributes to achieving the goal of interpreting the provision consistently and coherently with other international regimes. Further, it limits the risk of interpreting the exclusion clauses arbitrarily.

The approach of applying Article 1F in a manner consistent and coherent with other international bodies of law should be a ‘matter of law’. With this in mind, the position I aim to highlight is that the exclusion provision can and should be interpreted in line with international standards and principles, to achieve a consistent and coherent interpretation.

As elaborated in Chapter 1, support for this conclusion can be found in several sources. First, the general rule of interpretation – Article 31(1) of the VCLT – recognises coherent interpretation, particularly underlining consideration of the

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1047 For further analysis of this, see particularly Chapters 2, 3, 4 and 5.

context, good faith, and object and purpose of a provision. Second, Article 31(3)(c), providing for systemic integration, points to harmonisation through the interpretation process. Third, the evolutionary interpretation method, though it is not codified in any written interpretation norm *per se*, is nonetheless a recognised principle of international law, and contains support for regime integration between different international frameworks.

In general, the rules on treaty interpretation contain several methods. Thus, other interpretation rules might be suitable for the exclusion provision — depending on the context or the specific question being investigated. As I have stated, it might be impossible to find the ultimate interpretation of the exclusion provision — the aim of this study was not to present the most ‘accurate’ interpretation. Nor was it to provide an ‘inventory’ of different ways of interpreting Article 1F. Rather, the focus was to find the international meaning of Article 1F. The following section focuses on how to use the remarks from this section in the search for the meaning and threshold of the exclusion standard of proof.

7.3 How to Interpret the Evidentiary Threshold of ‘Serious Reasons for Considering’

This study has focused on finding guidance on how to understand the exclusion provision in relation to terrorism from an international law perspective. The research question required unpacking into a few sub-questions. One was the understanding of the provision’s standard of proof — ‘serious reasons for considering’. Examining the interpretation of the evidentiary exclusion standard was not as clear and straightforward as expected. Given the range of discussions and analyses, it has been challenging to find both its meaning and its most representative threshold. This was largely due to the vague wording of ‘serious reasons for considering’, which through a purely textual reading does not give any guidance in understanding either its meaning or where to accurately place its benchmark. With the narrative of a quasi-criminal trial in an exclusion context in mind, even more confusion is created. As elaborated in Chapter 6, the exclusion assessment procedure allows a large range of evidence to be brought. However, adjudicators are not required to collect the same amount of evidence and quality of evidence as in a criminal trial context. Thus, the threshold for exclusion cannot be characterised as the same for the conviction standard ‘beyond reasonable doubt’. Still, given the object and purpose of both the exclusion provision and the Refugee Convention, there are reasons to establish a high standard of proof for the exclusion of refugees. As the key notion of the entire refugee regime is a legal system that provides humanitarian protection, the purpose of adopting a high exclusion standard supports this approach. Overall, the ultimate aim of the refugee

1049 See Chapter 1.
1050 For further analysis of this, see particularly Chapters 4, 5 and 6.
framework is to find the refugee who needs international protection, not the ‘un-deserving refugee’.

Investigating the question of how to understand the exclusion standard of proof according to international law standards, one of the conclusions drawn in Chapter 6 was to find guidance in the language of international criminal law to the extent possible without causing friction with the objectives of the international refugee system. The conclusion should be viewed from the perspective of the overall steps necessary in a criminal law procedure. Another aspect is if and how which criminal evidentiary standard could be transferred into the context of ‘serious reasons for considering’. Given the several distinctions regarding the objectives and principles between international refugee law and international criminal law, the proposal of using the standard applied in international criminal law cannot be made in a strict sense. It is important to bear in mind that systemic integration is not aimed to cause a collision between different bodies of law. In this sense, the ideal to integrate the norms and principles between international refugee law and criminal law shall not be made at the expense of overriding the fundamental purpose of the refugee legal system. An important conclusion of Chapter 5 was that the central matter of the refugee framework is the refugee determination process, not quasi-conviction of potential criminals.

As discussed in Chapter 6, we can surely place the ‘serious reasons for considering’ somewhere in between the criminal law standards of ‘arrest warrants’ (ICC standard),1051 ‘indictments’ (ad hoc tribunals standard)1052 and ‘confirmation of charges’ (ICC standard).1053 As explained in Chapter 6, some argue for closer interaction between the exclusion standard and the ICC ‘reasonable grounds to believe’. Others argue in favour of pinpointing Article 1F’s standard of proof closer to the ICTY/ICTR indictment standard of ‘reasonable grounds to believe’. However, the common position has been not to reach the level of ‘beyond reasonable doubt’. Further, one can conclude that there is no clear settled threshold of ‘serious reasons for considering’. Although there are many compelling arguments for transferring thresholds from other evidentiary standards into the exclusion standard, I suggest that the threshold of ‘serious reasons for considering’ should be placed somewhere between the threshold of the ICTY/ICTR ‘indictments’ standard and the ICC ‘confirmation of charges’ standard. However, I do not intend to propose modified versions of these standards. Instead, I have attempted to illustrate how the normative analysis supports placing the exclusion standard on a spectrum between the two. I argue that this is possible as the analysis of the jurisprudence presented in Chapter 6 suggests that the ad hoc tribunals

1051 ICC Statute, Article 58(1)(a).
1052 ICTY RPE and ICTR RPE, Article 47(b) – equated with Article 18(4) of the ICTY Statute and Article 17(4) of the ICTR Statute (prima facie case).
1053 ICC Statute, Article 61(7).
‘indictments’ and the ICC ‘confirmation charges’ standards contain several comparable components. In fact, there is a stronger similarity between these two criminal evidentiary standards than between the ‘reasonable grounds to believe’ and ‘substantial grounds to believe’ standards under the ICC. An argument speaking in favour of transferring the ICTY/ICTR ‘indictments’ and ICC ‘confirmation charges’ standards would be the result of having a high standard of proof in exclusion cases. Further, it would help to ensure that the provision is interpreted and applied restrictively with respect to its normative nature, as an exception rule to the humanitarian protection in the Refugee Convention. For this reason, adequate assessment procedures with stringent evidential requirements should be the basis for ‘serious reasons for considering’. With the guidance of the ad hoc tribunals ‘indictment’ standard and the ICC ‘confirmation of charges’ standard, the evidence gathered could also be required to qualify at the level of credible, comprehensive and convincing testimony and evidence. Further, these two criminal evidentiary standards would enhance the exclusion provision to reach a level of coherency in the assessment procedure – and support the applicant in getting his/her procedural safeguards protected.

