AALBORG UNIVERSITET

UPHOLDING THE INTEGRITY OF THE INTERNATIONAL REFUGEE REGIME: CONSISTENCY IN STATE PRACTICE REGARDING THE EXCLUSION OF WAR CRIMINALS FROM REFUGEE STATUS

A DEEP ASSESSMENT INTO ARTICLE 1(F)(a) OF THE 1951 REFUGEE CONVENTION

THESIS

Submitted in fulfillment with the requirements for the Master in Global Refugee Studies

Supervised By: Danny Raymond

KUSH RAMNIKLAL RAITHATHA

(KENYA)

Copenhagen

2021

For Dad and Mum

We are living in a world of disquiet. A great many people fear getting trampled, thwarted, left behind. Machines take their jobs. Traffickers take their dignity. Demagogues take their rights. Warlords take their lives. Fossil fuels take their future.(..)And yet people believe in the spirit and ideas that bring us to this hall. They believe in the United Nations. But do they believe in us? Do they believe as leaders, we will put people first? Because we, the leaders, must deliver for we, the peoples.

- Speech of the United Nations Secretary General Antonio Guterres at the General Assembly in 2019.

Abstract

The 1951 Refugee Convention is the foundational element of refugee protection in the 21st century. The objective of this instrument is to offer protection to the "vulnerable" but at the same time deny protection to persons who are "undeserving of it". It was with this thought that the drafters of the 1951 Refugee Convention created the exclusion clauses. Amidst modern day debate, this paper seeks to address the exclusion of persons with respect to whom "there are serious reasons for considering" that they have committed war crimes as enshrined in Article 1(F)(a) of the 1951 Refugee Convention. The overall objective of this paper is to revive scholarly attention on the exclusion of alleged war criminals from refugee status, but more importantly pave way for a more detailed stance on the state practice of the Global South in regards to the exclusion of war criminals from refugee status. In doing so, this paper's main argument is that the exclusion of individuals from refugee status, which in itself is an exception of the 1951 Refugee Convention, should be done in a restrictive, just and consistent manner in which the integrity of the international refugee regime is upheld whilst ensuring the protection of people in need.

Table of Contents

Abbreviations

AJIL – American Journal of International Law

AU – African Union

Brit YB Int'l L – British Yearbook of International Law

ECOSOC – United Nations Economic and Social Council

EWCA – England and Wales Court of Appeal

FCA – Federal Court of Appeal (Canada)

FCA – Federal Court of Australia

FCAFC – Federal Court of Australia, Full Court

GCIV - Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts

IAC – International Armed Conflict

ICC – International Criminal Court

ICJ – International Court of Justice

ICRC – International Committee of the Red Cross

ICTY – International Criminal Tribunal for the Former Yugoslavia

ICTR – International Criminal Tribunal for Rwanda

IHL – International Humanitarian Law

IJRL – International Journal of Refugee Law

ILC – International Law Commission

IRO – International Refugee Organization

JCE -Joint Criminal Enterprise

Mich. J. Int'l L — Michigan Journal of International Law

NIAC — Non-International Armed Conflict

NZLR — New Zealand Law Report

NZSC — New Zealand Supreme Court

OAU – Organization of African Unity

RSD – Refugee Status Determination

SACMED —Supreme Allied Command Mediterranean

SCC – Supreme Court of Canada

SG — United Nations Secretary General

UDHR — Universal Declaration of Human Rights

UKIAT — UK Immigration Appeal Tribunal

UKHL – UK House of Lords

UKSC – UK Supreme Court

UN – United Nations

UNGA – United Nations General Assembly

UNHCR — Office of the United Nations High Commissioner for Refugees

UNRRA —United Nations Relief and Rehabilitation Administration

UNTS — United Nations Treaty Series

VCLT — Vienna Convention on the Law of Treaties

ZACC – Constitutional Court of South Africa

Preface

The aftermath of the Second World War and the mass atrocities committed by Nazi officials and their collaborators during this period demanded immediate international intervention. The severity of the situation led to the formation of the 1951 Refugee Convention, in which its key purpose would be to provide short-term protection to persons who were forced to flee their respective countries, while at the same time preserve the territorial integrity of states and their authority to have effective control over their borders. One of the foundational elements of the Convention was that war criminals should not receive protection from the international community, since they were the ones to blame for the acts that led to displacement in the first place. It was with this thought in mind that the drafters of the 1951 Convention decided to form the exclusion clauses, whereby upcoming concepts of international criminal law and the laws of war were entwined into the framework of refugee protection. The purpose of these exclusion clauses was to make sure that the so-called "serious criminals" would not escape prosecution for the crimes they committed by applying for asylum. Article 1(F)(a) of the 1951 Refugee Convention denies protection to persons with respect to whom "there are serious reasons for considering" that:

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

Among other crimes mentioned above, this research pays critical attention to "war crimes", a legal concept with a comprehensive definition which can be interpreted in many forms. The content of war crimes law has been subject to consistent change over the past 70 years since the adoption of the 1951 Refugee Convention, and the nature of its incorporation into refugee law is still vague, with no elaborative study published on the topic especially in relation to state practice in the "global south".

Article 1(F)(a) of the 1951 Refugee Convention sets the foundation of this research whose objective is to offer a descriptive assessment of "war crimes" as grounds of exclusion from refugee status. Furthermore, it looks to go beyond refugee law and study the relationship between international refugee law, international criminal law and the laws of war. The main argument of this research is that amidst the lack of consistency in state practice in the application of the exclusion clauses as stated in the 1951 Refugee Convention, the exclusion of alleged war criminals in Article 1(F(a) must be constructed and practiced in the most restrictive, just and consistent way

in which asylum seekers are given more confidence on the integrity of their applications while at the same time maintaining states' immigrational authority.

1.Structure

This research is formed around two main parts. The first part delves deeper into the formation and historical development of the concept of exclusion from refugee status. The aim of the first part is to lay down the historical developments that inspired the formation of the exclusion clauses whilst underlining their cross-breaded nature. Section one and two analyze the early developments of exclusion in the immediate years following WWII (1946 to 1950), whilst section 3 elaborates on the drafting procedure of the 1950 Statute of the Office of the High Commissioner of Refugees, today known as the UNHCR and the 1951 Refugee Convention, with specific attention paid to the exclusion of war criminals in line with Article 1(F)(a). This is an area that has lost significance at the hand of scholars and therefore this first part seeks to revive the foundational elements of Article 1(F)(a) in order to gain a deeper understanding of the exclusion clauses.

The second part delves deeper into war crimes and analyzes each element that makes up Article 1(F)(a) of the 1951 Refugee Convention. It starts by examining how Article 1(F)(a) can be interpreted through the lens of treaty interpretation. It then goes on to examine the standard of proof for exclusion, the key characteristics that differentiates war crimes from national crimes, examples of war crimes and extended liability, proportionality considerations in refugee exclusion and lastly, examines the stance of the global south on refugee exclusion by paying critical attention to the state practice of states in Sub-Saharan Africa. The core arguments will be displayed by the case-law of national and international tribunals and treaties.

Two Annex sections are attached to this paper providing a list of acts that might qualify as war crimes in international armed conflicts and non-international armed conflicts respectively.

2.Methodology

The overall objective of this research is to delve deeper into the exclusion of refugees on the based on the accusations of war crimes. The idea is to have more consistent state practice be it in the global north or in the global south when applying the exclusion clauses as stated in Article 1(F)(a). As will be displayed through the course of this paper, the global north has always had a dominant stance not only during the creation of the 1951 Refugee Convention and other

legal instruments but also most of the scholarly work on exclusion leans towards describing and analyzing cases in the global north. On the other hand, the global south has hardly had any attention on its state practice on exclusion. Hence the overall goal of this paper is not only to highlight the global south's position on exclusion of refugees who have committed war crimes, but to advocate for consistency and restrictiveness in the application of Article 1(F)(a) which in itself is an exception of the 1951 Refugee Convention.

Instead of just compiling different laws and practice of states and tribunals on war crimes as grounds for exclusion from refugee status, the aim of this paper is to provide a normative assessment of the evolution of law in this area. Furthermore, the research engages with case-law of different courts and tribunals around the world dealing with exclusion cases. The main goal is to observe the application criteria of Article 1(F)(a) with special attention paid to "war crimes". The research methodology used in this paper has been inspired by the Doctrinal Legal Method or widely known as "Black-Letterism".[1]

Terry Hutchinson and Nigel Duncan, two prominent scholars in Doctrinal Legal Research define 'doctrinal' as the following: "The word 'doctrinal' is derived from the Latin word 'doctrina' which means knowledge, information and learning. The doctrine in question consists of legal concepts and principles of all kinds – cases, statutes, and rules. In short, doctrine has been defined as a synthesis of rules, principles, norms, interpretive guidelines and values. It explains, makes coherent or justifies a segment of the law as part of a larger system of law. Doctrines can be abstract, binding or non-binding."[2]

Legal doctrine consists of rules and laws associated with legal concepts or principles that have had a long history of development. Therefore, doctrinal legal research is all about delving deeper into concepts, values, principles and existing legal texts such as statutes, treaties, case-law etc. In addition, various other scholars have defined doctrinal legal research in their own contexts to explain different aspects of the research method like the purpose, sources, significance etc. For

[1] Terry Hutchinson & Nigel Duncan, '*Defining and Describing What We Do: Doctrinal Legal Research'*, [2012] 17(1) DEAKIN. L. Rev.
[2] ibid., at 84.

example, in relation to this study, Ian Dobinson and Francis Johns define the relevance of doctrinal research when conducting a study specific to particular areas of law, which in this research is the exclusion clause as listed in Article 1(F)(a) of the 1951 Refugee Convention. According to them, "Doctrinal or theoretical legal research can be defined in simple terms as what the law is in a particular area. By applying this research method, the researcher may collect and analyze a body of law together with any other legislation (primary sources). This often also includes a historical perspective and may also include various secondary sources such as journal articles, written commentaries on statutes and case-law and legislations."[3]

Assessing the definitions provided by the scholars above, it is safe to say that doctrinal legal research is a normative assessment of existing laws, case-law, secondary sources and other authoritative material on a specific matter. When looking at its jurisprudential foundation, doctrinal legal research attempts to maintain consistency in law based on legal reasoning. Studies that use doctrinal legal research usually look to assess and analyze existing laws, statutes and other such documents for the sake of brining stability in the law which would eventually lead to consistency in the application of law when delivering justice.[4] The ultimate objective of law is justice rather than mere legalities, texts and jargons. Therefore, doctrinal legal research is often applied in areas that look to enhance legal contents, code, or even interpret case-laws, statutes and treaties.[5]

2.1 Selection of Case-Laws (Global North and Global South)

As you will see throughout this paper there is a continuous mention of the global north and global south, especially in the second part when the research delves deeper into war crimes specifically. The global north in general terms represents a large part of geography comprising of many states, however for the sake of this research, critical attention is given to case-laws emerging from Canada and the United Kingdom with other states like Australia, Belgium and New Zealand complementing the research. The main reason for continuously highlighting Canada and the United Kingdom is due to their court's contribution to exclusion cases over time. Cases like the

[3] Ian Dobinson and Francis Johns, '*Qualitative Legal Research',* In: Mike McConville and Wing Hong Chui (ed), Research Methods for Law (Edinburgh University Press, 2007) at 20.
[4] Amrit Kharel, '*Doctrinal Legal Research',* [2018] SSRN Electronic Journal at 5.
[5] ibid., at 7.

one of *Ramirez* in Canada and *Gurung* in the United Kingdom have consistently been referenced across various exclusion proceedings globally. More importantly, when looking at the objective of this study, the courts of Canada and the United Kingdom have shown great inconsistencies in their interpretation of certain elements of exclusion like the "standard of proof for exclusion" which also have been referenced by various states respectively. Therefore, this paper uses the case-laws from these two states as a primary representation of the global north. Here it is important to note that: the decisions of national courts and tribunals used in this study (especially those from the global north) do not always represent unanimous state practice.

Retrieving case-laws from the global south proved to be a very difficult task. For the purpose of this research the global south is represented by state practice of states in Sub-Saharan Africa. The primary reason for selecting Sub-Saharan Africa is entirely due to the availability of data in relation to the purpose of this research. Finding data on exclusion from refugee status based on accusations of wars crimes posed as an incredible challenge and therefore to achieve one of the main goals of this research which is to highlight state practice from global south states, this research had to be dependent on the case-laws and statutes from Sub-Saharan Africa. Some of the main case-laws came from countries like Gabon, Namibia and Senegal. Regional Conventions and Charters like the Organization for African Unity Convention and the African Union Charter also supplement the research.

2.2 Limitations

This section will begin by first, stating some of the limitations of using the doctrinal legal research method and then move on to state some of the limitations of the data used in this research.

One of the biggest drawbacks of conducting doctrinal research is the availability of reliable data. When using this method, the researcher must be competent enough to identify data that is reliable and make sure that the data has some kind of authority, be it primary or secondary.[6] Secondly, doctrinal methodology does not always offer an appropriate framework for problems that arise from the context in which the law is operational. In other words, doctrinal methodology assumes that the law only exists in an objective vacuum resulting from legal gaps

[6] ibid., at 12.

rather than in social contexts. The law does not operate in a vacuum, it operates within a society and every element of it would affect the society.[7] Therefore, researchers may need to have more than just doctrinal research skills such as comparative and empirical research skills in order to make their research more relevant for the world. There is also a scope for adopting and adapting other methodologies used in other subjects and contexts in order to have a broader view of the law and its purpose.[8]

It is also important to mention and reflect on some of the other limitations in regards the data used. Most of the data used in this paper is in the form of case-laws, legislations, statutes, guidance papers from both national and international courts and tribunals, and other forms of secondary sources that complement the above-mentioned primary sources.

Firstly, some of the sources that this research relies upon e.g., case-laws and statutes are not created with data research agendas related to the one this paper seeks to address and therefore when investigating such data, a lot of information may be lost in interpretation as not all documents will have the necessary information laid down in a straightforward manner in relation to the research question.[9] Secondly, there is always an important presence of bias when reviewing both the primary and secondary sources of data. In the legal context, a particular bias comes from reviewing case-laws and legislations of states like Canada and the United Kingdom which is likely to be aligned with their national interests.[10] Thirdly, one of the biggest limitations to this paper was document retrievability. The retrieval of case-laws, legislations etc. on exclusion from refugee status and the applicability of Article 1(F)(a) in the global south posed as a great challenge. Most of these documents turned out to be intangible, restricting the scope of this research while reviewing the stance of the global south in the application of the exclusion clauses and Article 1(F)(a).

[7] ibid., at 13.
[8] ibid.
[9] Glenn A. Bowen, '*Document Analysis as a Qualitative Research Method',* [2009] 9 Qualitative Research Journal at 31.
[10] ibid., at 32.

Part I

The Formation and Historical Development of the Exclusion Clauses

Introduction

The exclusion-clauses were created in the midst of the atrocities of the Second World War. Their initial purpose was to ensure that Nazi criminals and perpetrators of crimes who disguised as refugees, never escaped prosecution and punishment following the surrender of Germany. They later on also served as a tool to pick out individuals who were "undeserving" of material assistance which was directed to people affected by the war. The exclusion clauses have been and are still an integral part of the system that protects refugees and displaced persons.

This first part of the research looks to analyze the historical development of the exclusion clauses from their early developments in 1946 to the adoption of the Refugee Convention in 1951. The objective of this chapter is to pay critical attention to the historical developments that lead to the formation of the exclusion clauses and more importantly to pave way for their most true interpretation. Within that process, it sheds light on how the evolution of the law of refugee protection worked side by side with international criminal law and other forms of law such as the law of war (widely known and international humanitarian law). Furthermore, it delves into the origins and creation of the law of refugee protection and the international refugee regime. Throughout this paper, a critical emphasis is laid to the exclusion of persons suspected to have committed or been involved in criminal activities - war crimes in particular.

