Asylum for the "Undeserving": A Human Rights Perspective on the Refugee Convention's Exclusion Clause

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Article 1F of the Convention relating to the Status of Refugees allows a state to exclude an individual who would otherwise qualify for asylum from obtaining refugee status if they are suspected — but not convicted — of a serious domestic or international offence. The majority of academic discussion on exclusion focusses on how to ensure due process for claimants, or how best to put the exclusion clauses into practice in accordance with international public, human rights and criminal law. However, there is little literature questioning whether the exclusion clauses themselves are justifiable or desirable. This article does exactly that. It asks whether today, nearly 70 years after the Convention was drafted, the rationales for exclusion still hold water. It appraises the justifications typically provided for exclusion, and finds that they fall short of the human rights standards to which the international community has committed itself. The reader is invited to question whether the international asylum system can truly have integrity if it allows an individual to be returned to a state where they will likely face human rights abuses, or even death, simply because they have been labelled "undeserving" of protection.

I INTRODUCTION

> [T]he individual is always more than a refugee, for the individual remains a human being.
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> —Gervase Coles[1]

The preamble of the Convention relating to the Status of Refugees (the Refugee Convention) recalls "the principle that human beings shall enjoy fundamental rights and freedoms without discrimination".[2] However, certain

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1 Gervase Coles "Approaching the Refugee Problem Today" in Gil Loescher and Laila Monahan (eds) *Refugees and International Relations* (Oxford University Press, Oxford, 1989) 373 at 395 as cited in Todd Howland "Refoulement of Rwandan Refugees: the UNHCR's Lost Opportunity to Ground Temporary Refuge in Human Rights Law" (1998) 4 UC Davis J Int'l L & Pol'y 73 at 92.

2 Convention relating to the Status of Refugees 189 UNTS 137 (signed 28 July 1951, entered into force 22 April 1954) [Refugee Convention], preamble. See also Protocol relating to the Status of

aspects of the Convention are incongruous with human rights norms.[3] The exclusion clauses in art 1F of the Refugee Convention allow a state to deny refugee status to an individual who would otherwise qualify for asylum if they are suspected — but not convicted — of a serious domestic or international offence. When viewed through a human rights lens, the exclusion clauses sit uncomfortably with modern understandings of the Refugee Convention as a human rights treaty. This is because exclusion punishes individuals for offences of which they have not yet been proven guilty.

This article examines the three main justifications for the exclusion clauses and argues that none of them are compatible with human rights principles. Part II provides an overview of the exclusion clauses and their practical application, and discusses the consequences of exclusion for asylum seekers. It explores the original rationales behind the exclusion clauses, which are best understood in light of the historical context in which the Refugee Convention was drafted. Part III discusses why it is both relevant and necessary to analyse the exclusion clauses through a human rights lens. Finally, Part IV explores the three main justifications for the exclusion clauses, evaluating them for consistency with contemporary human rights discourse. This article argues that these justifications cannot be reconciled with modern human rights norms, which is problematic in a global society that claims to hold human rights in high regard. The reader is invited to question whether the international asylum system can truly have integrity if it allows an individual to be returned to a state where they will likely face human rights abuses, or even death, simply because they have been labelled "undeserving" of protection.[4]

II SETTING THE SCENE

In order to fairly critique the exclusion clauses, one must first understand how they operate and why they were originally included in the Refugee Convention. This Part provides a brief overview of the exclusion clauses, how they operate and the consequences of exclusion for asylum seekers. It also describes the historical context in which the Refugee Convention was drafted and how it informed the rationales behind the concept of exclusion.

The Definition of "Refugee"

International protection for refugees predates the Refugee Convention; the concept of asylum has existed in various shapes and forms throughout much of history. However, the Refugee Convention was the first international

Refugees 606 UNTS 267 (opened for signature 31 January 1967, entered into force 4 October 1967) [Refugee Protocol], preamble.

3 This article uses the term *human rights* to refer to the rights to which individuals have legal entitlement by virtue of domestic and international human rights instruments.