To clarify, the conclusions above relate to the entire scope of the exclusion provision. In other words, there is no justified ground to impose different levels of an evidentiary standard depending on which criminal act that triggered the exclusion clauses. As emphasised in the previous analysis, there is nothing in the available guidelines on how to interpret the standard of ‘serious reasons for considering’ or during the drafting process speaking in favour of applying different thresholds of evidentiary standards. One might argue in support of introducing a different threshold for ‘serious reasons for considering’, and perhaps approach this from the position of allowing the ‘seriousness’ of a crime to decide where to place the standard of proof or that a wide spectrum of benchmarks would benefit the exclusion standard. However, I still argue for the position of maintaining the same level of exclusion evidentiary standard regardless of if the applicant is excluded due to an international or serious non-political crime. Further, the vague wording of ‘serious reasons for considering’ and the differing interpretations of the provision should not be equated with an understanding that different levels of the exclusion standard should be introduced. This conclusion aligns with the wording of the exclusion clauses. Each of the exclusion clauses encompasses a range of crimes, yet all cover criminal acts that are ‘serious’ or ‘heinous’. In light of the object and purpose of Article 1F, the present study has also concluded that all three exclusion clauses, despite their textual and contextual differences, form an integral part of the norm and realise the objectives of Article 1F as a whole. Therefore, I argue that the exclusion provision has a constant threshold for ‘serious reasons for considering’ throughout the entire provision.\footnote{1054 For further analysis, see Chapters 2, 5 and 6.} Having different evidentiary thresholds for the different parts of Article 1F would, in
fact, only result in more ambiguity and arbitrary interpretation. Furthermore, it would impact the legal certainty of the exclusion procedure, making it less coherent, and fail to maintain the predictability of the procedure.

With account taken of the normative analysis of how to interpret and understand the exclusion evidentiary standard from an international law perspective, the next part of this chapter brings light on the core aspect of the research question, namely the issue of exclusion from refugee protection based on terrorist crimes.

7.4 The Impact of Terrorism in the Exclusion Clauses

The evolutionary approach has impacted the refugee legal system in many ways. One main example is the shift towards recognising terrorist crimes as a sufficient act for exclusion. Despite the increased attention to protecting the integrity of the refugee legal system from asylum seekers associated with terrorist crimes, as discussed in Chapter 3, linking terrorist crimes to the exclusion provision must be done cautiously. This is mainly because of the broad discrepancy and inconsistency in the definitions of terrorism. The differing interpretations of the exclusion standard ‘serious reasons for considering’ and acknowledgement of terrorism (a non-universal concept) as an exclusion crime undoubtedly puts Article 1F in grave jeopardy. For this reason, deciding on exclusion from refugee protection due to terrorist acts requires a diligent assessment procedure and legitimate grounds of evidence justifying the decision.

7.4.1 Terrorism Linked (Generally) to Articles 1F(b) and 1F(c)

There are two central elements worth highlighting in the context of exclusion due to terrorism. First, the committed terrorist act must be associated with one of the exclusion clauses. As highlighted in Chapter 3, recognising terrorism within the scope of the exclusion provision would mean that a terrorist offence can trigger any of the three exclusion categories. Second, transferring terrorist acts within the scope of the exclusion provision does not create an additional objective to protect the national security of the host state.

As stated, the crime of terrorism can trigger the application of Articles 1F(a), (b) or (c). Which of the exclusion categories it concerns depends on the context in which the terrorist crime has been conducted. However, as concluded in Chapter 3, exclusion due to acts of terrorism is usually not linked to Article 1F(a). Instead, terrorist acts have more often been associated with Articles 1F(b) or (c).

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1055 For the meaning of ‘evolutionary approach’ and how it is used in this dissertation, see Chapter 1.
1056 For further analysis on this, see particularly Chapters 4, 6 and 7.
1057 For further analysis on this, see Chapter 3.
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1059 See Chapter 3.
As demonstrated in Chapter 3, this was mainly settled in the wordings of UNSC Resolutions 1373 (2001)\(^{1060}\) and 1624 (2005), emphasising that terrorist-related offences are to be declared serious crimes and acts contrary to the purposes and principles of the United Nation. \(^{1061}\)

We can start with analysing terrorism as a ‘serious non-political crime’. No one is arguing against the fact that terrorist attacks are serious and grave in their detrimental effects on civilian populations and nations. Thus, it is no surprise that state practice has meant that terrorist crimes generally fall within the context of Article 1F(b). The use of the term ‘non-political’ crime enhances the correlation between exclusion and terrorism even further.

However, terrorist attacks, such as bombings, with political motives could also be considered as ‘serious non-political’ crimes within the scope of Article 1F(b). This aligns with the interpretation of Article 12(2)(b) of the EU Qualification Directive (which repeats Article 1F(b) in its entirety). The exclusion provision in the Qualification Directive confirms that specific cruel acts, ‘even if committed with an allegedly political objective, may be classified as serious non-political crimes’. The critical element to examine is, thus, the amount of damage that a particular terrorist attack caused and whether it was proportionate to the alleged purpose. This position also protects Article 1F(b) from being utilised by suspected terrorists who could claim that they committed a ‘political’ crime, to avoid application of Article 1F(b). As Kingsley Nyinah points out, it ‘appears to be a consensus that a political motive for a serious crime does not suffice to shield an applicant from exclusion because additional factors must be considered beyond the applicant’s subjective reasons for resorting to violence’.\(^{1062}\)

\(^{1060}\) As a reminder, in Resolution 1373 (2001), one can read that the UNSC calls upon states to: ‘[t]ake appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum seeker has not planned, facilitated or participated in the commission of terrorist acts.’ Further, to ‘[e]nsure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists.’, see UNSC Resolution 1373, 28 September 2001, S/RES/1373, at. p. 3, paras. 3(f) and (g).

\(^{1061}\) As a reminder, in the preamble of Resolution 1624 (2005), the wording of Article 1F(c) states: ‘recalling that the protections afforded by the Refugees Convention and its Protocol shall not extend to any person with respect to whom there are serious reasons for considering that he has been guilty of acts contrary to the purposes and principles of the United Nations.’ Further, ‘[r]eaffirming that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are contrary to the purposes and principles of the United Nations.’, UNSC, Resolution 1624, 14 September 2005, S/RES/1624, p. 2.