1. The United Nations Relief and Rehabilitation Administration (UNRRA)

Towards the end of the Second World War, it was clear that a combined effort of both the military and civilians was needed to rescue the countries most devastated from war, which also contributed to the most horrific displacement of populations globally. Countries like the UK and US had already been involved in relief work through individual programs soon after the war began and also co-operated through the Inter-Allied Committee on Post-War Requirements.[11] However, for greater efficiency, the allies believed that relief and rehabilitation needed to be on a multilateral

[11] Louise W Holborn, '*The International Refugee Organization: A Specialized Agency of the United Nations, Its History and Work 1946-1952',* (Oxford University Press 1956). at 17.

level through the United Nations (UN) which was also intimately associated with the establishment of eventual peace following the war.[12] These events led to the formation of the United Nations Rehabilitation and Relief Administration (UNRRA) in November 1943, to provide relief for the victims of war through the "provisions of food, fuel, clothing, shelter and other basic necessities, medical and other essential services", as well as prepare and facilitate for the "return of prisoners and exiles to their homes."[13] The UNRRA successfully operated until 1947 assisting millions of victims of war both in Europe and Asia in that time.[14]

Almost since its formation, the UNRRA found itself being overwhelmed with the amount of relief it needed to provide within short periods. Hence it was extremely important for the UNRRA and the Allied Military authorities to prioritize who they would be able to offer assistance to.[15] In August 1945 the Council formed and adopted Resolution 71 that stated:

> 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 the charges of having collaborated with the enemy or having committed other crimes against the interests or nationals of the United Nations.[16]

An agreement between the UNRRA and the Supreme Allied Command Mediterranean (SACMED) meant that SACMED was responsible for regulating, arresting, and surrendering those who do not deserve to be in UNRRA camps and installations. Such people would not receive any assistance from the UNRRA, regardless of where they were detained; whether in the custody of military or civilian authorities.[17] However, due to a large number of complaints by camp

---

[12] ibid.
[13] Agreement for the United Nations Relief and Rehabilitation Administration, Article 1(2).
[14] Cf. United Nations, *Summary of AG-018 United Nations Relief and Rehabilitation Administration (UNRRA) (1943-1946)* (United Nations Archive and Records Management Section, 2015) at 1.
[15] Atle Grahl-Madsen, '*The Status of Refugees in International Law'*, vol I (A.W. Sijthoff 1966).
[16] Resolution 71 was reviewed and worded in the following way: "[…] in cooperation with the occupying authorities, the military authorities and the governments concerned, the Administration will take immediate measures to withdraw its assistance from those displaced persons who have been determined by 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." See also: Andreas Zimmerman, *'The 1951 Refugee Convention Relating to the Status of Refugees and its 1967 Protocol : A Commentary'* (Oxford University Press, 2011) at 583.
[17] Agreement Relating to Transfer of Responsibility of Displaced Persons from SACMED to UNRRA (1946), Article II (3).

administrators of the fact that there were a large number of war criminals living amongst the camp population the UNRRA Council went to amend resolution 71 in May 1946 to the effect that a mere discernment of being a collaborator by the military and its authorities would be sufficient enough to deny assistance, whether or not such persons are detained in custody or not.[18]

Making no mention of "war crimes" or "war criminals when dealing with exclusion, the actions of the UNRRA echoed those of the Moscow Declaration of 1943 and the London Agreement of 1945 in which the allies had made a decision to detain and return German officers and Nazi collaborators who had committed crimes and atrocities during the war.[19]

2. The International Refugee Organization (IRO)

The thought behind creating the international refugee organization was already raised in 1945 during the San-Francisco conference that drew up the Charter of the UN. The "questions relating to refugees" took a central role through many parts of the discussions in the first General Assembly of the United Nations in 1946 as it proved to have grave humanitarian and political implications. Nearing the end of 1946, the General Assembly had come up with a final resolution in which they had accepted the constitution, provisional budget, and interim measures to be taken for establishing the International Refugee Organization (IRO).[20]

2.1 The Establishment and Drafting of the Constitution of the International Refugee Organization

The discussions ahead of the establishment of the IRO unfolded in the Third Committee of the UN General Assembly, whose main area of expertise is in dealing with human rights, humanitarian affairs, and social matters. However, the first debate in the Third Committee showcased differences in approach between western nations and countries from the eastern bloc. The general feeling amongst western states was that the refugee problem was international in scope and character and therefore needed to be solved through the formation of an international framework.[21]

---

[18] Grahl-Madsen, op. cit., at 5.

[19] The Moscow Declaration on its statement on atrocities states: "[…] those German officers and men and members of the Nazi party who have been responsible for or have taken consenting part in the above atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of free governments which will be erected therein."

[20] Holborn, op. cit., at 30-31.

[21] ibid., at 31.

While the eastern bloc countries put forward a different proposal. The delegate from Yugoslavia thought that the problem of displaced persons was no longer important for the international community as the defeat of the Axis Powers allowed for the return of all displaced persons to their home countries.[22]

They further elaborated that the return of displaced persons to their home countries should be dealt with through bilateral agreements between countries hosting the refugees and their countries of origin.[23] With further discussions in the General Assembly, some important points were upheld and elaborated on by countries from the eastern bloc (Byelorussia, Poland, USSR, and Ukrainian SSR). Delegates from these countries emphasized that in their opinion all "men of goodwill" could return to their countries, however, quislings, war criminals, traitors, Fascists, and other undemocratic elements who opposed governments of their countries should not receive any assistance from an international organization.[24]

One of the main areas of concern amongst the delegates present at the Third Committee was on the distinction between genuine refugees and war criminals, quislings, and traitors who were disguised as refugees. In that regard, the Soviet delegation put forward a proposal that stated among other things, that:

> Quislings, traitors, and war criminals, as persons dishonoured for collaboration with the enemies of the United Nations in any form, should not be regarded as refugees who are entitled to get the protection of the U.N., and that quislings, traitors, and war criminals who are still hiding, under the guise of refugees, should be immediately returned to their countries.[25]

This proposal replicated resolution 3(I) of the General Assembly on the extradition and punishment of war criminals, which stated, that states should take all possible measures to make sure that those who have committed or taken part in war crimes, crimes against peace, and crimes against

[22] ibid.
[23] UN Doc. A/C.3/7, para 1.
[24] ibid.
[25] Holborn, op. cit., at 32.

humanity should be apprehended and returned to the countries where the crimes were committed so that they can be tried immediately.[26] After a considerable amount of discussion, the US delegation proposed a resolution according to which persons who objected to going back to their home countries should not be forced to do so, however, all efforts should be made to ensure their repatriation. However, this resolution should at no point interfere in any way with the surrender and prosecution of war criminals, quislings, and traitors, in accordance with international arrangements and agreements that have been in place.[27]

With that, the US resolution also stated that the General Assembly make a recommendation to the Economic and Social Council (ECOSOC) to develop a special committee to conduct a deep examination of the refugee problem and to report it to the Second Session of the First Session of the General Assembly.[28] After further deliberations, the General Assembly adopted the draft resolution on the 12th of February 1946, with 42 votes in which no delegate voted against it nor abstained.

Resolution 8(I) begins by acknowledging that the refugee problem and the problem of displaced persons needs to be given immediate attention. It further emphasizes the necessity to distinguish between "genuine refugees and displaced persons, on the other hand, and war criminals, quislings and traitors on the other."[29] Furthermore, the resolution sets out some recommendations in line with the role given to ECOSOC; First, the recognition of the international character and scope of the refugee problem; second, no refugees or displaced person shall be compelled to return to their home countries if they have a valid objection of returning to their home country and against those who have no criminal charge against them; third, that the future of these refugees or displaced persons shall become a concern of whatever international body that maybe be recognized or established; fourth, the main task being to encourage and assist in all ways possible the process of repatriation.[30]

---

[26] Sibylle Kapferer, '*Article 14(2) of the Universal Declaration of Human Rights and Exclusion from International Refugee Protection'* (2008) 27 Refugee Survey Quarterly 53, at 19.
[27] Holborn, op. cit., at 32–33.
[28] ibid., at 33.
[29] UN Doc. GA Res. 8(I).
[30] ibid.

These discussions in the Third Committee exposed the complications regarding the question of defining the term "refugee" especially after the events of WWII. The exclusion of war criminals became an integral element of the guiding principles that would be followed while examining the refugee problem. The introduction of the exclusion clauses demanded further examination on how these principles would be applied in order to safeguard the interests of states.[31]

Following the proposition of the General Assembly, ECOSOC formed a Special Committee on Refugees and Displaced Persons, which looked deeper into the scope and nature of the refugee problem and the process of creating a specialized agency of a non-permanent character to deal with the refugee problem.[32] Moreover, one of the main roles of the Committee as stated in Resolution 8(I) was to work on the definition of the terms "refugees" and "displaced persons" and with that draw the line between who was a genuine refugee and who was not. As the rapporteur of the Special Committee, Raymond Bousquet stated that the term "refugee" was the "cornerstone of the whole edifice" that they had set out to build.[33] Finding a mutually accepted definition of these terms proved to be the most difficult and controversial debate in the Committee.

The main reason for this as stated by the British delegate, Sir George Rendel was due to the differences in opinions between the rights of individuals and the rights of the state.[34] These differences were showcased in the kind of approaches the major powers took while discussing this issue. Eleanor Roosevelt asserted the position of western states, which was more focused on finding ways in the "interest of humanity and social stability to return thousands of people who have been uprooted from their homes and their countries to a settled way of life."[35] Meanwhile, other governments mainly from the eastern bloc maintained that refugees and displaced persons consisted of "people committed in one way or another to the occupation authorities or sections of the population who, owing to their anti-democratic activity, do not wish to return to their own country."[36] The committee eventually decided to classify these persons in different groups, which

[31] Holborn, op. cit., at 33.
[32] ibid., at 34.
[33] ibid., at 36.
[34] ibid.
[35] ibid.
[36] ibid.

would help ensure precision in identifying those persons entitled to receiving international protection.

During these meetings, the discussions came down to the distinctions between "genuine refugees and displaced persons and war criminals, quislings, and traitors, and Germans being transferred to Germany from other states or who fled to other states from Allied troops."[37] The central arguments then turned on the questions of principle, particularly on the political dissidents who did not actively support the enemy but were opposed to the new regimes in their country of origin. The Polish, Soviet and Yugoslav delegates proposed that only persons who desired to return home should be eligible for assistance, while western states advocated that these individuals should receive protection and therefore they should be included in the mandate of the IRO.[38] They eventually concluded and agreed that individuals who had participated in groups whose purpose inter alia was to overthrow, by armed force the government of a "member of the United Nations" or have participated in any terrorist organization, and those who pose as active leaders of political movements hostile to the government should be excluded from the mandate of the IRO.[39]

The outcome of the discussions in the Special Committee became the draft constitution for the International Refugee Organization. The draft was forwarded to ECOSOC, which then conveyed it to the Third Committee which recommended its adoption to the General Assembly on 15 December 1946. The definition of refugees as agreed provided as follows:

> the term "refugee" applies to a person who has left, or who is outside of, his country of nationality or of former habitual residence, and who, whether or not he had retained his nationality, belongs to one of the following categories:
>
> (a) victims of the Nazi or fascist regimes or of regimes which took part on their side in the second world war, or of the quisling or similar regimes which assisted them against the United Nations, whether enjoying international status as refugees or not;
>
> (b) Spanish Republicans and other victims of the Falangist regime in Spain, whether enjoying international status as refugees or not;

[37] ibid., at 37.
[38] ibid., at 39.
[39] Constitution of the International Refugee Organization (adopted 15 December 1946, entered into force 20 August 1948) 18 UNTS3 (IRO Constitution) Annex I, Part II, paragraph 6(a) and (b).

(c) persons who were considered refugees before the outbreak of the second world war, for reasons of race, religion, nationality, or political opinion.[40]

2.2 Exclusion Clauses and the Constitution of the IRO

As mentioned previously in this paper, the process of defining refugees and displaced persons created a huge stir between delegates both in the Special Committee and later in the Third Committee. In light of these complexities surrounding the eligibility of refugee status and assistance, the IRO published a "Manual for Eligibility Officers" in 1950. This manual helped establish, among other things, some principles of interpretation to be followed in determining who was a refugee and who qualified for assistance from the IRO.[41]

Furthermore, the Manual provided detailed information on the content of the exclusion clauses. For example, the expression of "war criminals" applied to those who have committed crimes against peace (i.e., those who have planned aggressive war), serious violations of the "accepted rules of warfare" (i.e., murder of prisoners and hostages), and crimes against humanity (i.e. the internment of civilians in inhuman conditions and extermination of Jews in gas chambers).[42]

The IRO ended its operations in 1952, but since its formation in 1947, it had successfully provided assistance to more than 1.5 million people who had been displaced by the war.[43] It did so by managing camps, feeding, and providing medical assistance to all refugees and displaced persons.[44]

3. UNHCR and the 1951 Refugee Convention Relating to the Status of Refugees

With the end of IRO's mandate soon approaching, a large number of displaced persons who were both *de jure* and *de facto*[45] stateless had barely be resettled or repatriated. This made it clear that the problem of refugees and displaced persons was nowhere close to being resolved. States started deliberating alternatives to the IRO in the Third Committee and the ECOSOC to develop a broader

[40] ibid., Annex I, Part I, section(a)(1).
[41] Holborn, op. cit., at 207.
[42] International Refugee Organization *Manual for Eligibility Officers* (Imprimeries Populaires, 1950) at 31, para 5.
[43] Holborn, op. cit., at 1.
[44] ibid.
[45] The concept of "*de facto stateless persons"* was very similar to those of refugees, since they were persons who "without having been deprived of their nationality they no longer enjoy the protection and assistance of their national authorities." In: UN Doc. E/1112, (*A study of Statelessness, 1949).*

more detailed international regime that would offer protection to a larger number of unprotected persons. On the 3rd of December 1949, the General Assembly adopted Resolution 319 (IV) A, in which it decided to form "The High Commissioner's Office for Refugees", a supplementary agency of the UN entrusted to "promote, stimulate and facilitate the execution of the most suitable solution to the refugee problem."[46] Within one year the statute of the UNHCR would be adopted, beginning its operations in January 1951, putting an end to all operations of the International Refugee Organization. ECOSOC then established an *ad hoc* Committee on Refugees and Stateless Persons which worked on drafting a new convention on the rights and duties of refugees which came into effect in July 1951.

The formation of the UNHCR led to the emergence of a new international regime of protection in which refugees and displaced persons would no longer be nurtured by an international organization, but rather live an independent life in countries that gave them a home. What the international community realized from the abolition of the IRO was that if they were to avoid a premature abolition of the UNHCR they would have to ensure that all persons deserving of international protection be "integrated in the economic system of the country of asylum" which meant that they would be able to provide for their needs and those of their families independently instead of being entirely dependent on the UNHCR.[47] In short, host countries would be responsible for ensuring the rights of refugees as vested in this convention. The purpose of the UNHCR would then become entirely non-political in character and instead be humanitarian and social in which it can provide assistance to all groups and categories of refugees.[48]

As had been during the construction of the IRO's mandate and constitution, the exclusion of persons suspected to have committed serious crimes or heinous acts was an important aspect of this new framework. This time the drafters of both the UNHCR's Statute and the 1951 Refugee Convention kept in mind some of the developments that had happened in other branches of law such as the adoption of the Universal Declaration of Human Rights in 1948, especially Art. 14[49],

[46] UN Doc. GA Res. 319 (IV) Annex, para 4.
[47] UN Doc. E/AC.32/2, ("*Memorandum by the Secretary General to the Ad Hoc Committee on Statelessness and Related Problems"*, 1950) at 6-7.
[48] UN Doc. GA Res 428 (V), Annex (*"Statute of the Office of the United Nations High Commissioner for Refugees",* 1950), Chapter 1, Para 1.
[49] Article 14 of the UDHR provides that "(1) everyone has the right to seek and to enjoy in other countries asylum from persecution; (2) the right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations."

the Geneva Conventions of 1949 and the early development of International Criminal Law. By the end of the drafting process, both instruments, in accordance to their objective, included the concept of "war crimes" as a criteria for exclusion from refugee status, whilst the terms "Quislings" and "Traitors" had no mention.

3.1 The Statute of the United Nations High Commissioner for Refugees (UNHCR)

With the expected dissolution of the IRO, the ECOSOC had already in 1949, began searching for different avenues for the future of international protection for refugees. Later that year, the Council adopted Resolution 248 (IX) A in which inter alia it requested that the Secretary-General come up with a plan for an organization that would succeed the IRO within the mandate of the United Nations.[50] The resolution further stated that the SG's plan should consider the following options: a) the establishment of a high commissioner's office under the control of the United Nations, b) the establishment of a service within the United Nations Secretariat.[51]

During its fourth session, the General Assembly had received the Secretary-General's report on refugees and stateless persons[52], a communication from the General Council of the IRO[53], and a draft resolution by France[54], on the functions and duty of the High Commissioner's Office. This was later replaced by a draft resolution submitted by both the French and US delegations.[55] After reviewing and altering certain aspects of it, the draft resolution submitted by France and US was adopted by the Third Committee. With resolution 319 (IV) A, the General Assembly formed the Office of the High Commissioner for Refugees in adherence with the provisions vested in the annex of the above-mentioned resolution. Furthermore, it asked the ECOSOC to prepare a draft resolution that incorporated the requirements for the functioning of the UNHCR, which was then adopted during the Council's 11th session[56].

Together with the draft provisions on the functioning of the UNHCR, the General Assembly also focused upon the definition of refugees to be included in both the convention and statute of the

[50] UN Doc. ECOSOC Res 248 (IX) A adopted 6 August 1949.
[51] ibid.
[52] UN Doc. A/C.3/527, ("Refugees and Stateless Persons: Report of the Secretary-General") adopted on 26 October 1949.
[53] ibid., para 6.
[54] UN Doc. A/C.3/529 ("Refugees and Stateless Persons: France: Draft Resolution") submitted on 2 November 1949.
[55] UN Doc. A/C.3/L.29 submitted on 13 November 1949.
[56] UN Doc. ECOSOC res. 319A (XI) adopted on 11 August 1950.

office, which would also be a key link in binding both instruments together. Future debates that unfolded in the Third Committee would largely revolve around making the refugee definition more "broad and precise", both in statute and convention.[57] The representatives of France, United States, Israel and Venezuela were in favor of a more precise definition of a "refugee", while representatives from, Yugoslavia, Netherlands, Belgium, Canada, Turkey and the United Kingdom were in favor of a more general definition. There were also some representatives like the Union of South Africa, who supported a general definition for the Statute, but a limited definition for the Convention.[58] During the 329th meeting of the Third Committee, an informal working group was formed in order to examine the different amendments and draft resolutions submitted by various countries.[59]

With the debates of who should and should not be included in the refugee definition already in motion through the submission of different proposals, the representative from Yugoslavia went on to suggest a comprehensive provision on exclusion. His proposal included, inter alia*,* an explicit mention to crimes "committed under article 6 of the statute of the International Military Tribunal".[60] In light of this proposal and after further amendments, the working group decided to exclude from the scope of the UNHCR any person:

> "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 provisions of article 14 paragraph 2 of the Universal Declaration of Human Rights."[61]

After further debate, Yugoslavia's initial proposal on the provision on exclusion was accepted by the working group. The Third Committee and General Assembly adopted Resolution 428 (V),

[57] United Nations, '*Economic and Social Questions'* [1950] Yearbook of the United Nations 24, [1950] 438, at 538.
[58] ibid.
[59] The working group analyzed drafts submitted by Yugoslavia, Israel, France, Venezuela, Egypt, Lebanon, Belgium, Canada, Saudi Arabia, Turkey and the United Kingdom.
[60] United Nations, *Economic and Social Questions,* op. cit., at 580.
[61] ibid., at 584

which included the statute of the UNHCR, a comprehensive definition of a refugee[62] and the exclusion criteria as put forward by the working group.[63]

3.2 The 1951 Convention Relating to the Status of Refugees and the Drafting process of Article 1(F)

The Convention Relating to the Status of Refugees was accepted by the United Nations Conference of Plenipotentiaries in 1951. However, before this happened, states had failed to reach agreement on a convention that would fit all their interests in the ECOSOC, which was given the role to examine the "problem of refugees and stateless persons". This process also went through groups like the *ad hoc* Committee on Refugees and Stateless Persons, the Third Committee and ECOSOC's Social Committee. These events led up to the United Nations Conference of Plenipotentiaries which was called in Geneva from the 2-25 July 1951 in order to reach an appropriate agreement.