4 See UNHCR *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* HCR/GIP/03/05 (2003) at [2].

instrument to address the problem of forced migration through the creation of a permanent framework for the protection of refugees,[5] driven predominantly by the need to address the mass displacement of people resulting from the Second World War.[6] The Convention was also one of the first international instruments to codify the modern definition of a refugee.[7] A person excluded from refugee status is someone who would otherwise fall under this definition.

An individual whose circumstances meet the refugee definition is said to be a refugee, and is therefore deemed deserving of protection by a receiving state.[8] Article 1A(2) of the Refugee Convention defines a refugee as someone who is unable or unwilling to return to their state of origin "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion". Article 33(1) protects a refugee from *refoulement* (expulsion or return) to any place where they may be persecuted on those grounds. Notably, while there is a human right to *seek* asylum, there is no right to *receive* asylum.[9] Only a person who meets the criteria of the art 1A(2) definition may receive asylum.

The Exclusion Clauses

Article 1F of the Refugee Convention provides certain exceptions to art 1A(2). It declares that specific individuals are excluded from refugee status:[10]

> The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
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> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

5 James C Hathaway "The Evolution of Refugee Status in International Law: 1920–1950" (1984) 33 ICLQ 348 at 357.

6 Jeff Handmaker "Seeking Justice, Guaranteeing Protection and Ensuring Due Process: Addressing the Tensions Between Exclusion from Refugee Protection and the Principle of Universal Jurisdiction" (2003) 21 NQHR 677 at 680.

7 United Nations High Commissioner for Refugees [UNHCR] "Introductory Note" in *Convention and Protocol Relating to the Status of Refugees* (UNHCR, Geneva, 2010) at 3.

8 At 3. In this article, a "receiving state" refers to a state in which an individual has sought asylum, and which is responsible for determining that individual's refugee status.

9 Natalie Baird "The Rights of Refugees" in Margaret Bedggood, Kris Gledhill and Ian McIntosh (eds) *International Human Rights Law in Aotearoa New Zealand* (Thomson Reuters, Wellington, 2017) 377 at [9.3.02].

10 Refugee Convention, art 1F.

This list of offences is exhaustive;[11] however, it is not without ambiguity. Article 1F(a) is relatively self-explanatory, as crimes against peace, war crimes, and crimes against humanity are now well-defined in international law.[12] Article 1F(b) is less straightforward because it does not offer specific guidance as to which crimes are "serious non-political crimes" and which are not. There are also no universal definitions of "serious" or "non-political" crime elsewhere in international law.[13] As a result, state practice regarding the interpretation of art 1F(b) is inconsistent.[14] For example, there is disagreement about whether the seriousness of a crime should be measured according to the severity of the penalty prescribed to it in the asylum seeker's state of origin, or in the state where refuge is being sought, or in both.[15] Even more problematic is art 1F(c), which does not deal with "crimes" at all. Its scope is far from clear because the phrase "purposes and principles of the United Nations" can be read broadly.[16] Guidance from the United Nations High Commissioner for Refugees (UNHCR) suggests that only the most serious and sustained violations of human rights which for some reason are not covered by arts 1F(a) or 1F(b) would qualify.[17]

When receiving refugees, the majority of states adopt the practice of determining whether an individual's circumstances qualify them for refugee status under art 1A(2) *before* considering whether the exclusion clauses are applicable (the 'inclusion before exclusion' approach).[18] This means that an asylum seeker can be excluded from refugee status even after they have already established that they have a well-founded fear of persecution in their state of origin. Other states take an alternative approach and instead assess a claimant's eligibility under art 1A only *after* determining that the art 1F exclusion would not apply.[19] This latter approach has been severely criticised as undermining the humanitarian purpose of the Refugee Convention and

11 UNHCR *Guidelines*, above n 4, at [3].

12 The international instruments that offer guidance on the definition of those crimes include: Convention on the Prevention and Punishment of the Crime of Genocide 78 UNTS 277 (opened for signature 9 December 1948, entered into force 12 January 1951); Statute of the International Criminal Tribunal for the Former Yugoslavia, annexed to *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, S/25704 (1993), adopted in SC Res 827, S/RES/827 (1993); Statute of the International Criminal Tribunal for Rwanda, annexed to and adopted in SC Res 955, S/RES/955 (1994); and Rome Statute of the International Criminal Court 2187 UNTS 3 (opened for signature 17 July 1998, entered into force 1 July 2002) [Rome Statute].