Furthermore, as argued in Chapter 2, the fact that Article 1F(b) contains a special objective to ‘protect the community of a receiving country from the danger of admitting a refugee who has committed a serious common crime’, does not justify exclusion due to security reasons. In respect to this, the exclusion clause is not intended to be used as a counter-terrorism mechanism for the purpose of expanding the interpretation and application of exclusion based on terrorism. The objective of Article 1F(b) might certainly give the impression that ‘protecting state security’ and excluding refugees perceived as ‘dangerous’ are justified grounds for exclusion. However, the fundamental basis is that exclusion based on risk and security issues would ‘be contrary to the object and purpose of Article 1F and the conceptual framework of the 1951 Refugee Convention’.

As already mentioned, Article 1F(b) is an integral part of the objective of the exclusion provision, ‘which is not the protection of asylum-state safety and security, but the exclusion of persons deemed inherently unworthy of [the refugee status]’. Thus, the central purpose is to exclude the ‘undeserving refugee’ from refugee protection.

With respect to the overall framework and objective of Article 1F and the distinct relationship to Article 33(2) of the Refugee Convention, there is no valid reason to apply Article 1F(b) as a state-protective provision, not even in relation to exclusion decisions based on terrorist crimes.

Shifting the focus to Article 1F(c), this particular exclusion category has recently been given more attention and recognition in jurisprudence compared with in past decades. The high requirement and quite vague wording of Article 1F(c) previously meant that this exclusion clause was subject to limited attention and guidance. In terms of terrorism, the international community has declared its close link to Article 1F(c) by declaring terrorist violence as any act contrary to the purposes and principles of the United Nations. With the binding implication of the Security Council Resolutions, in addition to the 2011 EU Qualification Directive referring to its own understanding of ‘acts contrary to the purposes and principles of the United Nations’, terrorism has undoubtedly become included in the international legal system. However, linking terrorism to ‘acts contrary to the

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1064 See Chapter 2 n 239 with reference to UNHCR, Statement on Article 1F of the 1951 Refugee Convention – Issued in the context of the preliminary ruling references to the Court of Justice of the European Communities from the German Federal Administrative Court regarding the interpretation of Articles 12(2)(b) and (e) of the Qualification Directive, July 2009, p. 8.
1066 For more analysis on this, see Chapter 2.
1067 See Chapter 2.
purposes and principles of the United Nations’ requires certain clarifications. Although the Security Council Resolutions refer to facilitating acts, not every act mentioned in the resolutions triggers the qualification of Article 1F(c). Further, the binding character of the UNSC Resolutions and the lack of a universal definition of terrorism calls for a careful assessment of Article 1F(c). There is also a firm emphasis on states not being permitted to adopt direct application of Article 1F(c) to crimes labelled as terrorism.

7.4.2 Terrorism as an ‘Act Contrary to the Purposes and Principles of the United Nations’ – Risk of Expanding the Scope?

Integrating terrorism within the context of exclusion from refugee protection has clearly shed light on an expanded and increased use of the exclusion provision. This impact is the result of the multiple UNSC resolutions adopted as measures in the counter-terrorism commission, and the confusing intersection between the exclusion and exception provisions (Art. 1F and 33(2)). While the evolving counter-terrorism measures have strengthened the bridge between refugee law and terrorism, they have also placed exclusion decisions based on terrorism in a vague and ambiguous position. As argued in this thesis, despite the increased interest to adopt security measures to protect state borders and national security, the initial intention behind the exclusion clauses was not to guard the interest of national security. It is therefore important to remember that there is no inherent link to national security as in protecting ‘national security’ and refugee law through Article 1F, nor was any such link presented by the drafters. Rather, the exclusion provision was and is linked to the humanitarian objective of the Refugee Convention and the purpose to protect universal protection from being exploited by undeserving refugees who commit serious crimes. Accordingly, interpreting the exclusion clauses more arbitrarily for the interest of keeping a ‘threat’ outside national borders would be contrary to the object and purpose of the entire refugee system.

Maintaining the balance between the issues of exclusion from humanitarian protection due to heinous crimes and not violating relevant norms of international and domestic legal frameworks is crucial. As the principle of Article 1F is not intended to function as a quick fix for limiting the inflow of refugees and migrants, it is important to protect the exclusion clauses from expanding their scope. However, based on the findings presented in Chapter 3, this might already have occurred. This is true particularly for Article 1F(c), which through several statements of recognising terrorism as ‘acts contrary the purposes and principles of the United Nations’ has developed to also include private actors allegedly able to commit offences against the purposes and principles of the United Nations. For the purpose of retaining the high bar of application concerning ‘acts contrary to the purposes and principles’, it is crucial not to lose sight of the ratione personae.
Initially, they limited the scope of application to actors acting on behalf of a state. Thus, even if private groups or single private actor could be subject to the exclusion category of Article 1F(c) due to allegedly committing terrorist crimes, it is important to ‘limit the scope of application to acts bearing a certain element of “policy-making”’.

7.4.3 Membership of a Terrorist Organisation and Individual Criminal Responsibility

As observed in this study, state practice has over time revealed several provisions that establish criminal liability based on membership or any form of association with a violent group. Knowing that exclusion due to ‘serious non-political crimes’ fulfils a distinct role in terms of both its objectives and its link to domestic criminal law, there may be a motive to argue for ‘membership of a terrorist organisation’ as a sufficient ground for exclusion from refugee protection. However, even if current state practices support considering membership or association to a violent group, such as a terrorist organisation, as an adequate form of criminal liability, it is vital to be cautious in accepting this. Here, one needs to consider some central aspects. First, ‘membership’ as a separate form of criminal liability is not enshrined in international criminal law (at least not at present). Second, affirming issues relating to membership or association in a terrorist organisation as adequate to qualify the threshold of Article 1F(b) could expand the scope of Article 1F. Further, this would increase the disparity between the three exclusion clauses in terms of complicity level. Third, it is worth remembering the initial position taken with respect to excluding membership as the only justified ground for Article 1F. This is mainly related to the importance of maintaining a restrictive interpretation of Article 1F and protecting the humanitarian objectives. For this purpose, ambiguous and arbitrary assessment of exclusion cases without credible and reliable evidence demonstrating an individual’s association with a criminal offence should to the largest extent be prevented. With respect to this and the aim to move towards convergence in the interpretation of Article 1F – one suggestion in this study has been to rely on international criminal standards in matters of criminal responsibility. The concluding analysis of how, why and which international criminal norm(s) that is of most interest is presented below.