3.2.1 Drafting of the Convention in ECOSOC

The thought of developing a convention on the protection of refugees and stateless persons was first suggested in the report "*A Study of Statelessness"* a report by the Secretary-General during the formation of Resolution 116 (VI) D.[64] The objective of this Resolution was for the SG to make recommendations of concluding a further convention on stateless persons after conducting a study on the existing situation in regards to their protection.[65] In his final report the Secretary-General recognized the need to adopt an international convention that would help determine the legal status of stateless persons while excluding "war criminals and such other categories of persons".[66] In his opinion, only an international agreement would be sufficient enough to deal with the complex

---

[62] Cf., Paragraph 6(A) and (B) of the UNHCR Statute.

[63] The proposal put forward by the working group went on to become paragraph 7(d) of the Statute of the UNHCR, which states the following: "[p]rovided that the competence of the High Commissioner as defined in paragraphs 6 above all shall not extend to a person (d) in respect of whom there are serious reasons for considering that he has committed a crime covered by the previous treaties of extradition or a crime mentioned in Article 6 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."

[64] UN Doc. ECOSOC res 116 (VI) D adopted on 1 and 2 March 1948 .

[65] ibid.

[66] During this time statelessness and refugeehood were seen as problems that were interlinked and therefore they had to be dealt with together. The Secretary-General stated in his report that: "[t]he problem of refugees was settled under special historical and political conditions. Today we wish to tackle the problem of stateless persons as such. It hardly seems possible therefore to discriminate between them or divide them into classes. The problem must be settled as a whole, and all stateless persons must in principle be treated alike. A multiplicity of conventions would be a needless unjustifiable complication." In: *A study of Statelessness,* op. cit., at 53 .

issue at hand, something that would be difficult to do if they were to be dependent only on states' legislations and administrative practice without any sort of agreement.[67]

The ECOSOC adopted Resolution 248 (IX) B,[68] following the Secretary-General's recommendations in which it appointed an *ad hoc* Committee on Statelessness and Related Problems.[69] The committee worked on examining draft resolutions which were submitted by various countries during the first session between 16 January to 16 February 1950. It then made a report and prepared the first draft convention on the status of refugees which included among other things the preamble and forty articles ranging from general provisions, legal status and final clauses.[70]

Article 1 of the draft convention included a comprehensive definition of the term "refugee" which included *inter alios* any person qualifying as refugee under previous treaties and arrangements[71], and those who were displaced by the events that occurred before January 1 1951, who had a "well-founded fear of persecution" [72] and were therefore unwilling or owing to such fear unable to avail themselves to the country of their origin.[73] More importantly, the *ad hoc* Committee included also in Article 1 Paragraph C the criteria for exclusion, that states:

> "no contracting State shall 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."[74]

[67] ibid., at 51.
[68] This resolution was adopted at the same time as resolution 248 (IX) A, which inspired the formation and drafting process of the UNHCR's Statute.
[69] The Committee included representatives from Belgium, Brazil, Canada, China, Denmark, France, Israel, Poland, Turkey, Union of Soviet Socialist Republics, the United Kingdom, the United States and Venezuela.
[70] The Committee had also drawn up a draft protocol covering the legal status of stateless persons who fell beyond some of the articles in the convention to stateless persons who were not refugees
[71] Like the 1922 Arrangement with respect to the issue of certificates of identity to Russian Refugees, the 1933 Refugee Convention, the 1936 Provisional Arrangement concerning the status of refugees coming from Germany.
[72] UN Doc. E/AC.32/5 (E/1618) at 12.
[73] ibid.
[74] UN Doc. E/AC.32/5 (E/1618) at 13.

The report submitted by the *ad hoc* committee was examined by the Economic and Social Council in their 11th session. After the review process, deliberations began in the Social Committee of the ECOSOC and mainly revolved around the proposed definition of the term "refugee". One of the main concerns arising from these debates was whether a definition based on categories should be the main point of focus. This principle, although not necessarily the definition was seconded by the representatives from Australia, Brazil, China, France and the United States who thought that any instrument that involves definite legal obligations should have a precise definition. They felt that the broader the definition the narrower the protection states would be willing to offer, making it difficult to implement it at the global level.[75] On the other hand, representatives from Belgium, Canada, Pakistan and the United Kingdom all supported a definition that should cover all refugees and not restrict itself to a specific group or category. They believed that a restrictive instrument would not be adequate enough to serve a lasting convention on refugees.[76] After much debate, the definition based on categories was adopted by the Committee. The *ad hoc* committee was dissatisfied with the Social Committee's decision on the "refugee" definition and decided to take it up for further debate. After further discussions, the Social Committee agreed to redraft certain sections of the text in Article 1 which also included rephrasing some part of paragraph C.

However, one thing that the delegates present at the Social Committee agreed upon was that war criminals as defined in Article 6 of the London Charter of the International Military Tribunal[77]

[75] United Nations, *Economic and Social Questions,* op. cit., at 571.
[76] ibid.
[77] Article 6 of the London Charter provided the following: "The tribunal established by the agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations committed any of the following crimes. The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: (a) crimes against peace: namely, planning preparation, initiation, or waging of war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;; (b) War Crimes: namely, violations of the law or customs of war. Such violations shall include, but not be limited to, murder or ill-treatment or deportation to slave labour or for any other purpose 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; (c), namely, Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."

should be excluded from refugee status. They were also in agreement concerning the fact that the "purposes and principles" of the charter of the United Nations were extremely vague and might prompt abuses from states wishing to exclude refugees and to what acts could be covered by the provision. For instance there was a confusion to whether individuals could be held accountable for acts violating the UN charter or only states and persons occupying government posts. The Secretariat clarified the situation and maintained that persons such as collaborators, persons liable for genocide and those engaging in racial discrimination[78] could be held liable for their acts under international law and be punished for such crimes constituting to the violation of international law.[79]

As a potential solution to this lack of clarity, the representative from France amended its original proposal by replacing the words "or any other acts contrary to the purposes and principles of the United Nations" by making a simple reference to Article 14(2) of the Universal declaration of Human Rights. The French delegate went on to say that:

> the phrase in question applied to – and hence excluded – war criminals, ordinary criminals, and certain individuals who, though not guilty of war crimes might have committed acts of similar gravity against the principles of the United Nations, in other words, crimes against humanity.[80]

However, that was a theoretical position, the foundation of the problem laid in state practice and in the type of situations states may find themselves in and therefore he went on to elaborate on his statement by stating that:

> put differently, was the question whether a neo-Hitler, who was not guilty of any war crimes, merely because there had been no war, would have the right to be classified as a refugee, after torturing, persecuting and reducing people to slavery. That was the extreme case of a great tyrant. There might, however, be a large number of more petty tyrants likewise guilty of acts contrary to the purposes and

[78] UN Doc. E/AC.7/SR.160 at 16 .
[79] UN Doc. E/AC.7/SR.166 at 8.
[80] ibid., at 4

> principle of the [UN] Charter, who had by such acts created fear from which refugees had fled.[81]

The amended proposal by France also demanded a much higher evidentiary threshold for exclusion; the expression "in its opinion" was replaced by "serious reasons to consider". On the other hand, he also mentioned that proceedings that had already began should not be regarded as conclusive, as they sometimes could be instituted by a country on unjust grounds.[82] The overall idea was that countries who were willing to grant hospitality should be the ones who have the power of discretion in deciding who was a genuine refugee and who was not, this would also serve as an essential safeguarding instrument for both the refugees and the country of refuge.[83] This would also enable host countries, should they want, to classify common criminals or political tyrants as refugees but at their own liability.

The amended proposal was finally adopted by 7 votes to 0, with 8 abstentions. The provision states the following:

> [n]o contracting shall 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 person who falls under the provisions of Article 14 (2) of the Universal Declaration of Human Rights.[84]

3.2.2 Debates in the Third Committee of the General Assembly

During its 324th –332^{nd,} 334th and 335th meetings, the Third Committee delved deeper into the refugee definition at hand that would be inserted into the Convention and Statute of the UNHCR. Yet again, two opposing views emerged. On one hand, France, Venezuela, Israel and the United States favored a more precise definition restricted to those categories that were earlier identified by the ECOSOC. According to them the role of the UN should be to "prevent refugees from

[81] ibid., at 6
[82] ibid., at 7.
[83] ibid.
[84] UN Doc. ECOSOC Res. 319 B (XI) II.

becoming a liability towards the international community."[85] Czechoslovakia and Poland, for instance had a more radical view of the proposed definition. According to them the definition was "designed to enable certain countries to continue to use refugees as agents to provoke political disorder in their countries of origin."[86] Contrastingly, Belgium, Canada, Netherlands, Turkey, Yugoslavia and the United Kingdom stressed for a broader definition that could offer protection to non-European refugees.

In November 1950 the already mentioned working group was created to discuss the different amendments submitted by various countries in regard to what definition of the term "refugee" to include in Article 1 of the draft Convention. Prior to the formation of this group, much attention was paid to the so called "inclusion clauses", however, the working group proposed a text on exclusion that would significantly be indistinguishable from that adopted by the ECOSOC.

The Australian delegation, during the debates in the Third Committee, was apprehensive with the language used in the Universal Declaration of Human Rights, stressing that it was too vague to be part of both instruments under consideration and therefore inappropriate to reference in legally binding instruments as this.[87] This was seconded by the Chilean delegation who thought that this type of language only belonged to a declaration with proclaimed moral principles and could be easily used to deprive people of the benefits which they might otherwise enjoy under the draft of the Convention.[88]

The Third Committee went on to adopt the amended definition of the term refugee and submitted it to the General Assembly. The wording on exclusion that was proposed by the working group went on to become Article 1(E) of the draft convention and went on to state the following:

> "provisions of the following Convention shall not apply to any persons with respect to whom there are serious reasons for considering that (a) he has committed a crime specified in Article 6 of the London Charter of the International Military Tribunal;

[85] United Nations, *Economic and Social Questions,* op. cit., at 577
[86] ibid., at 571
[87] ibid., at 579
[88] ibid.

> or (b) he falls under the provisions of Article 14, paragraph 2, of the Universal Declaration of Human Rights."[89]

3.2.3 The 1951 Conference of Plenipotentiaries and the Adoption of Article 1(F)

In December 1950, the General Assembly adopted Resolution 428 (V), whereby it decided to convene the Conference of Plenipotentiaries in Geneva to complete the drafting of refugee convention. It asked governments to take into account the draft convention proposed by the ECOSOC, and in particular the revised definition of the term refugee annexed in the convention. This conference was an opportunity for states[90]- some of which had not participated in previous debates – to dig deeper into the different provisions submitted by the ECOSOC and the General Assembly and to reach an agreement.

The refugee definition in which the exclusion clause appeared served great importance to the conference, and therefore they appointed a working group that would study Section E of Article 1 of the Draft Convention. As the debates unfolded, there was no significant controversy on the wordings of the exclusion clause however, delegates failed to reach an agreement in regard to the exclusion grounds and therefore debates on what would become section (b) and (c) of Article F continued in plenary.

The debate on the exclusion of war crimes began with the German delegate, who was also a diplomat under Hitler's regime, and a witness to the Nuremberg trials when he submitted an amendment to the draft convention replacing reference to the London Charter with a much broader reference to the 1949 Geneva Conventions and the 1948 Genocide Convention:

> [t]he provisions of the present convention shall not apply to any persons with respect to whom there are serious reasons for considering that (a) has committed a war crime or a crime against humanity as specified in article 147 of the Geneva Convention of 12 August 1949 relative to the Protection of Civilian Persons in the

[89] Kapferer, op. cit., at 67.

[90] The countries represented in the conference were: Australia, Austria, Belgium, Brazil, Canada, Colombia, Denmark, Egypt, France, Federal Republic of Germany, Greece, Holy See, Iraq, Israel, Italy, Luxembourg, Monaco, Netherlands, Norway, Sweden, Switzerland, Turkey, the United Kingdom, the United States, Venezuela, and Yugoslavia. Cuba and Iran were represented by observers.

> Time of War and in corresponding articles of the three other Geneva Conventions of the same date and in article III of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; or (b) has committed crime against peace, namely planning, preparation, initiation, or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in common plan or conspiracy for the accomplishment of any of the foregoing; or (c) he falls under the provisions of article 14, paragraph 2, of the Universal Declaration of Human Rights.[91]

His main argument for making this amendment was that the purpose of this convention was to extend the scope of protection to refugees who were not immediately affected by the consequences of the War. He added that there had been more recent developments in the area of international crimes than the London Charter, which only offered a temporal scope, as it was influenced by the events that occurred during WWII.[92]

Mr. Meyrowitz of the Consultative Council of Jewish Organizations objected the German proposal stating two points: First, that the proposal would "threaten the development of the principles of international law with regard to the responsibility of the individual for war crimes and crimes against humanity" and Second, that the provisions of the London Charter had already gone beyond the institution for which they were created and had already been the focus point of the work of the International Law Commission (ILC).[93] In response, the German representative stated while not being opposed to the London Charter, that the Charter only covered crimes against humanity committed "before or during" WWII. He was also aware of the fact that war crimes and crimes against peace could undoubtedly fall under the other proposed exclusion clauses and that such crimes were both common crimes and violations against the United Nations.[94]

Mr. Robinson, the delegate from Israel agreed with Mr. Meyrowitz that the London Charter provided a more comprehensive body of criminal law and the German proposal disregarded that.

[91] UN Doc. A/CONF.2/76.
[92] ibid.
[93] UN Doc. A/CONF.2/SR.24 at 6-8
[94] ibid.

He also observed that from a legal standpoint there were two main questions that came up from the German proposal: first, was whether there were any substantive differences between the draft Article 1 (E) and the proposed amendment; and second, if there were no disparities, what would be the legal effect of omitting the London Charter.[95]

Taking the first issue, it seemed that as far as crimes against humanity were concerned, the wordings in the German proposal were similar to those in Article 6 of the London Charter. As to the reference of war crimes, there was a slight difference as GCIV contained a much more comprehensive list of crimes. This notwithstanding, he further emphasized that the wordings of all the Geneva Conventions were undoubtedly influenced by the London Charter. On the other hand, he spotted several differences between the proposed definition of crimes against humanity and the definition provided in Article 6 of the London Charter. Some of these discrepancies were that Article 147 of the Geneva Convention was comprehensive, whilst Article 6 of the London Charter referred to "other inhumane acts" leaving the interpretation of this phrase to courts. Furthermore, he argued that the Geneva Conventions only covered "crimes committed by the enemy in occupied territory, whereas the London Charter dealt with crimes committed against any population, including that of the contracting state concerned."[96]

He felt that it would be almost impossible to interpret Article 1(E) without making mention of the London Charter, as it was the "most authoritative and widely recognized source of international criminal law".[97] In addition, related material such as the Nuremberg records would guide decision makers while determining if a certain act would qualify as war crime, criminal act of government officials, or even how to deal with pleas in trials such as: superior orders, duress, necessity, overriding national interest and national emergency.[98]

However, due to the lack of agreement, states decided to refer the German proposal to a working group which composed of delegates from France, the Federal Republic of Germany, Israel, the United Kingdom and the High Commissioner. During these meetings the British representative proposed an amendment for sub-paragraph "a":

[95] ibid., at 14.
[96] ibid.
[97] ibid., at 15.
[98] ibid.

> "(a) he has committed a crime against peace, a war crime, a crime against humanity, as defined in the international instruments drawn up to make provisions in respect to such crimes."[99]

The German representative accepted the British proposal, and the text was submitted to the conference during its 29th meeting and was later adopted by 20 votes to 1 (Israel), with 2 abstentions.

The discussions on the other two sub-paragraphs continued in the conference, with a continued trend in disagreements. This time, the British delegation wanted to remove references to Article 14(2) of the UDHR. They were concerned that the Declaration only dealt with "principles and ideals" and was not an instrument which would provide satisfactory reference to a legal text. They further added that the phrase "prosecutions arising from non-political crimes" as mentioned in Article 1(E) would lead to the arbitrary and unjust of exclusion of refugees who had committed crimes that may not be deserving of exclusion.[100] On the other hand, the French delegation wanted to retain Article 14(2) of the UDHR, stressing its importance in drawing the line between genuine refugees and those fleeing from prosecution. The debates centered around these two issues and also touched upon various standpoints such as the right to asylum, extradition and the *locus criminis.* Reference to the Universal Declaration of Human Rights was replaced by "serious non-political crimes" which would not cover crimes committed in the country of asylum.[101] They also adopted the Yugoslav delegate's proposal on the amendment on sub-paragraph (c), on the "Principles and Purposes of the United Nations."[102]

The text in sub-paragraph (b) was subject to minor changes made by the Style Committee in order or make the text clearer. Article 1(E) was then renamed to Article 1(F) and was adopted in its entirety into the Final Act of the conference and into the Convention Relating to the Status of Refugees on 20th July 1951.[103] The final version now states the following:

---

[99] UN Doc. A/CONF.2/92.
[100] UN Doc. A/CONF.2/SR.29.
[101] ibid.
[102] ibid., at 17
[103] UN Doc. A/Conf.2/L.1. Add. 10.

> "The provisions of this Convention 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 of 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 principle of the United Nations."