13 Ned Djordjevic "Exclusion under Article 1F(b) of the Refugee Convention: The Uncertain Concept of Internationally Serious Common Crimes" (2014) 12 JICJ 1057 at 1057; and Akbar Rasulov "Criminals as Refugees: The 'Balancing Exercise' and Article 1F(b) of the Refugee Convention" (2002) 16 Geo Immigr LJ 815 at 815.

14 Djordjevic, above n 13, at 1057; and Rasulov, above n 13, at 819.

15 Rasulov, above n 13, at 819.

16 UNHCR *Guidelines*, above n 4, at [17].

17 At [17].

18 Geoff Gilbert "Current issues in the application of the exclusion clauses" in Erika Feller, Volker Türk and Frances Nicholson (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, Cambridge, 2003) 425 at 464. This approach is also recommended by the UNHCR. See UNHCR *Guidelines*, above n 4, at [31].

19 Michael Bliss "'Serious Reasons for Considering': Minimum Standards of Procedural Fairness in the Application of the Article 1F Exclusion Clauses" (2000) 12(Special Supplementary Issue) IJRL 92 at 105–108.

placing undue weight on detecting criminals rather than protecting vulnerable victims.[20] Invoking the exclusion clauses should be "an exceptional measure" rather than as a screening tool for undesirable asylum seekers.[21] Therefore, this article will proceed on the basis that the former — and more widely-adopted — approach is best practice.

Consequences of Exclusion

If the exclusion clauses apply, the claimant cannot be recognised as a refugee and, therefore, will not receive protection under the Refugee Convention.[22] Since art 33(1) only protects *recognised* refugees from refoulement, the receiving state may refoul the claimant back to their state of origin, although there is no obligation to do so.[23] Any person who is excluded under art 1F will have a well-founded fear of persecution from their state of origin because they would have already been assessed under art 1A(2). Therefore, refoulement would expose them to a real risk of human rights abuse at the hands of their home state or other individuals. Furthermore, even if they are not refouled, an individual excluded from refugee status will usually only have access to minimal rights in the receiving state.[24] The UNHCR recognises the seriousness of the consequences for individuals excluded from the right to asylum, which is why it recommends that states only apply art 1F as an extreme measure.[25]

Rationales for Exclusion

The Refugee Convention's *travaux préparatoires*[26] and subsequent guidance issued by the UNHCR indicate that the drafters of the exclusion clauses were primarily driven by the following considerations:[27]

1. they did not want the humanitarian objectives of the Refugee Convention to be abused by recipients who are "undeserving" of protection;
2. they wanted to ensure that those guilty of serious crimes did not escape legal culpability for their actions by obtaining refugee status and protection in another state; and

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20 Michael Kingsley Nyinah "Exclusion Under Article 1F: Some Reflections on Context, Principles and Practice" (2000) 12(Special Supplementary Issue) IJRL 295 at 304–305.

21 At 304–305.

23 UNHCR *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* (2003) at [21].

23 At [21]–[22].

24 See Jane McAdam "Complementary protection and beyond: How states deal with human rights protection" (Evaluation and Policy Analysis Unit, Working Paper No 118, August 2005) UNHCR <www.unhcr.org> at 5; and Jennifer Bond "Excluding Justice: The Dangerous Intersection between Refugee Claims, Criminal Law and 'Guilty' Asylum Seekers" (2012) 24 IJRL 37 at 56.

25 *Note on the Exclusion Clauses* EC/47/SC/CRP29 (1997) at [5].