The element of actus reus and mens rea rooted in criminal law is significant for the assessment of the exclusion provision. The evaluation of facts in the exclusion process follows the same logic as within a criminal case. As concluded in Chapter

1068 See Chapter 3.
1069 See Chapters 3 and 6.
6, the question whether there are ‘serious reasons for considering’ that an asylum seeker has committed an alleged act applies to both the actus reus of the crime and the mens rea element.\textsuperscript{1071} With supportive language stated in the Commentary to the first version of the EU Qualification Directive, assessment of any committed crime that might be eligible for the ‘serious reasons for considering’ standard ‘should be based solely on the personal and knowing conduct of the person concerned’.\textsuperscript{1072} Consequently, it is the person with the intent and knowledge of his or her allegedly committed crime who is ‘undeserving’ of refugee protection (due to the interest of maintaining the integrity of the refugee system) – not the person who acts in negligence.\textsuperscript{1073}

Furthermore, the catalogue of criminal liability terms established in criminal law provides guidance to the field of refugee law in areas where adjudicators are required to assess issues outside their range of expertise. This relates closely to the limitations described by the decision-makers investigating the exclusion provision – namely assessing matters of criminal responsibility in an administrative context. The reason for the interrelation between administrative law and criminal law is also relevant. The aspect of assessing a matter within administrative law, while examining issues of individual responsibility and grounds for excluding criminal accountability, not only shapes the exclusion procedure as a quasi-criminal-setting, it also highlights how dependent the exclusion procedure is on criminal law. The decision-makers need to possess a qualified level of knowledge to understand how to interpret the merits of criminal law in the scope of exclusion cases. Further, the criminal framework can function as a supplementary mechanism in areas where no further guidelines for the exclusion provision can be found in administrative law. However, as the exclusion provision belongs within administrative law pursuant to its own objectives, principles, evidentiary standards and assessment procedures, inviting the criminal law dimension into exclusion processes could create tension. An individual might be excluded from refugee protection because there is ‘serious reasons for considering’ that he/she has committed an international or serious non-political crime, though the same person is acquitted in a criminal law context due to a lack of sufficient evidence justifying ‘beyond reasonable doubt’. Importantly, the purpose of the exclusion provision is not to prosecute the asylum seeker or function as a criminal mechanism – the aim is to determine whether the individual can be provided refugee status and refugee protection according to refugee law. Thus, while I argue for the im-

\textsuperscript{1071} See Chapters 3 and 6.
\textsuperscript{1073} See Chapter 5 n 862 with reference to Li, Yao, Exclusion from Protection as a Refugee, An Approach to a Harmonizing Interpretation in International Law, Brill-Nijhoff, International Refugee Law Series (volume 9), 2017, p. 240.
portance of interacting with the criminal language, I also emphasise the complexity behind relying on criminal laws when interpreting a refugee norm enshrined in administrative law. For this reason, if conflicts arise at the intersection between international refugee and criminal law when assessing exclusion cases, the most beneficial outcome should be applied in favour of the refugee.

As already stated in Chapter 6, criminal responsibility can be declared based on a range of different actions. The modes of liability pursuant to Article 25 of the ICC Statute include accountability based on active conduct of a crime and omission of liability (the duty to act). Although contribution to the crime must in one way or another be confirmed, the specific contribution to the allegedly committed crime can occur through direct, joint or indirect participation.

Nonetheless, the domestic and international criminal framework encompasses many different criminal liability forms. These include a range of extended modalities that may result in an individual being held accountable, such as joint criminal enterprise, co-perpetration or indirect perpetration, as used by ad hoc tribunals or ICC. These forms of criminal responsibility should not be included in the context of exclusion cases. The only exception might be command responsibility, enshrined in Article 28 of the ICC Statute. As the saying goes ‘with great power comes great responsibility’ – senior officials must be aware of possible crimes that occur under their command and effective control. Thus, they could prevent them from happening. Still, liability of exclusion crimes based on command responsibility can only be justified in non-controversial cases and where the criminal liability terms are fulfilled in an uncontested manner.

Further, considering the objective of the exclusion provision presented by the drafters and the serious consequences of the provision, leaning on general conditions of ‘mere membership’ of a violent organisation without examining individual responsibility would be contrary to the general principles of procedural fairness. Even where there is an interest to protect national security, the obligation to maintain the legitimacy of the exclusion provision and protect the humanitarian objective of the Refugee Convention means that the principles of procedural fairness should be considered. Therefore, the requirement to determine individual responsibility does not become less important if an asylum seeker is a member of a terrorist organisation. Exclusion must still be justified in accordance with procedural standards. As stated by the UK House of Lords, when ‘applying Article 1F to persons suspected of terrorism, the standard procedural

1074 See Chapter 6.
1075 See Chapter 6.
1076 See Chapter 6 n X for a comprehensive analysis of individual criminal responsibility and modes of liability referencing, for instance, Li, 2017, pp. 241–274.
fairness guarantees and substantive law must be complied with'. In the end, the ultimate qualification of the exclusion provision is not based on recognition of a crime, but rather on whether there are ‘serious reasons for considering that [an individual] has committed an excludable crime under Article 1F’.

Thus, to maintain the humanitarian purpose and protect the individual from being subject to arbitrary and unjustified exclusion assessments, evaluation should be done on case-by-case basis, without any opening for automatic exclusion decisions. Likewise, the exclusion assessment should be in line with the traditional liability concepts used in both domestic and international criminal law doctrine for a coherent evaluation of criminal responsibility of the excludable offences under Article 1F. This position bears no exception, not even in cases concerning membership in a particularly violent group. In other words, the prevailing rule must be that mere membership, even in an organisation responsible for heinous terrorist violence, is to be supplemented with evidence proving the person's participation in the performance of the act or other forms of criminal liability related to exclusion crimes. Thus, as application of the exclusion evidentiary standard would be difficult to justify without evidence associating an individual to the commission of the criminal act, I argue that facts such as membership of a violent organisation or listing of terrorist organisations or terrorist suspects addressed within an exclusion context should not pre-empt application of the main rule to examine individual criminal responsibility under Article 25(3) of the ICC Statute.

To clarify, this would also apply in cases where the applicant might be assisting or by other means facilitating the commission of a terrorist crime without actually committing the offence. For instance, as confirmed by the CJEU in the Lounani case presented in Chapter 3, financing foreign fighters in a terrorist group was sufficient to qualify for exclusion under ‘acts contrary to the purposes and principles of the United Nations’. However, even if the chain of criminal liability for exclusion can be displayed, the requirement of a link between the applicant's own contribution and the terrorist offence must be met. This is mainly because unpredictable and extended liability forms of criminal responsibility would place the asylum seeker in a more dangerous position and increase the risk of ambiguous assessments and inconsistent interpretations of Article 1F.