Throughout the years after its adoption, the exclusion criteria set out in Article 1(F) has been replicated in various other international instruments from Africa to Europe.[104] It is also enshrined into domestic legislations of various countries.

[104] E.g., Article 1(5) of the OAU Refugee Convention and Article 12(2) of the 2011 EU Qualification Directive.

Conclusion to Part I

The examination of the historical development of the exclusion clauses has shown us that from the early formation of the UNRRA and its Resolutions to the drafting process of the 1951 Refugee Convention, the distinction between "real" refugees and war criminals was a permanent and continued point of discussion amongst the delegates. Prolonged debates during various conferences and diplomatic meetings on the refugee problem prove that no state challenged the idea that war criminals were "undeserving" of international protection and assistance as refugees. In fact, the drafters of the convention were so keen on denying them protection that they framed exclusion as an *erga omnes partes* obligation. Instead, most debates were concerned with the wordings of the clauses and their depth. These debates, however, reflected contrasting views on the political nature and, the legal essence of asylum in the international community.

Furthermore, the drafting process of the 1951 Refugee Convention reveals how advances in international criminal law, international human rights law and international humanitarian law inspired the text of the exclusion clauses. The internationalization of the refugee problem went hand in hand with the internationalization of war crimes which eventually led to the erosion of the collective responsibility paradigm that had previously prevailed in the international society. Furthermore, with the development of the Universal Declaration of Human Rights in 1948, the right to asylum became a matter of international law. The withdrawal of the terms "Quislings" and "traitors"[105] from the wording of the exclusion clauses to the referencing of the London Charter and Article 14(2) of the UDHR show a clear mark of interconnectedness. The exclusion clauses, as we see them today are a crossbreed of this.

While the drafters of the 1951 Refugee Convention paid attention to the legacy of the Nuremberg Trials, they were also aware that their goal was to establish a strong legal system for refugees, and not to, as the delegate from Israel stated, to "legislate in question of international criminal law, or to define international crimes and embody them in provisions which would exclude certain persons from the scope of the Convention."[106] More importantly, the drafters were aware that to understand

[105] High treason is an offense under national law. The elimination of the terms "Quislings" and "traitors" after WWII re-established the point that these persons would be prosecuted before, and punished by the courts and tribunals of their respective countries. During the drafting of this convention, this was no longer a concern of the United Nations. Cf. Royal Institute of International Affairs, *'The Treatment of War Crimes: III. Punishment of Quislings and Traitors'* [1945] Bulletin of International News 22, [1945] 251, at 251-253 .
[106] Cf., UN Doc. A/CONF.2/SR.24 at 15.

the meaning of the different criminal offenses included in refugee law, the interpreter would have to have a sound understanding of the jurisdictions of international criminal law and the laws of war. They also ensured that the sources of these terms were as express and as broad as possible, hence incorporating not only binding international instruments like the London Charter and the Geneva Convention of 1949 but also resolutions and declarations like the UDHR.

In conclusion, studying the history of the exclusion clauses and seeing how different political and legal developments influenced their creation can be particularly revealing for their interpretation and application. And therefore, recognizing the "mixed" nature of these provisions serves as an important point of departure in order to have a deep understanding of them.

Part II

Article 1(F)(a) - War Crimes and Exclusion from Refugee Status

Introduction

After the adoption of the 1951 Refugee Convention, the exclusion clauses did not serve much purpose for many decades. This changed in the 1990s, after mass atrocities like the genocide in Rwanda and in the former Yugoslavia increased the concern of the international community to punish war criminals, and with that there was a reinvigorated interest in Article 1(F)(a). The aftermath of the attacks of September 11, 2001 began a new era of the "war against terror", and with that a lot of the attention on exclusion shifted to the exclusion of alleged terrorists under Article 1(F)(c).[107] Meanwhile Article 1(F)(a) lost its importance in academia, despite the existence of countless cases across various national and international courts and tribunals dealing with war crimes and its evolution since the 1990s.

This chapter looks to examine the exclusion of alleged war criminals from refugee status with a section dedicated to each of the different elements used to form Article 1(F)(a) of the 1951 Refugee Convention. The first section begins by assessing Article 1(F)(a) through the lens of treaty interpretation. The second section examines the standard of proof required for exclusion, the third section lays down the elements needed to differentiate war crimes from national crimes while also looking at the enshrinement of war crimes in different legal instruments of international law. The fourth section will provide detailed examples of what acts amount to war crimes and in what circumstances, the fifth section analyzes the principle of proportionality and the importance of its applicability in exclusion proceedings. The last section will lay a particular emphasis on the legislations and state practice of states in the global south, Sub-Saharan Africa in

[107] In the aftermath of the 9/11 attacks the United Nations Security Council (UNSC) adopted Resolution 1373 which stated that "acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations." Furthermore, Res.1373 made an explicit link between terrorism and asylum, despite no asylum-seeker being part of the group that conducted the 9/11 attacks. This resolution has changed the way in which courts interpret Article 1(F)(c), as of now any acts that qualify as terrorism will automatically disqualify an individual from asylum. In the United States, the definition of terrorism or terrorist activity includes providing any "material support to a terrorist organization", this includes training individuals to petition against the United Nations, advising a group of on the laws of war, or even providing meals to suspected terrorists. Moreover, by linking asylum as a safe haven for terrorists, the UNSC reinforced the terrorism narrative that berates asylum seekers in the minds of the public. This was a crucial step in the criminalization of asylum seekers and refugees.

particular regarding the exclusion of alleged war criminals under Article 1(F)(a) of the 1951 Refugee Convention. The main argument is that, in line with the text provided in Article 1(F)(a) of the 1951 Refugee Convention, the exclusion of individuals from refugee status should be restrictive, just and consistent throughout overall state practice.

1.The Interpretation of Article 1(F)(a)

Before getting deeper into the analysis of war crimes and their meaning under Article 1(F)(a), it is important to start by addressing the appropriate framework needed for their interpretation. The purpose of this section is to conduct a deeper examination on how to interpret and apply the law of war crimes rather than just combining the law and practice of war crimes during the application of the exclusion clauses. Therefore, the purpose of this section is to establish a stable and consistent framework while examining the substance of Article 1(F)(a).

1.1 Vienna Conventions: The General rule for Treaty Interpretation

The 1969 Vienna Convention on the Law of Treaties (VCLT) is the go-to instrument when one seeks to interpret a treaty-based formal regime. The foundational principle of treaty interpretation, as stated in in Article 31(1) of the VCLT, is that a treaty must 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." Paragraph 2 of the same article establishes the meaning of "context" during treaty interpretation, paragraph 3 states that, together with the context the interpreter shall consider all subsequent agreements involved between the parties in question together with any relevant rules of international law applicable between the parties involved. Lastly, paragraph 4 provides that a special meaning be given to a term if it is established that the parties so intended.[108]

The overall idea is that those engaged in treaty interpretation must seek to "give effect to the intention of the parties as fully and fairly as possible."[109] Hence when conducting a *bona*

[108] Vienna Convention on the Law of Treaties, (adopted 23 May 1969, entered into force 27 January 1980) UNTS 1155, p. 331, Art. 31.
[109] Andrew Clapham, '*Brierly's Law of Nations: An Introduction to the Role of International Law in International Relations*' (Oxford University Press , 7th ed, 2012), at 349.

fide interpretation, the interpreter must focus on the "ordinary meaning" of the terms that are the purpose of examination.[110] Article 31(1) provides an enhanced description of "ordinary meaning", which must be determined in relation to the context, object and purpose of the treaty in question. Furthermore, the scope of treaty interpretation in it has principles of reasonableness and effectiveness. The principle of reasonableness basically means that the interpreter must always balance rights and obligations without depriving a provision of its original meaning.[111] While the principle of effectiveness means that the interpreter must read and take into account all possible provisions of the instrument or clause in question in a manner in which it gives a meaning to all of them in accordance to their purpose.[112] The primary objective of this principle is that the treaty in question should be read and applied as a whole.[113]

Having a sound understanding of treaty interpretation is very important especially when interpreting treaties that have far-reaching humanitarian aims such as 1951 Refugee Convention.[114] The context of the 1951 Refugee Convention confirms its human rights character and humanitarian intent, in fact, the preamble[115] starts by recognizing the clear importance of human rights law in refugee protection. The UNHCR recognizes that having such an express link confirms the aim of the drafters whose goal was to "incorporate human rights values in the identification and treatment of refugees, thereby providing helpful guidance for the interpretation while being in harmony with the Vienna Treaty Convention, of the provisions of the 1951 Convention."[116] Similarly, international human rights law has significantly evolved since the adoption of the 1951 Convention and in that process has been recognized and ratified universally.

---

[110] Cf., ILC, '*Commentary on Draft Articles,*' [1966] Yearbook of the International Law Commission [1966] II, para.12.
[111] Cf. *Rights of Nationals of the United States of America in Morocco (France v. United States of America)* (1952), Judgement, ICJ Reports, at 40.
[112] Hersch Lauterpacht *'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties'* [1949] 26 Brit. Y.B. Int'l L 48, at 74.
[113] Richard Gardiner *'Part II Interpretation Applying the Vienna Convention on the Law of Treaties, A General Rule, 5 The General Rule: (1) The Treaty, its Terms, and their Ordinary Meaning'* [2015] Oxford Public International Law, at 13.
[114] As stated in *R vs Asfaw,* "[i]t is of course true that in construing any document the literal meaning of the words used must be the starting point. But the words must be construed in context, and an instrument such as the Refugee Convention must be given purposive construction in line with its humanitarian aims." In: *R vs Asfaw* [2008] UKHL 31, [2008] para 11, at 6.
[115] Article 31(2) of the VCLT.
[116] UNHCR, *'Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees'* (UNHCR, 2001), at 1.

This has ensured that the Convention is applied in accordance with the prevailing system of international law.[117]

The exclusion clauses therefore create a divergence in a treaty whose main objective is the protection of refugees and their rights without any discrimination, and therefore Article 1(F(a) is an exception that must be interpreted and applied restrictively.[118]

2.The Standard of Proof Required for Exclusion

The standard for proof required for exclusion in Article 1(F)(a) is "serious reasons for considering". This standard is rather unusual as it is an invention of international refugee and not common within other areas of law.[119] As mentioned in the first part of this paper, the term "serious reasons for considering" was first mentioned during the debates in the Special Committee of the ECOSOC in 1950 in a proposal put forward by the French delegation as an alternative to the expression "in its opinion". The French delegate claimed that, by putting in this higher threshold, there would be no need for a formal proceeding against the asylum seeker before excluding him/her from protection. On the other hand, the fact that proceedings may have begun against the claimant should not be regarded as conclusive, as they could have been imposed by a government on unjust grounds.[120] The main objective was that in absence of a world government, the "power of discretion" which is an essential safeguarding element both for real refugees and the refugee hosting state must be left to the state as they are willing to grant hospitality.[121] However, their decision regarding this would have to be exercised within the scope and limits of the Convention.

---

[117] James Hathaway and Michelle Foster, '*The Law of Refugee Status'* (Cambridge University Press 2nd ed, 2014) at 9. This was laid down by the ICJ in S*outh West Africa:* "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of interpretation" In: *Legal consequences for states of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970) Advisory Opinion of 21 June 1971, ICJ Reports, para 53.

[118] UNHCR, '*Background Note on the Application of the Exclusion Clauses- Article 1F of the 1951 Convention Relating to the Status of Refugees*' (UNHCR, 2003), para 4.

[119] ibid., para. 107

[120] Cf. UN Doc. E/AC.7/SR.166 at 7.

[121] ibid.

Since the adoption of the 1951 Refugee Convention, courts and tribunals from different countries have interpreted and applied "serious reasons for considering" threshold in multiple ways.[122] For example, the Canadian government gives its national courts the freedom to interpret this differently at different levels depending on the offense committed and case in question. However, the general approach has ranged from "something more than mere suspicion"[123] to the civil law standard of "balance of probabilities"[124] however, solely taking into account the balance of probabilities threshold would be too low a threshold for exclusion. In short, there will be reasonable grounds if there is a substantial basis for the belief which is based on strong and credible evidence.[125] Moreover, to protect *bona fide* refugees from unfair exclusion, UNHCR continuously advocates for states to have a higher evidentiary threshold of "serious reasons for considering" in cases which may give rise to substantial suspicion.[126] This basically means that immigration authorities do not need a determination of guilt that he/she has committed a war crime before excluding him/her under Article1(F)(a) of the 1951 Refugee Convention bearing the benefit of doubt on the individual in question. This practice has been recognized among others by the Australian,[127] South African,[128] Canadian,[129] New Zealand[130] and British[131] courts and tribunals. As mentioned previously it is also largely agreed that the burden of proof should be borne by the state that is excluding an applicant from refugee status.

Some courts have elaborated further on effectiveness of "serious reasons for considering" stressing that this test is different than that applicable in actual war crime trials.[132] The UK Supreme Court has elaborated further on the approach of the UK Immigration Appeal Tribunal (UKIAT)

[122] Sibylle Kapferer, '*Exclusion Clauses in Europe A Comparative Overview of State Practice in France, Belgium and the United Kingdom'* [2000] 12 International Journal of Refugee Law 195 at 195 -221.
[123] Cf. *Yasser Al-Sirri v Secretary of State for the Home Department* [2009] EWCA Civ 222, para 33.
[124] Cf. *Saul Vicente Ramirez v. Canada (Minister of Employment and Immigration)* [1992] FCJ 109, Para 5
[125] ibid.
[126] UNHCR *Background Note,* op. cit., para 107.
[127] *SRYYY V Minister for immigration & Multicultural & Indigenous Affairs* [2005] FCAFC 42, para 79.
[128] *Gavrić v Refugee Status Determination Officer, Cape Town and Others* [2018] ZACC 38, para 89.
[129] Cf. *Ezokola v Canada (citizenship and immigration* [2013] SCC 40, [2013] 2 SCR 678. At 101.
[130] Cf. *Attorney General (Minister of Immigration) v Tamil X* [2010] NZSC 107, [2011] 1 NZLR 721, para 1.
[131] Cf. *Yasser Al-Sirri* (2009), op. cit., para 75(4).
[132] In *Al-Sirri*, the court stated inter alia that "'[s]erious reasons' is stronger than 'reasonable grounds' (…) 'considering' is stronger than 'suspecting'. In our view it is also stronger than 'believing'. It requires the considered judgement of the decision-maker." In: *Al-Sirri* (2009) op. cit., para 75 (1) and (3).

in *Gurung*[133]. This was first vaguely mentioned in *R (JS) (Sri Lanka) (Respondent) v. Secretary of State for the Home Department (Appellant)* in which the court stated that:

> "[s]erious reasons for considering" (…) 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.[134]

The Supreme Court of Canada also reached the same conclusion in the *Ezokola*[135] case. Additionally, in Canada, an individual may be excluded from refugee status on the grounds of "reasonable grounds to believe" standard. The reason for this is because Section 33 of the Canadian Immigration and Refugee Protection Act denies foreigners including permanent residents for which "there are reasonable grounds to believe" that they have committed a war crime or crimes against humanity.[136]

As we have seen so far, ways in which "Serious reasons for considering" has been applied and interpreted has been inconsistent and subject to comparison to different legal instruments from completely different contexts. These inconsistencies gained considerable attention from different scholars. Amid the lack of consistent state practice, some scholars have submitted different suggestions and views to mitigate the legal ambiguities surrounding what level of threshold would be enough for exclusion.[137] In this regard, a set of scholars drafted a set of

---

[133] In *Gurung*, the UK Immigration Appeal Tribunal held that: "international criminal law and international humanitarian law, which in our view should be the principal sources of reference in dealing with such issues as complicity, adopt similar although more detailed criteria in respect of those who for the purpose of facilitating an international crime aid, abet or otherwise assist in its commission or its attempted commission, including providing the means for its commission (see Art 25 of the International Criminal Court Statute and Art 7(1) of the ICTY Statute as analysed in the case of *Tadić* Case No: IT-94-1-T May 1997). Of course, such reference will need to bear in mind the lower standard of proof applicable in exclusion cases." In: *Gurung (Appellant) v The Secretary of State for Home Department (Respondent)* [2002] UKIAT 4870 [2002], para 109.

[134] *R (on the application of JS) (Sri Lanka) (Respondent) v. Secretary of State for the Home Department (Appellant) [2010] UKSC 15, para 39.*

[135] The Supreme Court of Canada held that: "unlike international criminal tribunals, the Refugee Protection Division does not determine guilt or innocence, but excludes *ab initio,* those who are not bona fide refugees at the time of their claim for refugee status. This is reflected in and accommodated by the unique evidentiary burden applicable to art. 1F(a) determinations: a person is excluded from the definition of "refugee" if there are serious reasons for considering that he has committed a crime against peace, a war crime, or a crime against humanity. While this standard is lower than that applicable in actual war crime trials, it requires more than mere suspicion." In" *Ezokola*, op. cit.

[136] James Simeon, '*The Application and Interpretation of International Humanitarian Law and International Criminal Law in the Exclusion of Those Refugee Claimants Who Have Committed War Crimes and/or Crimes Against Humanity in Canada*' [2015] IJRL 75, 79 [footnote 14].

[137] Jennifer Bond*, 'Principled Exclusion: A Revised Approach to Article1(F)(a) of the Refugee Convention*' [2013] 35 Mich. J. Int'l L. 15, at 38–42.

recommendations known as the the *Michigan Guidelines on the Exclusion of International Criminals.*[138] These guidelines seek to offer inter alia a sound understanding of "serious reasons for considering" threshold in line with the purpose and objective of the 1951 Refugee Convention.