26 Preparatory materials that form the official record of the treaty-making process.

27 UNHCR *Guidelines*, above n 4, at [2]; Kate Ogg "Separating the Persecutors from the Persecuted: A Feminist and Comparative Examination of Exclusion from the Refugee Regime" (2014) 26 IJRL 82 at 84–85; and Gilbert, above n 18, at 427–428.

3. there was a wider policy concern that granting asylum to individuals who had committed heinous acts and serious common crimes would undermine the integrity of the asylum system by offering protection to people who may themselves be perpetrators of persecution.[28]

The clauses reflect the context in which they were drafted: at a time when the world was still reeling from the atrocious genocides and crimes against humanity committed during the Second World War.[29] Prior to the War, there already existed a number of international instruments that addressed refugee asylum, yet none of them contained provisions that excluded criminals — convicted or suspected — from refugee status.[30] However, with the memory of the Nuremberg and Tokyo trials fresh in their minds, the drafters agreed that the new Refugee Convention should not extend protection to war criminals. Earlier drafts of the exclusion clauses even explicitly referred to those convicted of war crimes by the Nuremberg Tribunal.[31]

Moreover, the field of international criminal law was still very new in 1951. There was no concept of universal jurisdiction to prosecute serious crimes, and a permanent international criminal court had not yet been established.[32] Instead, crimes against humanity and war crimes were primarily dealt with by ad hoc tribunals or, in some limited circumstances, by domestic courts.[33] There was a real concern that asylum seekers could escape criminal liability simply by crossing state borders because states lacked any real mechanisms to prosecute criminals outside their domestic jurisdiction, and because there was limited international cooperation between states, such as in the form of extradition agreements.[34]

The majority of academic discussion on exclusion focusses on how to ensure due process for claimants, or how best to put the exclusion clauses into practice in accordance with international public, human rights and criminal law.[35] However, there is little literature questioning whether the exclusion clauses themselves are justifiable or desirable. This article does exactly that. It asks whether today, nearly 70 years after the Refugee Convention was drafted, the same rationales for exclusion still hold water. In doing so, the author adopts a human rights-based approach.

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28 The European Council on Refugees and Exiles *Position on Exclusion from Refugee Status* PP1/03/2004/Ext/CA (2004) at [4].

29 Ogg, above n 27, at 85.

30 Hathaway "The Evolution of Refugee Status", above n 5, at 358.

31 Karen Musalo, Jennifer Moore and Richard A Boswell *Refugee Law and Policy: A Comparative and International Approach* (2nd ed, Carolina Academic Press, North Carolina, 2002) at 700 as cited in Justin Mohammed "Exclusion in International Refugee Law: 20th Century Principles for 21st Century Practice?" (Winner of the Graduate Student Essay Contest, Canadian Association for Refugee and Forced Migration Studies, 2011) at 6.

32 Claire de Than and Edwin Shorts *International Criminal Law and Human Rights* (Sweet & Maxwell, London, 2003) at 315.

33 At 271.

34 At 271.

35 See, for example, Bliss, above n 19; Jennifer Bond "Principled Exclusions: A Revised Approach to Article 1(F)(A) of the Refugee Convention" (2013) 35 Mich J Int'l L 15; Rasulov, above n 13; and Mathias Holvoet "Harmonizing Exclusion under the Refugee Convention by Reference to the Evidentiary Standards of International Criminal Law" (2014) 12 JICJ 1039.

III WHY (NOT) HUMAN RIGHTS?

This article acknowledges that the Refugee Convention was not originally intended to be a human rights instrument. However, because of the way refugee law has come to be viewed over time, and because of the growing importance of universal human rights across the various spheres of international law, it is appropriate to reflect on the extent to which the Refugee Convention is consistent with human rights norms. Therefore, it is both relevant and necessary to analyse the exclusion clauses through a human rights lens.