Importantly, the humanitarian objectives of the refugee legal system are the foundation for protection of the interpretation of Article 1F with respect to both

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1078 Ibid.
1079 See in particular Chapters 3, 5 and 6.
1080 See Chapters 3 and 6.
international and domestic crimes. The interpretation should not be extended beyond the traditional criteria of liability developed by international criminal courts and tribunals. The objectives also guard the exclusion provision from encompassing a general analysis of individual criminal responsibility and exempt those who have committed minor crimes or had minor roles in a crime. Essentially, these people are not the ones who would cause any disrepute to the refugee legal framework. Therefore, they should not be considered undeserving of refugee protection.1081

I have now delved into the essential remarks regarding the main and sub-related research questions of this dissertation. The final section of this chapter focuses on revisiting the main research question and providing analytic conclusions on how to understand the exclusion provision in cases of terrorism from an international human rights and criminal law perspective.

7.5 How to Understand Exclusion from Refugee Protection Based on Terrorism in Light of International Standards

Here, I will attempt to present the final conclusions in relation to the research question introduced in Chapter 1. The first part focuses on presenting the conclusions based on the language of international human rights law. The second part delves into the criminal law standards. This is followed by a normative analysis addressing some closing observations and recommendations which I argue are important to consider in order to reach coherency, consistency, legal certainty and predictability in the interpretation of Article 1F.

7.5.1 In Light of International Human Rights Law

The importance of observing the humanitarian purpose of the 1951 Refugee Convention and its 1967 Protocol is greater than ever before. This is particularly relevant in relation to the increased border controls, the new security measures, and current conflicts and crises forcing millions of people to cross international borders in search of protection.

In tandem with the increase in armed conflicts, repressive regimes and violations of fundamental rights and freedoms forcing people to leave their home countries, there has also been an increase in the interest to reduce security threats, establish revisited asylum procedures and protect state borders from foreigners. In the aftermath of the 9/11 attacks, the international community as a whole has adopted a more urgent tone to ensure that terrorists are excluded from refugee protection. With respect to this, I argue that the objectives of Article 1F have

1081 See Chapter 6.
been implicitly changed as a consequence of terrorism being integrating within the scope of the exclusion clauses. The exclusion provision swiftly turned from the purpose of identifying the ‘undeserving refugee’ to that of identifying the ‘dangerous refugee who is undeserving of humanitarian protection’. This could be the reason why the confusion between the exclusion provision and the exception rule against the non-refoulement principle in Article 33(2) still exists and is growing.

Because of the vagueness resulting from terrorism being a non-universal concept, in particular as it relates to the issue of membership of a terrorist organisation – asylum seekers subject to exclusion from refugee protection based on terrorist crimes are inevitably placed in a vulnerable situation. This highlights how the process of excluding an asylum seeker due to terrorist offences results in fragility, weakness, unfair interpretations and non-fulfilment of legal certainty and procedural fairness.

Accordingly, the main position throughout this thesis has been to highlight the presence of the human rights approach as a building block upon which refugee law rests. Although refugee law and human rights law are two distinct legal frameworks, their close interaction in this context cannot be ignored. Though the refugee legal system was developed prior to many of the international human rights instruments, the principles and features of human rights law were already integrated into the language of refugee law. This indicates that the framework of international human rights law should be considered through the method of systemic integration when interpreting the exclusion provision. There is thus space to invite the intersection between the bodies of law to achieve coherent interpretation and legal certainty in exclusion procedures. In addition, the human rights approach aligns with an argument I have emphasised – namely not disregarding the humanitarian objective of refugee law. Regardless of the significance of Article 1F, the provision is an integral part of the Refugee Convention. Thus, the human rights approach contributes as a supplementary normative mechanism in upholding a restrictive interpretation of the exclusion provision.

Further, as discussed in Chapter 4, the serious consequences of an exclusion decision call for a restrictive interpretation. Though the human rights approach through the systemic integration and the evolutionary approach assists in maintaining a restrictive interpretation of the exclusion clauses and contribute to protecting the humanitarian objective – I have argued for not relying too much on human rights law as a safety mechanism that removes the serious outcomes of an Article 1F decision. The absolute character of the non-refoulement principle in human rights law prevents expulsion to a harmful place, but the same principle creates a limbo situation that an excluded individual must endure. This reveals why the systemic interaction with international human rights law cannot be applied as a wide-ranging safety net. Nonetheless, the human rights approach is
necessary to create a coherent and consistent interpretation of the exclusion provision, both to ensure restrictive application and to ensure the procedural safeguards of an exclusion procedure. At the same time, it sheds light on the significance of taking the humanitarian objective of the refugee regime into account.

One also needs to consider the textual wordings of the Preamble and the object and purpose of the Refugee Convention. With respect to the wordings of the Preamble and the humanitarian objectives – the Convention certainly appears to be a human rights treaty with the purpose to provide rights to refugees. Hence, the component that interlinks refugee law and human rights law is that both legal fields seek to provide protection to individuals.

With respect to the humanitarian purposes and the interest to provide refugees with ‘the right to have rights’ (to quote Hannah Arendt),\textsuperscript{1082} the dynamic between international refugee law and human rights law must be strengthened, integrated and developed. This will also fuel the interest in sustaining the humanitarian purposes of the Refugee Convention as an objective worth respecting, protecting and interpreting accordingly.

### 7.5.2 In Light of International Criminal Law

The wordings of a large number of international instruments (for instance, the adopted UN Security Councils resolutions, UN General Assembly declarations, and the sectoral anti-terrorism conventions) highlights the position taken by the international community to consider terrorism as prohibited in international law. As already mentioned, terrorism could, in theory, be defined as a ‘serious transnational, treaty-based crime that is on the brink of becoming a true international crime’.\textsuperscript{1083}

It has already been confirmed that the exclusion provision contains a strong connection to criminal law, both international and domestic. Which criminal law doctrine should be applied – international or national – depends on the crime.

\textsuperscript{1082} In describing the mass movement of refugees fleeing persecution for religious reasons during the twentieth century, Hannah Arendt defined the concept as follows: ‘[a] refugee used to be a person driven to seek refuge because of some act committed or some political opinion held. Well, it is true we have had to seek refuge; but we committed no acts and most of us never dreamt of having radical opinions. With us the meaning of the term “refugee” has changed. Now “refugees” are those of us who have been so unfortunate as to arrive in a new country without means and have to be helped by Refugee Committees.’ see Arendt, Hannah, ‘We Refugees’, in \textit{The Menorah Journal}, 1943, republished in Robinson, Marc (ed.), \textit{Altogether Elsewhere: Writers on Exile}, Faber and Faber, 1994.