The Michigan guidelines address the standard of proof for exclusion in a way that reflects both on the fact and law needed in making exclusion decisions.[139] Moreover, the language of Article 1(F)(a) requires "serious reasons for considering" that the applicant "has committed" a war crime.[140] Within the same line of reasoning, Hathaway and Foster have stated that:

> [w]hile the evidence presented need not to be conclusive of the question of guilt or innocence, it must nonetheless truly inform the question whether it may be 'considered that' circumstances of the individual case liability of one of the three kinds stipulated in paragraphs (a) (b) or (c) of Article1 F exists. This is so because the relevant issue is whether there are serious reasons for considering that the concerned person 'has committed a crime' (…) clearly requiring attention to the substantive content of the relevant crime or other act. While the drafters afforded states some measure of evidentiary flexibility, (…) they at no point suggested that anything less than clarity about the legal standards justifying exclusion was sufficient.[141]

Therefore, scholars of the Michigan Guidelines have consistently elaborated on the fact that an assessment of the relevant mode of liability is key to the analysis of the evidence presented in support of exclusion (such as the applicable *mens rea and actus rea)*.[142] Likewise, the alleged war crime must be recognized under international law; either stated in an international instrument or already enshrined in customary international law. On the other hand, if the standard of criminal liability is at any point contested, decision makers should rely upon the most relevant international instruments such as international criminal law.[143] If the suspected crime does not meet the criteria

[138] Colloquium on Challenges in International Refugee Law, *'The Michigan Guidelines on the Exclusion of International Criminals'* [2013] 35 Mich. J. Int'l L. 3.
[139] ibid., para 12.
[140] Hathaway and Foster, op. cit., at 534.
[141] ibid., at 535.
[142] *The Michigan Guidelines* op. cit., para 8.
[143] ibid., para 6.

needed to determine his/her standard of liability under international criminal law, or if it still remains contested in any matter of law, there would not be "serious reasons for considering" that the applicant has committed a war crime.[144] And therefore, when applying the exclusion clause, the decision-maker must have substantial concrete evidence that first, the applicant has committed a war crime and secondly his/her decision is not based upon disputed rules.[145] The reason behind this is that the goal and integrity of the institution of asylum could easily be threatened by unfairly excluding an individual from protection based on disputed norms and rules of international criminal law or where defense is viable.[146]

To conclude, it is important to note that the interpretation of the standard of proof is entirely dependent on the national legislations of the states applying Article 1(F)(a). In other words, as we have seen above, the cases of Canada and the United Kingdom are exceptions that have stemmed out of various interpretations aligned with their national interests and legislations and therefore to use such cases as rules would create a great deal of inconsistency when interpreting Article 1(F)(a). At the end of the day the guidelines provided by the 1951 Refugee Convention should be the first step for application as it is poses as the foundational element in determining who is a genuine refugee and who is not.

3.Differentiating War crimes from National Crimes and its Enshrinement in International and Refugee Law

The debates on the formation of the exclusion clauses, especially on the exclusion of war criminals during the second half of the nineteenth century brought to light the concept of individual criminal responsibility. This is where an individual would be held liable for acts that lead to violations of the laws of war. Prior to this, violations of the laws and customs of war would hold liable the state of which the perpetrator is a national.[147] Towards the end of WWII, violations of the *jus in bello*, the law that operates when an armed conflict or war has begun, became a concern of the international community and were therefore introduced in international law, cutting across

[144] ibid., para 15.
[145] ibid., para 14.
[146] Hathaway and Foster, op. cit., at 537.
[147] Cf. Antonio Cassese *et al, 'Cassese's International Criminal Law'* (Oxford University Press, 3rd ed, 2013) at 63.

the boundaries of domestic jurisdictions. The first international instrument to include war crimes in its jurisdiction was the London Charter of the International Military Tribunal which provides the definition of war crimes in Article 6(b) of its Charter. Likewise, the events of the Nuremberg Trials strengthened the stance of international criminal responsibility in international law. For the first time ever, individuals including senior members of the military and state could be punished for serious violations of the laws of war before an international court.[148]

Furthermore, the formation and adoption of the Geneva Conventions in 1949 promoted a significant growth in the content of war crimes law. Instead of mentioning the term "war crimes" in its mandate[149] the Geneva Conventions introduced the legal concept of "grave breaches" as stated in common Articles 50, 51,130 and 147. With that the Geneva Conventions laid down some guidelines at the practical level such as, making it obligatory for contracting states to criminalize certain acts under their domestic legislations, and an obligation to search and try alleged criminals, and if required extradite them to third states that are willing to prosecute them as all contracting states have the right to do so under the principle of Universal Jurisdiction.[150]

The additional protocols of 1977 expanded further on grave breaches regime by including a broader spectrum of violations and acts of the means and methods of war both in international and non-international armed conflicts.[151]

---

[148] ibid., 64.

[149] As stated in the ICRC's Commentary to the First Geneva Convention: "[t]he actual term 'grave breaches' was discussed at considerable length. The USSR delegation would have preferred the expression 'grave crimes' or 'war crimes'. The reason why the conference preferred the words 'grave breaches' was that it felt that, though such acts were described as crimes in the penal law of almost all countries, it was nevertheless true that the word 'crimes' had different legal meanings in different countries." In: Jean Pictet (ed.), *'The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field: Commentary'*, (ICRC, 1952), at 371.

[150] Article 49 of the Geneva Convention I states the following: "[t]he High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present convention defined in the following Article. Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with provisions of its own legislation, hand such persons over for trial to another High Contracting Party Concerned, provided such High Contracting Party has made out a *prima facie* case." See also: Gary D. Solis, *'The Law of Armed Conflict: International Humanitarian Law in War'*, (Cambridge University Press, 2nd ed, 2016) at 333.

[151] Cf. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of International Armed Conflicts (adopted 8 June 1977, entered into force, 7 December 1978) 1125 UNTS 3, Article, 85(3) and (4).

The formation of the *ad hoc* international criminal tribunals such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) revolutionized the jurisdiction of war crimes and international humanitarian law extensively.[152] Statutes from both tribunals expanded the scope of war crimes law like never before. These developments also inspired the adoption of the Rome Statute in 1998, whose Article 8 presents an extensive explanation of conducts amounting to war crimes. The Rome Statute also inspired the formation of the ICC in 2002.

3.1 How Do We Identify War Crimes? A Deeper Examination

To have a better understanding of war crimes it is necessary to differentiate between war crimes and national crimes as there are a large number of activities that are considered offensive from a criminal perspective that are also known as offenses in domestic criminal jurisdictions. Therefore, in order to differentiate between war crimes and national crimes some overarching requirements have been introduced to help decision makers at various levels.

For war crimes to be committed, an individual would have to meet two requirements: the first is that the activity, in which the person had been involved, should be one which is specifically prohibited by international law.[153] Therefore, for example, if an administrator of a detention camp unreasonably increases the price of food for prisoners of war, he/she will be violating Article 28 of Geneva Convention III[154] and the detaining power will be held responsible for that breach. This said, the above-mentioned violation does not meet the required "threshold of seriousness", and hence the individual selling the food will not be held criminally responsible. Secondly, the most obvious requirement would be an existence of an armed conflict. Hence, the act needs to have

[152] The Statute of the ICTR provides a wider and more contemporary approach to the ICTY in that the Statute of the ICTR explicitly extends its jurisdiction covering serious violations of common Article 3 of the Geneva Conventions that specifically deals with internal armed conflicts, armed uprisings, sustained insurrections and civil wars. Cf. Solis, op. cit., at 96.
[153] ibid., at 302.
[154] Article 28 of the Geneva Convention III states that: "[c]anteens shall be installed in all camps, where prisoners of war may procure foodstuffs, soap, and tobacco and ordinary articles in daily use. The tariff shall never be in excess of local market prices. The profits made by camp canteens shall be used for the benefit of the prisoners; a special fund shall be created for this purpose. The prisoners' representative shall have the right to collaborate in the management of the canteen and of this fund (…)" In: Geneva Convention Relative to the Treatment of Prisoners of War (adopted 2 August 1949, entered into force 21 October 1950) 75 UNTS 135, Article 28.

taken place during the existence of an armed conflict and thus if war crimes are violations of the laws of war, they can only exist when this body of law is applicable.[155]

The *Tadic*[156] case is one of the most prominent cases in the laws of war. one reason for this is that it has helped make clear various important concepts that were very vaguely described in Geneva Conventions of 1949. An important concept that it made clear is the requirement of a nexus between the violation committed by the accused and an armed conflict.[157]

There have been several debates on the scope and legal jurisdiction of war crime such as, whether the war in which the crime was committed was a formally declared war between two states and whether or not crimes committed during civil wars and non-international armed conflicts would fall under the jurisprudence of international courts and tribunals. Some of these discussions were made clear by the Appeals Chamber of the ICTY during the *Tadić* case that defined an "armed conflict" as:

> a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflict and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved.[158]

However, huge concerns lay in the fact that there are different set of rules that operate in an international armed conflict (IAC) and a non- international armed conflict (NIAC), and these differences have created discrepancies in the criminalization of certain acts. This is because, certain infringements of rules in an IAC would not necessarily be considered as offences in a NIAC and therefore it is important to analyze the nature of the conflict and the law in application before identifying the offenses committed by the perpetrator. Furthermore, not all crimes committed

[155] Solis, op. cit., at 302.
[156] *Prosecutor v Tadić* (Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-A (2 October 1995), para 94.
[157] Solis, op. cit., at 363.
[158] *Tadić,* op. cit., para 70

during a war automatically become war crimes. This is because for an act to qualify as a war crime there must be substantial connection between the conduct in question and the armed conflict – often known as the nexus – this is crucial in order to determine if the acts are a violation of domestic law or a war crime.[159]

As Cassese states, finding the link between a criminal offense and an armed conflict is much easier in IAC's as they present a clearer distinction between lawful combatants (Military, Naval units, Peace Corps etc.) and civilians due to its international nature, however, the same cannot be said for NIAC's where distinguishing between combatants and civilians is often a difficult task.[160] In *Kunarac,* the Appeals chamber of the ICTY listed down other criteria that would assist in assessing if a crime is related to an armed conflict: i) the perpetrator is a combatant; ii) the victim is a non-combatant; iii) the victim is a member of an opposing party; iv) the act may serve an ultimate purpose of a military campaign; v) and the crime is committed as part of or in the context of the perpetrator's official duties.[161]

Together with the above-mentioned elements needed to distinguish a war crime, individual criminal responsibility will also depend on the *mens rea* (mental element) of the alleged perpetrator.[162] In simple terms the *mens rea* infers that the perpetrator deliberately intended to commit the unlawful act, while being aware of the results of his/her actions. Furthermore, the required mental state will vary depending on the nature of the offense and the mode of criminal liability at stake. For example, in the case of command responsibility, a commander may only be held liable for the actions of his subordinates if there is enough evidence that he first, knew and

[159] Eve La Haye, *'War crimes in internal armed conflicts'*, (Cambridge University Press 2008) supra note, 29 at 110.
[160] Cassese *et al,* op. cit., at 77. (it is often difficult to make a clear distinction between lawful combatants and civilians in NIAC's because in NIAC's there is often the involvement of armed rebel groups who due to their nature do not showcase a clear sign of distinction e.g. uniform or flag. This makes it difficult for decision-makers to identify who committed an offense and who did not.)
[161] *Prosecutor v Kunarac et al.* (Judgement) IT-96-23 & IT-96-23/1-A (12 June 2002) para 59.
[162] As the Appeals Chamber of the ICTY found in *Naletilić* and *Martinović*: "[t]he principle of individual guilt requires that an accused can only be convicted for a crime if his *mens rea* comprises the *actus reas* of the crime. To convict him without him without proving that he knew the facts that were necessary to make his conduct a crime is to deny him his entitlement to the presumption of innocence. The specific required mental state will vary, of course depending on the crime and the mode of liability. But the core principle is the same. For a conduct to entail criminal liability, it must be possible for an individual to determine *ex ante*, based on the facts available to him, that the conduct is criminal. At a minimum, then, to convict an accused of a crime, he must have had knowledge of the facts that made his or her act criminal." In: *Prosecutor v. Naletilić* and *Martinović* (Judgement) IT-98-34-A(2 May 2006) para 114.

second had reason to know about them.[163] If it cannot be proven that the commander could have prevented the unlawful conduct from being committed he/she cannot be held accountable and instead the actual perpetrators of the crime e.g. soldiers will be held responsible under the principle of individual criminal responsibility[164]

In conclusion, apart from all the above-mentioned legal instruments essential to all war crimes, each offense will have its own unique set of elements and features.[165]

3.2 Individual Criminal Responsibility: Violations of Rules of the Corpus Juris of the Laws of War and Exclusion from Refugee Status

The most obvious way in which an individual could be held liable for war crimes under international law is if he/she directly commits the crime. Furthermore, under international law criminal responsibility is also given to those who participated and collaborated in other ways - from a soldier who knowingly kills and tortures civilians to his/her accomplices or from a commander who orders the bombardments of religious institutions and schools to his/her subordinates who carry out the commands. In fact, international crimes, and war crimes in particular are acts rarely conducted by lone individuals, the gravity of these offenses often require a collective effort from individuals who have a common agenda. The ICTY in the *Tadić* judgement stressed on this by saying:

> [m]ost of the time these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design. Although only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton, destruction of cities, town or villages, etc.), the participation and contribution of other members of the group is often vital in facilitating the commission of the offense in question. It follows the moral gravity of such participation is often no less – or indeed no different – from that of those actually carrying out the acts in question.[166]

[163] Solis, op. cit., at 428.
[164] ibid.
[165] International Criminal Court, *'Elements of Crimes'* (ICC 2001) at 13-42.
[166] *Prosecutor v Tadić* (Judgement, Appeals Chamber) IT-94-1-A (15 July 1999) para 191.

Concepts like "complicity" and "participation in a common plan" were already mentioned in texts related to criminal liability in the London Charter.[167] The statutes of both the *ad hoc* criminal tribunals went beyond the Nuremberg Trials in matters of individual criminal responsibility and liability. Article 7 of the ICTY statute which was also reproduced in Article 6 of the ICTR[168], assigns criminal responsibility on persons who:

> planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 and 5 of the present Statute, shall be individually responsible for the crime.[169]

The case-law of both these statues have provided important guidance for both the interpretation and application of different forms of criminal responsibility. Article 25(3) of the Rome Statute has also included some of these developments in its provision by establishing and listing down different forms of criminal responsibilities and liabilities eligible for punishment under the jurisdiction of the ICC.[170]

When it comes to being excluded from refugee status, an individual can only be excluded from refugee status under Article 1(F)(a) of the 1951 Refugee Convention if criminal responsibility can be proven and liked with one of the crimes mentioned in its text. It is also important to note that it is unlawful to exclude an individual from refugee status in cases where international criminal law does not impose criminal liability and sometimes as followed by most African states it would also be unjust to exclude an individual if the act in question is not listed in the treaty the state is signatory to. In addition, there are also certain conditions that justify or excuse the offender.[171] The reason for this is that the expression "has committed" in Article 1(F)(a) includes not only the

[167] Article 6(a) of the London Charter defines crimes against peace as: "planning, preparation, initiation, or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing"
[168] Cf. UN Security Council, *Statute for the International Criminal Tribunal for Rwanda* (as last amended on 13 October 2006), 8 November 1994, Article 6.
[169] UN Security Council, *Statute for the International Criminal Tribunal for the Former Yugoslavia* (as amended on 17 May 2002), 25 May 1993, Article 7.
[170] Cf. Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 137 UNTS 123, Article 25(3)
[171] Justifications would be: (e.g., self-defense, necessity, and lawful belligerent reprisals) and excuses would be: (e.g., duress, mistake of law, mistake of fact, mental incapacity). Cf., Articles 31 to 33 of the Rome Statute.

elements of the crime but also the ascription of criminal responsibility to the offender.[172] According to the UNHCR, individual criminal responsibility in cases of exclusion will arise "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."[173] The UNHCR also guides decision-makers to refer to the jurisprudence of the ICTY and ICTY in case they need further clarity on what kind of criminal responsibility is involved. It is important to note that it is not an obligation for states to do so and it is at their discretion on how they seek to analyze the different forms of criminal liability throughout the exclusion proceedings.[174]

4.The Definition of War Crimes in International Instruments and Examples of Specific War Crimes

The drafters of the 1951 Refugee Convention consistently drew inspiration from various international instruments, using them as the main point of reference for determining the content of various crimes. This showcases the open-endedness of Article 1(F)(a) in which different courts and tribunals can easily interpret the meaning of different crimes in a dynamic manner, hand in hand with the developments of international criminal law and the laws of war.[175]

Some of the first instruments used by the drafters of the 1951 Refugee Convention were the London Charter, the 1948 Genocide Convention, the 1949 Geneva Conventions and the ILC Nuremberg Principles. In addition, there have been many other international instruments that have been adopted after the 1951 Refugee Convention came into force. These include: the 1968 Convention of the Non-Applicability of Statutory Limitations of War Crimes and Crimes Against Humanity, the 1977 Additional Protocols to the Geneva Conventions, the Statutes of both the ICTY and ICTR, and the Rome Statute, whose Article 8(2) provides the most comprehensive, yet non exhaustive definition of war crimes.[176] Decision makers also have the freedom to rely on other

[172] Nikola R. Hajdin, *'The actus reus of the Crime of Aggression',* In: Eric De Brabandere (ed), Leiden Journal of International Law (Cambridge University Press, 2021) at 5.
[173] UNHCR, *Background Note*, op. cit., para 51.
[174] ibid., para 52.
[175] Another obtrusion is that Article 1(F)(a) does not all the use of domestic legislations as an autonomous source for interpretation. Furthermore, the country applying Article 1(F)(a) does not need to be party to a particular international instrument defining a specific war crime.
[176] The Rome Statute is one of the most referred to international instruments in exclusion cases. See for instance: *R (on the application of JS) (Sri Lanka) (Respondent) v. Secretary of State for the Home Department (Appellant)* [2010] UKSC 15, para 8.

"soft-law" documents (e.g., ILC Draft Articles and UN General Assembly Resolutions) and case law sourced from international criminal tribunals.