There is no doubt that modes of liability pursuant to criminal law provide guidance in the assessment of exclusion crimes prior to the assessment of if there are ‘serious reasons for considering’ that an individual has committed an excludable act. Now, the question is if modes of liability based on membership of a terrorist organisation pursuant to international criminal law should also be applied in the context of exclusion, even if membership of a violent organisation *per se* is not recognised as a crime in international criminal instruments. Instead, it appears in domestic criminal law system. Is it possible to use principles and norms from international criminal law in regard to this issue?

As mentioned in this study, the idea of considering international criminal responsibility norms has been presented in domestic jurisprudence. Most familiar is the landmark case of *JS (Sri Lanka)*, which overruled the previously recognised *Gurung* doctrine.\(^{1084}\) As highlighted in Chapter 6, the House of Lords declared that investigating criminal responsibility based on membership of a terrorist organisation should be conducted in accordance with Article 25(3) of the ICC Statute. Likewise, the Court shed light on Article 30 in relation to the mental aspects of committing the offence triggering the exclusion provision. As mentioned in this study, the *JS (Sri Lanka)* case has gained support from other domestic and regional courts, actors and scholars involved in the examination of Article 1F.\(^{1085}\)

Further, the application of the ‘mere membership’ as a justified ground for exclusion is inconsistent. Though the initial position was to reject the ‘mere membership’ doctrine as a qualifying factor for exclusion from refugee protection, the analysis has shown a diverse and shifting approach – even at the EU level.\(^{1086}\) This impacts the general view on how to deal with rules and principles of criminal responsibility in the assessment of exclusion cases. State practices highlight a discrepancy in both the interpretation of the standard of proof in Article 1F and the interaction with criminal law doctrine. This makes it difficult to establish how to read the law as it is. In fact, this becomes even more difficult as the refugee legal system lacks any authoritative legal body that can confirm the ‘accurate’ reading of the law.\(^{1087}\) As it might be difficult to settle the *lex lata* position, moving towards a ‘soft version’ of a *lex ferenda* reasoning might be appropriate. As a normative conclusion, I emphasise that the exclusion provision derives from an international law convention. Many state parties to the Convention have replicated the wording of Article 1F in its entirety. This is also the case for the exclusion clauses in the EU Qualification Directive. Thus, as a general principle in treaty

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\(^{1084}\) See Chapter 6. The *Indra Gurung v Secretary of State for the Home Department*, [2002] UKIAT 4870 decision also referred to international criminal law doctrine.

\(^{1085}\) See Chapters 3 and 6.

\(^{1086}\) See Chapter 3 analysing the CJEU: Case C-573/14 *Commissaire général aux réfugiés et aux apatrides v Mostafa Lounani*, Judgment, 31 January 2017.

\(^{1087}\) Although issues concerning the Refugee Convention can be presented before the International Court of Justice, no state party has done so as yet.
interpretation – there is an aim to pursue an international meaning of ratified provisions and unify the meaning of the international norm. Given the issues related to Article 1F and the increased concern of associating the provision with a non-uniform concept like terrorism, assessment of exclusion based on membership of a terrorist organisation should follow the rules and principles of criminal responsibility pursuant to international criminal law. Hence, investigating the actus reus and mens rea in accordance with criminal standards appears appropriate in the context of Article 1F. This position is also supported in scholarly work, statements from the UNHCR and case law from the CJEU and domestic jurisprudence. Like Li, I argue that decision-makers should conduct a diligent assessment of individual criminal liability forms confirming that criminal responsibility has been fulfilled as regards both the actions and the state of mind of the refugee. This relates in particular to issues of declaring membership of a terrorist organisation as a reason to justify application of Article 1F. Given that some domestic systems have criminalised association with terrorist organisation (with a broad scope and definition of criminal offences), an increasing number of exclusion decisions based solely on ‘membership’ with a terrorist group might be the expected outcome. Ultimately, the legal movement might turn towards the Gurung doctrine approach, where the matter hinged mainly on the violent character of the group rather than the individual’s own contribution to the actual crime. My argument rests upon the importance of examining the person’s own association with the crime (i.e., the actus reus and mens rea elements) before stating that there is a ‘serious reason for considering’ that the applicant has committed a terrorist crime. This corresponds with the two-sided functions of the ‘serious reasons for considering’, i.e., the evidentiary and substantive roles. While the evidentiary element of the ‘serious reasons’ standard ‘is generally understood to be a means of accommodating the practical constraints of access to less evidence than is normally available in a criminal trial’, the ‘substantive matter […] requires that exclusion decisions be based upon settled norms of international criminal law’. Further, this normative approach would likely improve understanding of the exclusion provision to reach a coherent, and, to the greatest extent possible, convergent interpretation of the provision, both in regard to the exclusion provision as a whole and in cases examining association with a terrorist organisation.

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1088 See Chapters 3 and 6.
1090 This is also highlighted for instance in the R(JS)(Sri Lanka) v Secretary of State for the Home Department, [2010] UKSC 15 and the CJEU: Joined Cases C-57/09 and C-101/09, Bundesrepublik Deutschland v B and D, Judgment, 9 of November 2010.
7.6 Concluding Observations

The concepts of terrorism and refugees differ in their normative character and objectives. Nevertheless, they have been recently associated and discussed with similar connotations of mistrust and exclusion. In Penelope Mathew’s words: ‘[t]he terrorist is perceived to pose fundamental challenges to the State-bound system of international law, while the refugee is an inconvenient problem because he or she also falls outside the State system’.  

This highlights how an asylum seeker, in the absence of a legal label recognising him or her as a deserving refugee, will most likely be regarded with suspicion. The development after the 9/11 attacks, where the UN Security Council called upon states to condemn terrorist crimes and not provide any terrorists safe havens, has not weakened this perception. These events only raised the level of suspicion and drew the matters of terrorism and refugee closer to each other. The fact that asylum seekers are portrayed as ‘criminals’, ‘possible terrorists’ or illegal migrants whose presence is to be managed as a matter of border and crime control, and whose protection needs are a secondary issue underlines how the approach towards refugees has changed over time. The growing misconception where the terms terrorists and refugees are closely linked and used interchangeably in the debates on ‘foreigners’ causing danger, threat or destruction to the safety of receiving states would place the exclusion provision in an uncertain spot. Having terrorists recognised to be excluded from refugee protection under Article 1F may run counter to the objectives of the exclusion provision. It would no longer concern the question of identifying the undeserving refugee, but instead that of identifying the undesirable refugee. For this purpose, it is critical, as reaffirmed in many of the UN resolutions, that states observe the obligation to ensure that counter-terrorism measures are aligned with relevant international fields, such as international human rights law and refugee law. This would maintain the principle of providing human rights protection even in times of emergency. Further, it would ensure that the value of human dignity is protected and consistent with international standards and the rule of law.