4.1 Examples of War Crimes and Extended Liability

The Rome Statute, which proves to be one of the most comprehensive instruments in providing a detailed description of war crimes, since its adoption in July 1998, makes a mention of 50 war crimes both in International and non-international armed conflicts. However, this number is subject to constant change as international criminal law continues to develop. Events like the Kampala Review Conference[177] continuously work to make amendments to the Rome Statute in order to meet modern requirements. The Statutes of both the ICTY and the ICTR have also recognized several war crimes.

The list of war crimes is substantially lengthy all with different characteristics. Within these war crimes, there are some that are largely committed by combatants due to the nature of the crime. An example of this would be when there has been an improper use of a flag, insignia, or uniform of the United Nations.[178] On the other hand, there are crimes that are more common to civilians, crimes that are most likely to appear in exclusion cases and within the jurisprudence of Article 1(F)(a). This section will provide detailed examples of some of these crimes.

4.1.1 Rape and Other Gender Crimes

Gender crimes like rape and other forms of sexual violence were largely ignored during the formation of various instruments within the framework of the laws of war. Despite having being mentioned in Articles 44 and 47 of the 1863 Lieber Code, rape was never mentioned as a crime neither in the charter of the International Military Tribunal (Nuremberg) nor in the 1949 Geneva Conventions which reflects on the fact that it was not always prosecuted with great diligence.[179]

---

[177] The Kampala Review Conference of the Statute of the International Criminal Court took place between the 31st of May to the 11th of June 2011 in which contracting parties of the ICC took stock of the implementation of the Rome Statute and its impact and made further amendments to the statute in order to meet contemporary cases.
[178] ICC, *Elements of Crimes,* op. cit., Article 8(2) (b) (vii)-3.
[179] Solis, op. cit., at 340.

It was not until the formation of the ICTY in 1991 in which that changed. Its stance on the criminalization of gender crimes has helped ensure that "rape and other acts of sexual violence entail individual criminal responsibility under international law."[180] Article 5 of ICTY's Statute lists rape as a crime against humanity, while the Rome Statute of the ICC declares rape as a war crime and a violation of the laws of both international and non-international armed conflicts.[181] The ICC has also listed forced pregnancy as a war crime in Articles 8(2) (b) (xxii), and 8(2) (e) (vi), in both international and non-international armed conflicts.

Despite the sea of change in the prosecution of rape and gender crimes as war crimes there have been some disagreements on the definition of rape. The jurisprudence of the ICTR defined rape as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive."[182] However, the trial chamber of the ICTY leaned towards a more precise definition that would align with the criminal law principle of specificity. The ICTY therefore adopted a more specific definition of rape in which: "rape is the penetration of the vagina, the anus or mouth by the penis, or of the vagina or anus by other object without the consent of the victim".[183] The appeals chamber of the ICTY in the case of *Kunarac*[184] further acknowledged this definition and has since been incorporated in the Elements of Crimes of the ICC which also added that rape can be committed against both women and men.

Other debates regarding rape as a war crime revolved around the form of sexual violence in which some decisions, especially in the ICTR focused on coercive circumstances at the time of committing the offense while others instead found that the essential element was the lack of consent of the victim. Yet again, the *Kunarac* judgement played an important role in making a clarification on this issue by stating that the correct requirement was a lack of true consent which would usually not be possible in coercive situations.[185]

---

[180] Wolfgang Schomburg and Ines Peterson, *'Genuine Consent to Sexual Violence under International Criminal Law*', [2007] American Journal of International Law, 101-1, at 121-122.
[181] Solis, op. cit., at 340.
[182] *Prosecutor v. Akayesu* (Judgement) ICTR-96-4-T (2 September 1998) para 598.
[183] *Prosecutor v. Furundžija* (Judgement) IT-95-17/1-T (10 December 1998) para 177.
[184] *Kunarac et al.,* op. Cit., para 128.
[185] *Kunarac et al.,* op. cit., para 129-130.

The ICC elements of crime has adopted a similar approach to the one put out by the ICTY appeals chamber and states:

> "The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons, or another person, by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent."[186]

There have been numerous cases of rape and gender crimes apart from the ones mentioned in the ICTY, ICTR and the Rome Statute since these early developments. Rape is now explicitly recognized as an instrument of genocide, a crime against humanity, and a war crime. Gender crimes are considered as war crimes regardless of whether they are committed in international or non-international armed conflicts.

4.1.2 Aiding and Abetting

The terms aiding and abetting usually go hand-in hand, however the two terms within this context work slightly differently. Aiding refers to providing some type of physical assistance during a commission of a crime while abetting leans towards moral encouragement.[187] The *acts reus* (criminal act) of aiding and abetting includes practical assistance, encouragement, or moral support enough to have a substantial effect on the commission of the international crime. Aiding or abetting on its own is enough to hold a person criminally liable for a crime despite the fact that the individual in question may not be the actual perpetrator of the crime. Acts of aiding and abetting can be committed at a time and place different from the actual crime.[188]

The *mens rea* required for aiding abetting is having the knowledge that all the support either direct or indirect provided by the individual in question will contribute significantly in the commission of the crime even though he/she may not intend to do so. The aider or abettor does not need to know if, where and when the crime was committed but he/she must be aware of the principal

[186] ICC, *Elements of Crimes,* op. cit., Article 8(2) (e) (vi)-1(2).
[187] Cf., Article 25(3)(c) of the Rome Statute
[188] Joseph Rikhof, '*Exclusion at a Crossroads: The Interplay Between International Criminal Law and Refugee Law in the Area of Extended Liability'* [2011] PPLA/2011/06 at 7.

offender's *mens rea* and the essential elements of the crime. However, the accused may also not have the same state of mind as the perpetrator or he/she could also have been coerced into participating[189], it is important to note that accused may be convicted for the crime even if the principal perpetrators have not been identified.[190]

The crime of aiding and abetting is rather common in exclusion cases despite the complexity of the crime. A lot of asylum seekers coming from conflict zones are prone to this be it through employment, civil service or political pressure. *AB*[191] demonstrates this well in which the appellant, an Iranian citizen who held a senior position in a woman's prison in Iran which largely held political prisoners in which they were detained and tortured. One of her task involved moving prisoners from one part of the prison to another where they could be interrogated and potentially be subjected to torture. Her request for asylum in the United Kingdom was denied since the appellant's activities fell within the definition of war crimes and crimes against humanity as she had aided and abetted acts of torture even if she did not intend to do so.[192]

4.1.3 Joint Criminal Enterprise

Regarding the legal characteristics of this concept, the ICTY Appeals Chamber's case-law has listed down three types of joint criminal enterprise (JCE).[193] In the first form of JCE, all the co-perpetrators must have a similar criminal intent to carry out the common goal which is the crime. The second form of JCE, which is also known as the 'systemic' form is a modification of the first form in which this form is characterized by the existence of an organized criminal system (armed groups and militias). The accused also needs to have knowledge of the nature of system and have an intention to help the organization further its criminal agenda. The third form of JCE which is also known as the 'extended' form goes beyond the common crime and entails responsibility for crimes which were not part of the common criminal goal but are an unavoidable consequence of it.[194]

[189] *Prosecutor v. Athanase Seromba* (Judgement) ICTR-2001-66-1 (13 December 2006) para 309.
[190] *Prosecutor v. Radoslav Brdanin* (Judgement) IT-99-36-A (3 April 2007) para 355.
[191] *AB (Appellant) vs. The Secretary of State for the Home Department (Respondent)* [2006] UKUT 00376 para 32.
[192] ibid.
[193] *Tadić,* op. Cit., para 227.
[194] ibid., para 220.

There have been sufficient amendments and clarifications made to these principles over time. Regarding the first two categories, it has been made clear that sole membership in a group having a common criminal purpose is not enough to amount to a war crime. The common objective of the organization can also change as long as all the members agree on it. This means that the common purpose, which is the crime, may evolve over time and therefore such an organization may have different members at different times.[195]

In respect to the contribution, the participation or contribution of the accused to the common purpose of the organization does not need to be substantive but it should be a significant contribution to the crime committed. The fact that different members might participate at different levels does not undermine the existence of a joint criminal enterprise, as each individual in question will have his/her involvement examined by the court during his/her trail proceedings.[196]

Apart from the ICTY and ICTR the Rome Statute of the ICC has also included a similar concept known as the common purpose the only difference is that it largely pays attention to the first two categories namely JCE I and II but not JCE III.[197]

5.Proportionality in Refugee Exclusion

One of the most controversial questions in the application of Article 1(F)(a) is whether decision-makers should consider the consequences of excluding an individual from international protection against the severity of the acts amounting to a war crime. Some authors like Guy Goodwin-Gill and Jane McAdam have dismissed this argument by simply stating that the seriousness of the crimes enlisted in Article 1(F)(a) leave no room for taking such a balance into consideration.[198]

This may be true for crimes against humanity, crimes against peace and majority of war crimes. However, since war crimes cover a large array of acts that are always not that clear, there might be cases of exclusion in which the consequences of excluding an individual from protection might

[195] Rikhof, op. cit., at 9.
[196] *Brdanin,* op. cit., para 432.
[197] Cf. Article 25(d) (i) and (ii) of the Rome Statute.
[198] Cf. Guy Goodwin-Gill and Jane McAdam, '*The Refugee in International Law'* (Oxford University Press, 3rd ed, 2007), at 165.

be disproportionate *vis-à-vis* the gravity of the offense committed especially when considering the legal implications of *refoulment*. Furthermore, it is important to note that exclusion proceedings do not need a determination of guilt in a criminal sense, and that exclusion should not be seen as a punishment.

Proportionality is a general principle of international law, applying in various situations especially in international humanitarian law when determining the use of force.[199] The overarching idea of the principle of proportionality is that "state's acts must be rational and reasonable exercise of means towards achieving a admissible goal, without excessively violating the protected rights of either individuals or another state".[200] Within the context of human rights, the principle of proportionality states that any interference with rights must be justified and sufficient with the intensity of the interference and with the purpose to be pursued.[201] In other words, the interpreter should always find a balance between the interests of the state/community and the individual's rights.

Coming back to exclusion, as an exception of human rights guarantees, the exclusion clauses should be applied in a way proportionate to their objective while being considerate of the circumstances of the case at hand. This is also the stance of the UNHCR. The office has been advocating for the inclusion of such a balance for cases on exclusion from refugee status for individuals who have committed "less serious war crimes".[202]

While exclusion under Article 1(F)(a) was framed to look obligatory, states are the ones who have the power of discretion in determining who is a genuine refugee and who is not; provided that they do so within the framework provided in the Convention. It is, hence, with the application of that discretion, that the decision makers in their everyday functions may consider balancing out the

[199] Solis, op. cit., at 239.
[200] Emily Crawford, '*Proportionality',* In: Rüdinger Wolfrum (ed), The Max Planck Encyclopaedia of Public International Law (Oxford University Press, 2012) para 1.
[201] Jan Sieckmann, '*Proportionality as a Universal Human Rights Principle',* In: David Duarte and Jorge Silva Sampaio (ed), Proportionality in International Law; An Analytical Perspective (Springer, 2018) at 3-24.
[202] An example of this would be: "[in the case of] isolated incidents of looting by soldiers, exclusion may be considered disproportionate if subsequent return is likely to lead, for example, to the individual's torture in his or her country of origin. Where, however, persons have intentionally caused death or serious injury to civilians as a means of intimidating a government or a civilian population, they are unlikely to benefit from proportionality considerations." In: UNHCR, *Background Note,* op. Cit., para 78.

consequences of the seriousness of the crime against the against the exclusion of the individual concerned. There is no fixed rule on the application of the proportionality test in exclusion proceedings- if the decision makers see it fit and if the circumstances require, it will always be at their disposal. In fact, the proportionality considerations can help make sure that Article 1(F)(a) is applied in accordance with the humanitarian objective and purpose of the 1951 Refugee Convention.[203]

6.Exclusion in Africa: Where Does the Global South's Position on Exclusion and Consistency in the Application of Article 1(F)(a) Globally

As we have seen throughout this research, starting from the creation of the IRO to the formation of the 1951 Convention Relating to the Status of Refugees and with that the creation of Article 1(F)(a) and the exclusion clauses, all these processes have been dominated by western states with an intention to protect their territories and communities. What is missing from all this is the position of the global south, be it in the formation of the exclusion clauses or be it on state practice. Most of the cases referenced by states during exclusion proceedings derive from western courts. Cases, like *Gurung* in the United Kingdom and *Ramirez* in Canada[204] without a doubt present important tools for the interpretation of Article 1(F)(a), however each state has its own interpretation of how they apply the exclusion clauses. We saw this on the section of standard of proof for exclusion where Canada and the United Kingdom have different thresholds in terms of standard of proof and for such reasons cases deriving from these countries are exceptions and therefore should not be treated as rules.

Hence the purpose of this section is to delve deeper into the state practice of the global south regarding exclusion from refugee status in order to gain a deeper perspective on the application of the exclusion clauses and state practice in that regard. In this paper the global south will majorly be represented by states in the Sub-Saharan region of Africa as this region is one of the largest refugee hosting regions in the world.[205]

---

[203] UNHCR, '*Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees'* (UNHCR, 2003), para 24.
[204] Joseph Rikhof, '*The Relationship Between Refugee Exclusion Law and International Law: Convergence or Divergence?'* (PhD Thesis, National University of Ireland Galway 2011), at 159.
[205] UNHCR, *Global Trends: Forced Displacement in 2019* (UNHCR, 2020).

6.1 The Influence of Article 1(F)(c) of the 1951 Refugee Convention and Article 1(5)(c) of the 1969 OAU Convention on the Application of the Exclusion Clauses in Sub-Sharan Africa

The Organization for African Unity (OAU), since its creation in 1963 has constantly worked towards uniting African states together with an overall objective of creating better future for the people of Africa. The OAU in 1969 went on to conclude the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa which serves as a regional legal instrument aimed at protecting refugees in Africa. In relation to exclusion from refugee status, the exclusion clauses in the OAU Convention replicate the provisions of the 1951 Refugee Convention. However, Article 1(5) of the OAU Convention adds an extra clause that recalls the language of the Article 1(F)(c) but adds the purposes and principles of the OAU to its text. Article 1(5) of the OAU Convention is worded as follows:

> "the provisions of this Convention shall not apply to any persons 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 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 Organization of African Unity; (d) he has been guilty of acts contrary to the purposes and principles of the United Nations."[206]

However, the purposes and principles of the OAU differ from those of the UN in two ways: (i) they include more concrete African political objectives of the time[207] and (ii) in relation to exclusion, they condemn acts such as 'subversive activities' and 'political assassinations', that can be conducted by individuals. These key differences offer a stronger basis for the exclusion of individuals from refugee status through the application of Article 1(5)(c) of the 1969 OAU Convention.[208]

[206] Organization for African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45, Art. 1(5).
[207] Objectives such as: unity, independence, non-alignment, eradicating colonialism etc.
[208] Charter of the Organization of African Unity, Art. III (5).

More than 35 African countries, in their national refugee legislations, have included elements of the exclusion clause based on Article 1(5)(c) of the OAU Convention making it a widely accepted instrument. Thus, the extent to which the OAU Convention's rules are applied in the national legislations offers a perspective on the attitude of states towards the rules, African states do not seem to have differences in the interpretation of these rules, neither do they seem to doubt the validity of Article 1(5)(c).[209] However, a substantive question arises from that fact that after the creation of the 2000 African Union Constitutive Act, which also led to the creation of the African Union (AU) and dissolution of the OAU, many states in their new national refugee legislations have begun to refer to exclusion on the basis of acts committed against the purposes and principles of the AU instead of the OAU.

This makes sense as the AU is the successor to the OAU, however, the objectives (not purposes) and principles of the AU are both broader and have different goals than those from the OAU.[210] One example of this is that the AU not only condemns subversive activities and political assassinations but also 'terrorist acts'[211] It is also important to note that not all purposes and principles of the OAU were replicated in the AU.[212] Legally, this means that the exclusion of refugees under Article 1(5)(c) is dependent on whether the national legislation of a particular African State refers to the OAU or the AU, leaving a huge gap in the application of the exclusion clauses and with that undermining the protection of persons who face persecution.[213] This said, the UN and the AU generally have the same overall objectives. However, these two instruments are different in a way that, although the purpose of the AU is not new to the UN, the AU has been considered to be the primary go-to instrument in Africa.

When looking into application of the exclusion clauses in Sub-Sharan Africa, there are a few important questions we need to pay attention to. These questions will be addressed individually in the coming sections.

---

[209] David James Cantor and Farai Chikwanha. '*Reconsidering African Refugee Law'*, [2019] 31 IJRL182, at 199. To see list of 35 countries, refer to footnote 70 of the same pages.
[210] Constitutive Act of the African Union, (adopted 11 July 2000, entered into force 26 May 2001) 2158 UNTS 3, Articles 3 and 4.
[211] AU Constitutive Act, Art 4(o).
[212] For example, non-alignment and eradicating colonialism.
[213] Cantor and Chikwanha, op. Cit., at 201.

6.2 Standard of Proof For Exclusion in Sub-Saharan Africa

The first one is regarding the exact meaning of the expression "serious reasons for considering".[214] As mentioned in previous sections of this paper, the UNHCR does not give a clear meaning or intention of the phrase. It also does not provide a clear definition of the phrase which only complicates the matter further, especially in situations where decision makers must consider two regional instruments in the AU and UN.

When referring to cases in Sub-Saharan Africa, it could be said that the decision makers who make decisions on refugee status sometimes tend to face not only individuals who face domestic criminal procedures but also, and to a larger extent, individuals who are facing prosecution from international tribunals.[215] The case-law of the ICTR has shown that prosecutors need to have substantial proof of participation in criminal activities before accusing them. This burden of proof requirement may sometimes make decision makers in African states rely on an indictment of an individual by for example, the ICTR, for war crimes or the other crimes listed in Article 1(F)(a) of the 1951 Refugee Convention and Article 1(5) of the OAU Convention. This would automatically prove that there are "serious reasons for considering" that he/she has committed such crimes.[216]

6.3 Mass Influx

The second question that arises during the application of the exclusion clauses in Sub-Sharan Arica is one on situations of mass influx. Unlike countries like the United Kingdom, Canada and many other countries in the global north, countries in Sub-Saharan Africa often receives asylum applications in large numbers. This is because there are a lot of ongoing civil wars in countries like the Democratic Republic of Congo and South Sudan that contribute to mass displacement.[217] Mass influxes often occur as consequences of war crimes or crimes against humanity[218], and often the perpetrators will seek refuge from prosecution amongst the asylum-seekers and a failure to

[214] Michael Bliss, '*Serious Reasons for Considering: Minimum Standards of Procedural Fairness in the Application of the Article 1F Exclusion Clauses'* [2000] 12 IJRL 92, at 115.
[215] ibid., at 119
[216] ibid.
[217] UNHCR, *Global Trends 2019* op. cit., at 3.
[218] Cristiano D'Orsi, *'Specific Characteristics and Challenges of Refugee and Asylum Seeker Protection in Sub-Saharan Africa- Lessons Learnt in Search of a Better Future'* (PhD Thesis, Université De Genève 2013), at 181.

identify and exclude these perpetrators could cause obstacles in the protection of *bona fide* refugees.[219]

In most situations of mass influxes in Africa, exclusion cases will be dealt with in a separate procedure after group inclusion under Article 1(2) of the OAU Convention has taken place. Once an individual has been included in the group inclusion determination process; he/she is a refugee until a decision is reached to exclude him/her under Article 1(5) of the OAU Convention. In short, while it is permitted to include refugees in a group in situations of mass movement, it is not allowed to exclude refugees on the basis of group determination as it would be contrary to states' obligations as laid down by the 1969 OAU Convention, making inclusion a prerequisite to exclusion in situations of mass influx.[220] Most countries in Sub-Saharan Africa often include refugees before excluding them. Exclusion before inclusion in Africa is rare as it goes against the purposes and objectives of both the 1951 Refugee Convention and the 1969 OAU Convention.[221] In addition, where exclusion is considered in situations of mass influx the balancing test must be applied. This basically means that the decision-maker will need to consider the risk of persecution the refugee faces individually and only exclude the refugee if the acts he/she has committed outweigh his/her level of persecution. This also helps maintain procedural fairness in exclusion decisions.[222]

Although situations of mass influx are different to individual determination processes in the global north, the same requirements of procedural fairness when dealing with exclusion cases still apply. However, state practice in the global north on inclusion before exclusion has almost never been uniform. For example, the U.K Immigration Appeals Tribunal throughout its case law has stated multiple times that inclusion should be considered before exclusion only when the application of Article 1(F)(b) is in question. This is because they apply the balancing test during the application of Article 1(F)(b) that deals with persons who have committed serious non-political crimes.[223] In Canada, the Federal Court of Appeals in *Moreno v. Canada*[224] stated that decision-

[219] ibid., at 182.
[220] Bliss, op. cit., at 120.
[221] ibid., at 107.
[222] ibid., at 129.
[223] ibid., at 108.
[224] *Moreno v. Canada (Minister of Employment and Immigration)* [1993] 2993 (FCA), [1994] 1 FC 298.

makers have no obligation to put inclusion before exclusion but observed that it would have been preferable if the decision-maker took that into account when dealing with the case.

6.4 Sub-Saharan Africa: National Legislations and Exclusion.

The national legislations of states in Sub-Saharan Africa regarding exclusion are usually different but not that conflicting. In fact, many countries in the region do not even include the exclusion clauses in their legislations.[225]

Many countries in the global north like the UK and Canada, have throughout their case-laws on immigration and exclusion set out their own interpretation of what acts are subject to exclusion under Article 1(F)(a). As we have seen previously in this paper, states' interpretation of Article 1(F)(a) has served great importance in shaping state practice on exclusion at various levels. Almost no domestic legislation of states in Sub-Saharan Africa provides a formal definition or interpretation of acts for which an individual may be excluded from refugee status. An exception is Namibia, where section 4 (3) of the 1999 Namibia Refugees (Recognition and Control) Act entails the definitions of "crime against peace or war crime or crime against humanity".[226]

On a general level, different states have different ways in which they deal with and interpret the exclusion clauses. When it comes to the application of the exclusion clauses and in particular Article 1(F)(a) no state apart from Namibia contains precise definitions of crimes listed in the mentioned article. However, this does not mean that these domestic legislations do not entail any elements of exclusion at all. Senegal for example, created a law in which both exclusion and cessation were put under one regulation that justified the loss of refugee status.[227] The structure of the Senegalese government makes it difficult to understand what pushed the Senegalese authorities to combine the traditional exclusion and cessation clauses which stand out independently in the main international instruments. Some scholars have argued that this could be due to its "weak" governmental institutions that keep falling short of in enforcing the international instruments like the 1951 Refugee Convention.[228]

---

[225] *Senegal: Law No. 68-27 of 1968 amended on the status of refugees*, 17 August 1968; *Gabon: Loi No. 5/98 du 1998, Portant statut des réfugiés en République gabonaise [Gabon]*, 5 March 1998.
[226] Namibia: *Refugees (Recognition and Control) Act 2* [1999], Section 4 (3).
[227] Sénégal: *Décret n° 78-484 du 5 juin 1978 modifie relatif à la Commission des réfugiés,* [1978], Article 2(2).
[228] Peter Nobel, '*Refugees, Law and Development in Africa'* [1982] 3 Mich. J. of Int'l L. 268.

One thing that is important to highlight in the overall state practice of Sub-Saharan African states is that there are clear tendencies in which national legislations of Sub-Saharan African states only refer to treaties to which the state concerned is party. For example, if Kenya is only signatory to the Rome Statute, it will only refer to crimes listed by the Rome Statute during exclusion proceedings. This trend has proven to narrow down the possibilities of exclusion from refugee status. Yet these practices to limit exclusion tend to create controversies with the wider goal of other African states and with the objectives of the OAU Convention as many states in the region and are trying to restrict the flow of refugees at their borders.[229]

To conclude, the lack of acknowledgment of the exclusion clauses in Sub-Saharan African states' legislations could be seen as a potential weakness and reason to why there has been minimal scholarly attention on exclusion proceedings deriving from this region. This also gives more credibility to the UNHCR through which decisions on exclusion are less likely to be contested. On the other hand, state practices on exclusion in Sub-Saharan Africa has different elements, from the role of the OAU to the role of the UN, these states have a wide array of instruments to rely upon when dealing with exclusion. What we saw here is that despite these states having the freedom to interpret and domesticate Article 1(F)(a) in ways that contribute to their national interests, most states have chosen to uphold the guidelines provided by the 1969 OAU Convention and the 1951 Refugee Convention. We have also seen that the Sub-Saharan region faces different challenges to what western states face, for example, in situations of mass influx, however, regardless of the type of movement, certain safeguarding elements and procedural fairness routines should be maintained to uphold the principal objective of the 1951 Refugee Convention. Finally, we have seen that inclusion has always come before exclusion in Sub-Saharan Africa and with that states have always looked to narrow down the possibilities of exclusion by only referring to treaties that they are signatory to. More importantly this has shown us that putting such safeguards at the center of protection are not only important to protect the rights of the individual in question but also to protect attempts by other states to weaken the protection obligations to which they all agreed to under the 1951 Refugee Convention.

[229] Cantor and Chikwanha, op. Cit., at 219.

Conclusion to Part II

This chapter discussed some of the integral elements of Article 1(F)(a) of the 1951 Refugee Convention, by paying critical attention to the scope and contents of "war crimes" as grounds for exclusion. It does so whilst advocating for a more consistent framework that both protects the international refugee regime and maintains normative consistency in state practice. Having consistency in exclusion proceedings would ensure that the object and purpose of the 1951 Refugee Convention is upheld but more importantly it would ensure that vulnerable persons deserving of international protection would never be left out while alleged war criminals are held accountable for their actions. A restrictive approach in the application of the exclusion clauses implies that once the content of the integrated concepts is determined in accordance with international criminal law, they must be read and applied together with the elements established in the text of Article 1(F), as well as the limitations that originate from the object and purpose of the Convention in its entirety. Applying the exclusion clauses based on the fact that "war crimes" as stated in Article 1(F)(a) has an autonomous meaning or that exclusion includes other forms of criminal liabilities besides those enlisted in international criminal law, would not only undermine the objective and purpose of the Convention but also contribute to a flawed interpretation of it during exclusion proceedings.

When referring to the standard of proof for exclusion, the "serious reasons for considering" threshold which is a genuine evolution of international refugee law- must be applied independently and in light with the object and purpose of the Convention. This standard of proof (which is lower than 'proof of guilt beyond reasonable doubt' but higher than 'mere suspicion or conjuncture' and 'reasonable grounds') also includes extensive considerations of relevant criminal liability. Moreover, "serious reasons for considering" implies that, before applying Article 1(F)(a), the decision makers must be sure that there is substantive evidence that the individual in question committed a war crime, whilst also making sure that the decision is not based on disputed rules and legalities.[230]

Retrospectively, one may see that when the 1951 Refugee Convention came into force the internationalization of war crimes was still in its infancy. Since then, the scope of war crimes law

[230] See section on "standard of Proof for Exclusion" of this paper.

has evolved quite considerably. A clear example of this is the criminalization of serious violations of the *jus in bello* governing non-international armed conflicts. On the other hand, the flexible language of Article 1(F)(a) allows states to interpret "war crimes" in dynamic ways.[231] We can see that throughout this paper as has been with the case-law of various tribunals like the ICTY, ICTR, states like the United Kingdom, Canada and other states in Sub-Saharan Africa. To sum up, it is at the hand of decision makers to decide how they want to interpret, adapt and apply the terms of international criminal law, refugee law and the laws of war as long as they do so by observing and respecting the purposes and objectives of the Convention.

[231] UNHCR, *Background Note,* op. cit., para 25.

Conclusion

This year will mark the 70th anniversary of the adoption of the 1951 Refugee Convention. The world has on its hands an unprecedented number of displaced persons which is only increasing by the year. Almost 80 million people worldwide have been forced to leave the comfort of their homes due to civil wars, armed violence and fears of persecution.[232] From that, over 26 million people have had to cross international borders to seek refuge while other have been displaced internally or are awaiting protection as asylum seekers in camps and asylum centers all over the world. Continuous violations of the laws and customs of war have been a major driving force in creating displacement and to add on, states are continuously looking for creative ways to by-pass binding rules that are in place to protect refugees. The rise of anti-refugee political ideals around the world together with the criminalization of migration[233] continues to disrupt the integrity and stability of an already weak international refugee regime. With increasing xenophobic and chauvinistic political systems all over the world[234], finding adequate protection as a refugee can be a daunting task with most having to make choices between life and death. Paying critical attention to all the challenges and uncertainties regarding the law of refugee status is, now more than ever, vital to save the international refugee regime.

By conducting a deeper examination of exclusion from refugee status based on accusations of "war crimes" this paper continuously observed its primary objectives of first, advocating for consistency in state practice during the application of the exclusion clauses and second, highlighting the state practice on the application of the exclusion clauses of states in the global south amidst the serious lack of scholarly attention. Furthermore, it studies the relationship between international refugee law, international criminal law and the laws of war and their relevance during the application of Article 1 (F)(a). The first part of this research began by studying the historical processes that led to the development of the exclusion clauses and then later delves deeper into all the events that led up to the formation of Article 1(F)(a) of the 1951 Refugee Convention. The main arguments were inspired by the practice of different states both in the global north and south, together with the

[232] UNHCR, *Global Trends 2019* op. cit., at 2.
[233] Human Rights Watch, *European Union: Events of 2019*, In: World Report 2020 (Human Rights Watch, 2020).
[234] ibid., at 210.

case-laws of various courts and tribunals. The findings of this research will be summarized in four parts below.

Firstly, some of the challenges that decision makers who deal with the interpretation and application of Article 1(F)(a) face today are due to some of the structural problems of the international refugee regime. The lack of an international court or authority that ensures the swift harmonization of the international refugee regime and with that international refugee law gives states the freedom to make decisions on how they apply and interpret the exclusion clauses. A consequence of this is that when applying Article 1(F)(a), decision-makers are forced to resort to case-laws of different courts and tribunals from other countries resulting in great inconsistencies. This is a result of the state-centric ideology of the 1951 Refugee Convention, whose initial goal was to only offer short-term protection to a small number of people who were forced to flee into exile, whilst ensuring that the territorial integrity of states is at no point violated.

Secondly, the definition of war crimes in Article 1(F)(a) is very similar to the definition provided in international criminal law. Therefore, international criminal law will always be the foundational element of law through which decision-makers will have to make their decisions on. The reason for this is that international refugee law draws inspiration from the constitutive elements of international criminal law and does not lead it.[235] Hence, the application of Article 1(F)(a) would almost be impossible without making reference to external sources, such as, the Geneva Conventions of 1949, the Rome Statue, and case-laws of international criminal tribunals such as the ICTY and ICTR. After all, these sources to a great extent influenced the formation process of the 1951 Refugee Convention and with that exclusion clauses and Article 1(F)(a). National courts and international tribunals continue to make efforts to try and keep up with the modernization of war and with that the different set of rules that govern it e.g. IHL. This can be seen with the criminalization of serious violations of the laws governing NIAC's and its incorporation as an exclusion criteria.

Thirdly, there lies a huge gap in documenting the state practice of countries in the global south, something that has received incredibly low attention by scholars writing on this topic. While most of the case-laws used in academia come majorly from the global north (mainly: Canada, United

[235] Hathaway and Foster, op. cit., at 572.

Kingdom, Australia, New Zealand, and France), the entirety of state practice on exclusion from refugee status in the global south remains unknown. This is extremely worrying as developing countries host over half of the refugee population. [236] While this research tries to fill that void by highlighting the state practice of countries in Sub-Saharan Africa not much else can be highlighted from the rest of the states in the global south. One reason for this could be that most of the refugee status determination (RSD) processes in such countries is primarily managed by the UNHCR and therefore the rates of contention remain pretty low. If that may be the case, the guidelines provided by the UNHCR in its Handbook[237] and its Guidelines on International Protection should be taken more seriously in RSD processes. Nevertheless, this is an area that undoubtedly deserves more academic and international attention.

Fourthly, tangible case-laws on exclusion have shown consistency in referencing international criminal law when interpreting and applying Article 1(F)(a) in specific regards to exclusion from refugee status based on accusations of "war crimes". It has also been the primary source of law when determining the mode of criminal liability. [238] The most referred to source of interpretation has also been the Rome Statute[239] and the case law of the ICTY. On the other hand, case-laws from states like Canada and the United Kingdom have shown contrasting state practice in relation to essential elements of exclusion such as the interpretation of the standard of proof for exclusion. The interpretation of "serious reasons for considering" has continuously been subject to change depending on the crime and case in question. Irrespective of the lack of consistency in state practice, the case-laws deriving from these countries continue to be key reference points on exclusion trials globally.

---

[236] Cf. UNHCR, *Global Trends 2019* op. cit., at 2.

[237] UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status* was created at the request of the Executive Committee of the High Commissioner, a body comprising of 53 nations, and issued in accordance with the Office's supervisory responsibility as provided in Article 8(a) of its statute. The Handbook provides important guidance on the interpretation and application of both the 1951 Refugee Convention and the 1967 Protocol.

[238] The Court of Appeal (EWCA) stated in *JS*: "[t]he starting point for a decision maker addressing the question whether there are serious reasons for considering that an asylum seeker has committed an international crime, so as to fall within Article 1F(a), should now be the ICC Statute. The decision maker will need to identify the relevant type or types of crimes, as defined in articles 7 and 8; and then to address the question whether there are serious reasons for considering that the applicant has committed such a crime, applying the principles of criminal liability set out in articles 25, 28 and 30 and any other articles relevant in the particular case. " In: *R (on the application of JS) (Sri Lanka),* EWCA, op. cit., para 115.

[239] The Rome Statute is "the most comprehensive and authoritative statement of international thinking on the principles that govern liability for the most serious international crimes", observed by the Supreme Court of the United Kingdom, In: *R (on the application of JS) (Sri Lanka) (Respondent),* op. cit., para 9.

To conclude, exclusion of alleged war criminals under Article 1(F)(a) of the 1951 Refugee Convention must be applied in a restrictive, just and consistent manner. Restrictive, so that the content of war crimes and the mode of criminal liability are determined by international criminal law, applied in line with the text of Article 1(F)(a) while respecting and observing the humanitarian objective of the 1951 Refugee Convention. Just, so that states can safe-guard the institution of asylum by ensuring *bona fide* refugees protected and alleged criminals are excluded, held accountable and prosecuted for their acts, whilst ensuring the grounds for exclusion are not based on contested rules and legalities. Consistent, so that we can get rid of a flawed interpretation of the exclusion clauses and with that of the 1951 Refugee Convention. While at the same time maintain uniformity and integrity in state practice when dealing with cases that fall within the framework of the international refugee regime.

⁂

References

I. Primary Sources

1. Treaties

Agreement Relating to Transfer of Responsibility for Displaced Persons from SACMED to UNRRA (1946).

Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

Constitution of the International Refugee Organization (adopted 15 December 1946, entered into force 20 August 1948) 18 UNTS 3.

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

Geneva Convention (III) Relative to the Treatment of Prisoners of War (opened for signature 12 August 1949, entered into force 21 October 1950), 75 UNTS 135.

Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), 137 UNTS 123.

Vienna Conventions on the Law of Treaties (adopted 23 may 1969, entered into force 27 January 1980), 1155 UNTS 331.

2. International Jurisprudence

International Court of Justice

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) Advisory Opinion of 21 June 1971, ICJ Reports.

Rights of Nationals of the United States of America in Morocco (France v. United States of America) (1952), Judgement. ICJ Reports.