Certainly, linking terrorism with refugee norms is a complex issue and requires measures to ensure that the exclusion provision is interpreted and applied with

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1093 See Chapter 3.


1095 Many of the UN instruments highlighting this matter are presented in Chapter 3.

1096 For further analysis, see Chapter 3.

legitimate means. On a final note, I will present a few observations (and recommendations) on certain aspects of the subject matter that this study has examined.

First, it is important to maintain the initial aim to interpret and apply the exclusion provision restrictively, as it constitutes a critical exception to the overall purpose to provide humanitarian protection. The humanitarian purpose has a central role in the interpretation of the exclusion provision.

Further, to ensure that these objectives are observed throughout the exclusion assessment – especially in regard to crimes that lack a precise definition – principles, such as the ‘presumption of innocence’ and the ‘benefit of the doubt’ should be applied. Equally important is using an inclusion-before-exclusion assessment procedure. Generally, this order emphasises the objectives of the refugee system by determining the refugee status before studying if there are ‘serious reasons for considering’ that an applicant is not deserving of refugee protection. Indeed, this relates to the overall purpose of the refugee system: to examine cases in respect of elements relating to persecution, not prosecution. In other words, the overall basis of international refugee law is to offer humanitarian protection, not to decide who is excluded from refugee protection. In addition, the common structure of any interpretation and application order is to examine the general norm before the exception norm. Thus, there is a strong implication to apply an inclusion-before-exclusion procedure. First, it should be examined if a person fulfils the refugee status definition, and only then if there are legitimate factors justifying the application of the exclusion provision. The guidance of Article 31(1) of the VCLT indicates that the context, object and purpose of the norm support an inclusion-before-exclusion procedure even though the wording of Article 1F is silent on this matter. Further, considering an inclusion-before-exclusion structure would, in my analysis, be further confirmation of the close dynamic between the inclusion and exclusion norms. This is certainly the case given the mandatory element of the exclusion clauses, but also given that the refugee status norm and the exclusion norm are not mutually exclusive. Both provisions have functions that are critical for the refugee system and in determining who can be provided refugee protection.

On the back of this conclusion, this study has also highlighted how the inclusion-before-exclusion procedure would strengthen the procedural safeguards for individuals seeking asylum. As the exclusion proceeding is conducted in an administrative context, not a criminal trial setting, the procedural rights and principles pursuant to both international human rights and criminal law instruments would be necessary to consider when interpreting and assessing Article 1F, though this may seem counter-intuitive. As analysed in Chapter 5, the relevant procedural rights to consider in international human rights and criminal law instruments should be Article 6 ECHR, Article 14 ICCPR, Article 21 ICTY, Article 20 ICTR and Article 67(1) ICC.
Further, the fact that the exclusion provision does not contain ‘terrorism’ as an explicit excludable act, though such acts have through dynamic development become associated with the provision, indicates that there is no need to define the crime as ‘terrorism’ per se. There is also no support in international instruments or scholarly work for including such crimes specifically. Nonetheless, bearing in mind the discrepancy between different terrorism definitions and the fear of arbitrary definitions of terrorist crimes – there is a need not to apply the exclusion provision in uncertain assessments based on loose definitions of terrorism. It is essential to apply Article 1F in relation to terrorist crimes that are defined under international instruments and that offer legitimate guidance on what terrorism constitutes.

Given the current UN Security Council Resolutions and global terrorism reports addressing the ongoing terrorist violence causing threats to international peace and security, one might expect the link between asylum and terrorism to remain. Although this study has not shown that there is a large increase of exclusion decisions based on terrorism, the aspect of bringing terrorist crimes in the sphere of exclusion might place the provision in a more uncertain setting. For instance, states might be compelled to place the ‘serious reasons for considering’ a lower threshold due to interest of minimising the ‘threat’ caused by refugee protection. Nonetheless, in order to counteract arbitrary, loose and vague interpretation of the exclusion provision, any terrorism-specific concern assessed in the context of exclusion should require a diligent assessment procedure with a high threshold for the exclusion evidentiary standard, showing that the applicant is personally associated with the criminal act. This study has, through the interpretation method of systemic integration and an evolutionary approach, highlighted that norms of international criminal law could be considered when assessing exclusion cases based on membership of a terrorist organisation. This strengthens the argument that ‘mere membership of a terrorist group’ should not be enough as a single factor for a decision on exclusion, despite being recognised as a crime in domestic jurisdictions. The rules on individual criminal responsibility under international criminal law are equally important to consider in order to achieve a coherent interpretation of Article 1F related to crimes that lack unified definitions. By analogy, this conclusion could apply equally in the context of membership of a violent group that is not necessarily labelled as a terrorist organisation. Thus, exclusion cases regarding asylum seekers associated with groups belonging to a repressive regime or militia group (to mention a few examples) would also require that contents are assessed in light of modes of liability, supported by credible and comprehensive evidence demonstrating the individual’s own partic-

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1098 See Chapter 3.
ipation and contribution to the crime committed. Consequently, ‘mere membership’ in either a terrorist organisation or another violent group should not be enough for exclusion from refugee protection under Article 1F.

Furthermore, the rules on treaty interpretation have proven that the exclusion provision, in cases concerning both terrorism or other crimes triggering the exclusion clauses, can be interpreted in accordance with international criminal and human rights standards. In fact, the language of international criminal law and human rights law contributes to the exclusion provision in many positive ways. The systemic integration of the three bodies of law has highlighted that there are normative solutions to the mismatch between international refugee law, human rights law and criminal law. Nonetheless, while it is possible to take inspiration from relevant rules in international human rights law and criminal law when interpreting the exclusion provision (whether it relates to the crime of terrorism or some other crime encompassed by Article 1F), the intersection between the fields of law has another aspect that cannot be ignored: They remain independent fields of laws with separate objectives, principles and rules. Additionally, the close interaction between international refugee law and human rights law does not resolve the limbo situation which becomes a reality for the individual subject to the exclusion clauses.