International Criminal Tribunal for the Former Yugoslavia (ICTY)

Prosecutor v Anto Furundžija (Judgment) IT-95-17/1-T (10 December 1998).

Prosecutor v. Kunarac et al. (Judgment) IT-96-23 & IT-96-23/1-A (12 June 2002).

Prosecutor v. Radoslav Brdanin (Judgement) IT-99-36-A (3 April 2007).

Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1 (2 October 1995).

Prosecutor v Tadić (Judgment, Appeals Chamber) IT-94-1-A (15 July 1999).

International Criminal Tribunal for Rwanda (ICTR)

Prosecutor v. Akayesu (Judgement Trial Chamber I) ICTR-96-4-T (2 September 1998).

Prosecutor v. Athanase Seromba (Judgement Trial Chamber) ICTR-2001-66-1 (13 December 2006).

3. National Jurisprudence

Australia

SRYYY v. Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCAFC 42.

Canada

Ezokola v. Canada (Citizenship and Immigration) [2013] SCC 40, [2013] 2 SCR 678.

Moreno v. Canada (Minister of Employment and Immigration) [1993] 2993 (FCA), [1994] 1 FC 298.

Saul Vicente Ramirez v. Canada (Minister of Employment and Immigration) [1992] FCJ 109.

New Zealand

Attorney-General (Minister of Immigration) v Tamil X [2010] NZSC 107, [2011] 1 NZLR 721.

South Africa

Gavrić v Refugee Status Determination Officer, Cape Town and Others [2018] ZACC 38.

United Kingdom

AB (Appellant) vs. The Secretary of State for the Home Department (Respondent) [2006] UKUT 00376.

Gurung (Appellant) v. The Secretary of State for the Home Department (Respondent) [2002] UKIAT 4870.

R (on the application of JS) (Sri Lanka) (Respondent) v. Secretary of State for the Home Department (Appellant) [2010] UKSC 15.

R (on the application of JS) (Sri Lanka) v. Secretary of State for the Home Department [2009] EWCA Civ 364.

R v Asfaw [2008] UKHL 31, [2008].

Yasser Al-Sirri v. Secretary of State for the Home Department, [2009] EWCA Civ 222.

4. United Nations Documents - Memoranda's, Reports and Resolutions

ILC, '*Commentary on draft articles*' [1966] Yearbook of the ILC [1966] II.

UN Doc. A/C.3/7.

UN Doc. GA res. 8(I).

UN Doc. E/1112, ("A Study of Statelessness", 1949).

UN Doc. GA res. 319 (IV).

UN Doc. E/AC.32/2, ("Memorandum by the Secretary-General to the Ad Hoc Committee on Statelessness and Related Problems", 1950.

UN. Doc. GA res. 428 (V), ("Statute of the Office of the United Nations High Commissioner for Refugees", 1950).

UN Doc. ECOSOC res. 248 (IX).

UN Doc. A/C.3/527, ("Refugees and Stateless Persons; Report of the Secretary General", 1949).

UN Doc. A/C.3/529, ("Refugees and Displaced Persons: France: Draft Resolution").

UN Doc. A/C.3/L.29.

UN Doc. ECOSOC res. 319A (XI).

UN Doc. ECOSOC res. 116 (VI) D.

UN Doc. E/AC.32/5 (E/1618), ("Report of the Ad Hoc Committee on Refugees and Stateless Persons", 1950).

UN Doc. E/AC.7/SR. 160.

UN Doc. E/AC.7/SR.166.

UN Doc. ECOSOC Res. 319 B (XI) II.

UN Doc. A/CONF.2/76.

UN Doc. A/CONF.2/SR.24.

UN Doc. A/CONF.2/92.

UN Doc. A/CONF.2/SR.29.

UN Doc. A/Conf.2/L.1 Add. 10.

UN Security Council, *Statute of the International Criminal Tribunal for the Former Yugoslavia* (as amended on 17 May 2002), 25 May 1993.

UN Security Council, *Statute of the International Criminal Tribunal for Rwanda* (as last amended on 13 October 2006), 8 November 1994.

5. Regional and National Legislations

Organization for African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45.

Charter of the Organization for African Unity.

Constitutive Act of the African Union, (adopted 11 July 2000, entered into force 26 May 2001) 2158 UNTS 3.

Gabon: *Loi No. 5/98 du 1998, Portant statut des réfugiés en République gabonaise*, 5 March 1998.

Namibia: *Refugees (Recognition and Control) Act*, 19 March 1999.

Senegal: *Décret n° 78-484 du 5 juin 1978 modifie relatif à la Commission des réfugiés*, 17 June 1978.

Senegal*: Law No. 68-27 of 1968 amended on the status of refugees*, 17 August 1968.

6. Miscellaneous

Human Rights Watch, '*European Union: Events of 2019'*, In: World Report 2020 (Human Rights Watch, 2020).

International Criminal Court, *'Elements of Crimes'* (ICC, 2011).

IRO, *'Manual for Eligibility Officers'* (Imprimeries Populaires, 1950).

UNHCR, *'Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees'* (UNHCR, 2003)

UNHCR, *'Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*' (UNHCR, 2001).

UNHCR, *'Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees'* (UNHCR, 2003).

United Nations, *'Summary of AG-018 United Nations Relief and Rehabilitation Administration (UNRRA) (1943-1946)'* (United Nations Archive and Records Management Section, 2015).

II. Secondary Sources

Amrit Kharel, *'Doctrinal Legal Research',* [2018] SSRN Electronic Journal.

Andreas Zimmerman, *'The 1951 Refugee Convention Relating to the Status of Refugees and its 1967 Protocol : A Commentary'* (Oxford University Press, 2011).

Andrew Clapham, *'Brierly's Law of Nations: An Introduction to the Role of International Law in International Relations'* (Oxford University Press, 7th ed, 2012).

Antonio Cassese *et al*, *'Cassese's International Criminal Law'* (Oxford University Press, 3rd ed, 2013).

Atle Grahl-Madsen, *'The Status of Refugees in International Law'* (vol. I, A.W.Sijthoff, 1966).

Colloquium on Challenges in International Refugee Law, '*The Michigan Guidelines on the Exclusion of International Criminals*', [2013] 35 Mich. J. Int'l L. 3.

Cristiano D'Orsi, *'Specific Characteristics and Challenges of Refugee and Asylum Seeker Protection in Sub-Saharan Africa- Lessons Learnt in Search of a Better Future'* (PhD Thesis, Université De Genève 2013).

David James Cantor and Farai Chikwanha, *'Reconsidering African Refugee Law'* [2019] 31 IJRL 182.

Emily Crawford, *'Proportionality'*, In: Rüdinger Wolfrum (ed), The Max Planck Encyclopaedia of Public International Law. (Oxford University Press, 2012).

Eve La Haye, *'War crimes in internal armed conflicts'*, (Cambridge University Press 2008).

Gary D. Solis, *'The Law of Armed Conflict: International Humanitarian Law in War'*, (Cambridge University Press, 2nd ed, 2016).

Glenn A. Bowen, '*Document Analysis as a Qualitative Research Method',* [2009] 9 Qualitative Research Journal.

Guy Goodwin-Gill and Jane McAdam, *'The Refugee in International Law'* (Oxford University Press, 3rd ed, 2007).

Hersch Lauterpacht, *'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*' [1949] 26 Brit YB Int'l L 48.

Ian Dobinson and Francis Johns, *'Qualitative Legal Research',* In: Mike McConville and Wing Hong Chui (ed), Research Methods for Law (Edinburgh University Press, 2007).

James Hathaway and Michelle Foster, *'The Law of Refugee Status'* (Cambridge University Press, 2nd ed, 2014).

James Simeon, *'The Application and Interpretation of International Humanitarian Law and International Criminal Law in the Exclusion of those Refugee Claimants who have Committed War Crimes and/ or Crimes Against Humanity in Canada'* [2015] IJRL 75.

Jan Sieckmann, *'Proportionality as a Universal Human Rights Principle',* In: David Duarte and Jorge Silva Sampaio (ed), Proportionality in International Law: An Analytical Perspective (Springer, 2018).

Jean Pictet (ed.), *'The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field: Commentary'*, (ICRC, 1952).

Jennifer Bond, *'Principled Exclusion: A Revised Approach to Article1(F)(a) of the Refugee Convention'* [2013] 35 Mich. J. Int'l L. 15.

Joseph Rikhof, *'The Relationship between Refugee Exclusion Law and International Law: Convergence or Divergence?'* (PhD Thesis, National University of Ireland Galway 2011).

Joseph Rikhof, *'Exclusion at a Crossroads: The Interplay between International Criminal Law and Refugee Law in the Area of Extended Liability'* [2011] PLA/2011/06 1.

Louise W. Holborn, *'The International Refugee Organization: a specialized agency of the United Nations, its history and work 1946—1952'* (Oxford University Press, 1956).

Michael Bliss, *'Serious Reasons for Considering': Minimum Standards of Procedural Fairness in the Application of the Article 1F Exclusion Clauses'* [2000] 12 IJRL 92.

Nikola R. Hajdin, *'The actus reus of the Crime of Aggression',* In: Eric De Brabandere (ed), Leiden Journal of International Law (Cambridge University Press, 2021).

Peter Nobel, *'Refugees, Law and Development in Africa',* [1982] 3 Mich. J. of Int'l L.1.

Richard Gardiner *'Part II Interpretation Applying the Vienna Convention on the Law of Treaties, A General Rule, 5 The General Rule: (1) The Treaty, its Terms, and their Ordinary Meaning'* [2015] Oxford Public International Law.

Royal Institute of International Affairs, *'The Treatment of War Crimes: III. Punishment of Quislings and Traitors*' [1945] Bulletin of International News 22, [1945] 251.

Sibylle Kapferer, *'Article 14(2) of the Universal Declaration of Human Rights and Exclusion from International Refugee Protection',* [2008] 27 Refugee Law Quarterly 53.

Sibylle Kapferer, *'Exclusion Clauses in Europe – A Comparative Overview of State Practice in France, Belgium and the United Kingdom'* [2000] 12 IJRL 195.

Terry Hutchinson & Nigel Duncan, *'Defining and Describing What We Do: Doctrinal Legal Research',* [2012] 17(1) Deakin. L. Rev.

United Nations, *'Economic and Social Questions'* [1950] Yearbook of the United Nations 24, [1950] 438.

Wolfgang Schomburg and Ines Peterson, *'Genuine Consent to Sexual Violence under International Criminal Law*', [2007] American Journal of International Law, 101-1.

Annex I

List of Acts That May Be Considered as War Crimes Under the Context of International Armed Conflicts (IAC's)

The Hague Conventions of 1907 On the Laws and Customs of War on Land

(Hague IV)

Art. 23. In addition to the prohibitions provided by special·Conventions, it is especially forbidden:
(a) To employ poison or poisoned weapons;
(b) To kill or wound treacherously individuals belonging to the hostile nation or army;
(c) To kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion;
(d) To declare that no quarter will be given;
(e) To employ arms, projectiles, or material calculated to cause unnecessary suffering;
(f) To make improper use of a flag of truce, of the national flag, or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention;
(g) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war;
(h) To declare abolished, suspended, or inadmissible in a Court of law the rights and actions of the nationals of the hostile party. A belligerent is likewise forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war.

Art. 25. The attack or bombardlp.ent, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited.

Art. 27. In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.

Art. 28. The pillage of a town or place, even when taken by assault, is prohibited.

Charter of the International Military Tribunal (Nuremberg Charter)

Article 6

The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes. The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(...)

b) War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to Slave labour 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.

Grave Breaches and Additional Protocols of the Geneva Conventions

First Geneva Convention

Article 50:

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Second Geneva Convention

Article 51:

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Third Geneva Convention

Article 130:

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.

Fourth Geneva Convention

Article 147:

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Additional Protocol I of 1977

Article 11 – Protection of Persons

(…)

4. Any wilful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a Party other than the one on which he depends and which either violates any of the prohibitions in paragraphs 1 and 2 or fails to comply with the requirements of paragraph 3 shall be a grave breach of this Protocol.

Article 85 – Repression of Breaches of this Protocol

(…)

2. Acts described as grave breaches in the Conventions are grave breaches of this Protocol if committed against persons in the power of an adverse Party protected by Articles 44, 45 and 73 of this Protocol, or against the wounded, sick and shipwrecked of the adverse Party who are protected by this Protocol, or against those medical or religious personnel, medical units or medical transports which are under the control of the adverse Party and are protected by this Protocol.

3. In addition to the grave breaches defined in Article 11, the following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health:

(a) making the civilian population or individual civilians the object of attack;

(b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a)(iii);

(c) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a)(iii);

(d) making non-defended localities and demilitarized zones the object of attack;

(e) making a person the object of attack in the knowledge that he is hors de combat;

(f) the perfidious use, in violation of Article 37, of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs recognized by the Conventions or this Protocol.

4. In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol:

(a) the transfer by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention;

(b) unjustifiable delay in the repatriation of prisoners of war or civilians;

(c) practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;

(d) making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, subparagraph (b), and when such

historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives;

(e) depriving a person protected by the Conventions or referred to in paragraph 2 of this Article of the rights of fair and regular trial.

Statute of the ICTY

Article 1: Competence of the International Tribunal

The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.

Article 2: Grave breaches of the Geneva Conventions of 1949

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(a) wilful killing;

(b) torture or inhuman treatment, including biological experiments;

(c) wilfully causing great suffering or serious injury to body or health;

(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;

(f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;

(g) unlawful deportation or transfer or unlawful confinement of a civilian;

(h) taking civilians as hostages.

Article 3: Violations of the laws or customs of war

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;

(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;

(d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;

(e) plunder of public or private property.

Statute of the ICTR

Article 1: Competence of the International Tribunal for Rwanda

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute.

Article 4: Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II

The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

(a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(b) Collective punishments;

(c) Taking of hostages;

(d) Acts of terrorism;

(e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(f) Pillage;

(g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilised peoples;

(h) Threats to commit any of the foregoing acts.

ILC Draft Code of Crimes Against Peace and Security of Mankind

1996

Article 20: War Crimes

Any of the following war crimes constitutes a crime against the peace and security of mankind when committed in a systematic manner or on a large scale:

(a) any of the following acts committed in violation of international humanitarian law: (i) wilful killing;
(ii) torture or inhuman treatment, including biological experiments;
(iii) wilfully causing great suffering or serious injury to body or health;

(iv) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(v) compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(vi) wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(vii) unlawful deportation or transfer of unlawful confinement of protected persons; (viii) taking of hostages;

(b) any of the following acts committed wilfully in violation of international humanitarian law and causing death or serious injury to body or health:

(i) making the civilian population or individual civilians the object of attack;

(ii) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects;

(iii) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects;

(iv) making a person the object of attack in the knowledge that he is hors de combat;

(v) the perfidious use of the distinctive emblem of the red cross, red crescent or red lion and sun or of other recognized protective signs;

(c) any of the following acts committed wilfully in violation of international humanitarian law:

(i) the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies;

(ii) unjustifiable delay in the repatriation of prisoners of war or civilians;

(d) outrages upon personal dignity in violation of international humanitarian law, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(e) any of the following acts committed in violation of the laws or customs of war:

(i) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;

(ii) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(iii) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings or buildings or of demilitarized zones;

(iv) seizure of, destruction of or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;

(v) plunder of public or private property;

(f) any of the following acts committed in violation of international humanitarian law applicable in armed conflict not of an international character:

(i) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(ii) collective punishments;

(iii) taking of hostages;

(iv) acts of terrorism;

(v) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(vi) pillage;

(vii) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are generally recognized as indispensable;

(g) in the case of armed conflict, using methods or means of warfare not justified by military necessity with the intent to cause widespread, long-term and severe damage to the natural environment and thereby gravely prejudice the health or survival of the population and such damage occurs.

Rome Statute of the International Criminal Court

Article 8:

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, "war crimes" means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(i)Wilful killing;
(ii) Torture or inhuman treatment, including biological experiments;

(iii) Wilfully causing great suffering, or serious injury to body or health;

(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(vii) Unlawful deportation or transfer or unlawful confinement;

(viii) Taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

(vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

(vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;

(xii) Declaring that no quarter will be given;

(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(xvi) Pillaging a town or place, even when taken by assault; (xvii) Employing poison or poisoned weapons;

(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;

(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

Annex II

List of Acts That May Be Considered as War Crimes Under the Context of Non - International Armed Conflicts (NIAC's)

Geneva Conventions and Additional Protocols

Common Article 3

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' hors de combat ' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.
The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Additional Protocol II of 1977

Article 1: Material field of application

This Protocol, which develops and supplements Article 3 common to the Geneva

Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

Article 4: Fundamental guarantees

1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.

2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:

(a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(b) collective punishments;

(c) taking of hostages;

(d) acts of terrorism;

(e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(f) Slavery and the slave trade in all their forms;

(g) Pillage;

3. Children shall be provided with the care and aid they require, and in particular:

(a) they shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care;

(b) all appropriate steps shall be taken to facilitate the reunion of families temporarily separated;

(c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities;

(d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of sub-paragraph (c) and are captured;

(e) measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being.

Statute of the ICTY

Article 1: Competence of the International Tribunal

The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.

Article 3: Violations of the laws or customs of war

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;

(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;

(d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;

(e) plunder of public or private property.

Statute of ICTR

Article 1: Competence of the International Tribunal for Rwanda

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute.

Article 4: Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II

The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

(a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(b) Collective punishments;

(c) Taking of hostages;

(d) Acts of terrorism;

(e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(f) Pillage;

(g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilised peoples;

(h) Threats to commit any of the foregoing acts.

Rome Statute

Article 8(2)

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(iii) Taking of hostages;

(iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

(d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(v) Pillaging a town or place, even when taken by assault;

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(ix) Killing or wounding treacherously a combatant adversary;

(x) Declaring that no quarter will be given;

(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(xiii) Employing poison or poisoned weapons;

(xiv) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xv) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions.

(f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.