In conclusion, due to the challenging aspect of establishing one true international meaning of the exclusion provision – the aim (with an attempt to at least come close to an international understanding) has instead been to present interpretation methods that consider relevant rules of international law for the purpose of enabling a coherent interpretation of exclusion based on terrorist crimes in the spectrum of international law. In the pursuit of this ambition, many issues and matters related to the exclusion provision and its interaction with other international bodies of law have been presented. However, this dissertation cannot cover all the issues related to the exclusion framework. These include procedural elements and evidence-related issues, the quasi-trial structure within an administrative context, compelling solutions to the limbo dilemma, and additional mismatches between refugee law and other bodies of law. Rather, the interest has been to cast light on these challenges and indicate that further research in these areas is necessary.

Enligt Artikel 1F nekas asylsökande, som i och för sig bedöms uppfylla kriterierna för flyktingstatus, internationellt flyktingskydd på grund av det har funnits ’synnerligen anledning att anta’ att de har begått eller på annat sätt varit ansvariga för straffbara gärningar, såsom brott mot freden, krigsbrott, brott mot mänskligheten, seriösa icke-politiska brott, samt gärningar som strider mot Förenta Nationens grundläggande grundsatser och principer. Syftet med bestämmelsen, som behandlas i denna avhandling, är att identifiera asylsökande som inte förtjänar flyktingrättens skydd.

Mot bakgrund av att den internationella flyktingrätten i huvudsak ska prioritera att erbjuda internationellt flyktingskydd markerade införandet av uteslutandebestämmelsen behovet av att uppnå en balans mellan olika intressen i syfte att skydda konventionens trovärdighet och grundsats. Dynamiken mellan flyktingsstatusbestämmelsen och uteslutandebestämmelsen innebar att man både sökte skydda det asylrättsliga systemet och inskränka möjligheten att bevilja flyktingstatus till de som förjämna det minst, dels beakta de allvarliga konsekvenserna av att förneka internationellt skydd till de som kan vara i behov av det allra mest.

I samband med införandet av uteslutandebestämmelsen var terrorism inte något uppmärksammat hot och blev därför inte införd i bestämmelsen som ett uteslutande brott. Eftersom 1951 års Genèvekonvention och dess 1967 års Protokoll anses vara levande instrument var det i sig inte problematiskt att terrorism koppades samman till uteslutandebestämmelsen efter spåren av 9/11 attentaten. Däremot har länken mellan uteslutandebestämmelsen och terrorism orsakat ytterligare utmaningar avseende tolkningen och tillämpningen av uteslutandebestämm-
melsen. Förutom att uteslutandebestämmelsen är unik i sin ordalydelse – är be-
stämmelsen också svår att tolka i ljest av sitt beviskrav och i relation till ett be-
grepp som saknar en universell definition, som exempelvis terrorism. I denna 
avhandling behandlas dessa delar särskilt och fokuserar på att hur uteslutandebe-
stämmelsen ska tolkas i relation till terrorism utifrån ett internationellt perspektiv, 
med särskild fokus på regler och principer inom mänskliga rättigheter och inter-
nationell straffrätt. I avhandlingen studeras även två delfrågor som fokuserar på 
hur beviskravet i uteslutandebestämmelsen – synnerligen anledning att anta – ska 
förstås utifrån processrättsliga principer samt hur frågan om medlemskap i ter-
roristorganisationer ska tolkas i relation till uteslutandebestämmelsen.

I syfte att kunna besvara forskningsfrågorna använder sig denna avhandling av 
en rättspositivistisk metod som ett teoretiskt ramverk samt relevanta tolknings-
metoder i enlighet med den folkrättsliga traktaträtten. Fokus ligger på de folk-
rättsliga rättskällorna och den tillämpliga tolkningsstandarden som riktar ljus mot 
bestämmelsens ordalydelse, dess sammanhang och ändamål som utgångspunkter 
vikt att tolkning. Det huvudsakliga målet i denna avhandling är att undersöka 
möjligheterna att nå en enhetlig och konsekvent tolkning av uteslutandebestä-
melsen, i syfte att värna om flyktingrättens ändamål och möjliggöra en rättssäker 
prövning av uteslutandeärenden, oaktat om det är terroristbrott eller övriga all-
varliga brott som aktualiserar uteslutandebestämmelsen.

Avhandlingen innehåller två centrala pelare; en materiell rättslig del och en pro-
cessrättslig del. Sammantaget är avhandlingen uppdelad i fyra delar. Förutom den 
inledande del I, fokuserar del II primärt på den materiella rätten rörande uteslu-
tandebestämmelsen och del III undersöker de processrättsliga frågorna. Dessa 
delar i avhandlingen täcker även de aspekterna som är centrala i forskningsfrå-
gorna, men också representativa för innehållet av uteslutandebestämmelsen. I del 
II studeras huvudsakliga syftet med uteslutandebestämmelsen och vad den 
egentligen innebär, konsekvenserna av att uteslutas från skyddsstatusförklaring, 
sambandet mellan terrorism och uteslutandebestämmelsen och hur delaktighet i 
terroristbrott ska förstås och tolkas i relation till uteslutandebestämmelsen. Utö-
ver det lyfter del II fram ett kritiskt perspektiv på mänskliga rättigheter som ett 
kompleterande rättsområde i relation till den internationella flyktingrätten. Trots 
att mänskliga rättighetsperspektivet är väsentligt för tolkningen och tillämp-
ningen av uteslutandebestämmelsen, något som understryks som en viktig slut-
sats i denna avhandling, så behandlar denna avhandling även perspektivet av att 
intra för att skydda individen från att inte utvisas till en 
farlig plats. I övrigt kvarstår de allvarliga konsekvenserna av ett beslut om uteslu-
tande från flyktingskydd. Det är därför väsentligt att ta hänsyn till de allvarliga 
konsekvenserna av uteslutandebestämmelsen och den limbosisituationen som 
uppstår för de uteslutande asylsökandena. I del III presenteras en djupgående

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The 1951 Refugee Convention and its 1967 Protocol serve to safeguard individuals fleeing persecution, a mission as pertinent today as in the post-World War II era. However, the lack of a unified approach to interpreting and applying the 1951 Refugee Convention leads to significant disparities among states in granting refugee protection, particularly in regard to complex provisions like Article 1F (also known as the exclusion provision). The exclusion provision’s vague standard of proof – ‘serious reasons for considering’ – and the unique assessment of individual criminal responsibility within an administrative procedure creates challenges, in particular when dealing with exclusion based on crimes lacking universal binding definitions, such as terrorism.

This study emphasises that interpreting the exclusion provision in line with international human rights and criminal law standards offers normative solutions to reconcile discrepancies within the framework of exclusion from refugee protection. Ultimately, this study aims to propose interpretation methods rooted in international law, to foster a coherent understanding of exclusion based on terrorist crimes within the broader spectrum of international law.

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