Relationship Status: It's Complicated

The relationship between human rights law and refugee law appears intuitive at first glance. However, on closer inspection, the two systems may not be entirely reconcilable. On one hand, it seems apparent that, at its core, refugee law is concerned with protecting and promoting fundamental human rights. This is evident in the preamble to the Refugee Convention, which explicitly recalls the importance of those rights.[36] However, a treaty's preamble is non-binding, and there is compelling evidence to suggest that the Refugee Convention was not intended by its drafters to act as a human rights instrument.[37] Traditionally, international documents concerning refugee protection did not always incorporate human rights language.[38] Instead, refugee issues were often framed in terms of "humanitarian concern[s]" and "humanitarian law".[39] States that signed the Refugee Convention made it clear that they were not interested in making "unlimited and indefinite commitments in respect of all refugees".[40] This reflects a traditional view of asylum as a privilege offered to victims of persecution through the receiving state's own political will, rather than as an obligation owed by states to those individuals.[41] Thus, it seems that the drafters intended the preamble's

36 "Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination". Refugee Convention, preamble.

37 Vincent Chetail "Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law" in Ruth Rubio-Marín (ed) *Human Rights and Immigration* (Oxford University Press, Oxford, 2014) 19 at 19.

38 Morten Kjærum "Refugee Protection Between State Interests and Human Rights: Where is Europe Heading?" (2002) 24 Hum Rts Q 513 at 524–525.

39 See, for example, "Conclusions on military and armed attacks on refugee camps and settlements", preamble, in *Addendum to the Report of the United Nations High Commissioner for Refugees* A/42/12/Add1 (1987) 42, which states "that refugee camps and settlements have an exclusively civilian and *humanitarian* character and on the principle that the grant of asylum or refuge is a peaceful and *humanitarian* act … and underlining that the rights and responsibilities of States pursuant to the Charter of the United Nations and relevant rules and principles of international law, including *international humanitarian law*, remained unaltered" (emphasis added). Humanitarian law can be distinguished from human rights law. It is concerned with protecting combatants and especially civilians during times of war.

40 *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Twentieth Meeting* A/CONF2/SR20 (1951) at 9.

41 Kjærum, above n 38, at 524–525.

reference to human rights norms to be symbolic rather than effective;[42] the Refugee Convention was not intended to be a human rights treaty per se.[43]

Calls for Consistency

International practice supports an approach to refugee law that emphasises human rights. Over time, refugee law has come to be viewed as complementary to, if not a constituent of, international human rights law.[44] Human rights law has greatly informed the development of refugee law, and human rights principles are now seen as integral to the operation of the refugee determination system. Because the two systems are so deeply intertwined, they ought to be coherent. Thus, it is problematic for certain aspects of the refugee law system to undermine human rights.

The Refugee Convention may not initially have been intended as a human rights treaty, but the international community is increasingly treating it as one. The United Nations itself began discussing refugee flows in human rights terms in the 1970s.[45] Further, some domestic courts have retrospectively interpreted the preamble to the Refugee Convention to mean that fundamental rights and freedoms are in fact the driving force behind the Refugee Convention.[46] For example, the Supreme Court of Canada has stated that "[u]nderlying the Convention is the international community's commitment to the assurance of basic human rights without discrimination."[47] In the academic sphere, commentators see human rights law as both informing and progressing refugee law.[48] Refugee law and human rights law are often

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42 Chetail, above n 37, at 27.

43 At 22.

44 Satvinder Juss "Toward a Morally Legitimate Reform of Refugee Law: The Uses of Cultural Jurisprudence" (1998) 11 Harv Hum Rts J 311 at 347–348; and Rebecca MM Wallace and Fraser AW Janeczko "The Concept of Asylum in International Law" in Mary Crock (ed) *Refugees and Rights* (Ashgate, Surrey, 2015) 33 at 49.

45 See, for example, Sadruddin Aga Khan *Study on Human Rights and Massive Exoduses* ESC Res E/CN4/1503 (1981) at 89 as cited in Howland, above n 1, at 89. Similarly, former UNHCR Sadako Ogata stated in 1995 that "human rights concerns go to the essence of the cause of refugee movements, as well as to the precepts of refugee protection and the solution of refugee problems." "Statement by Mrs. Sadako Ogata, United Nations High Commissioner for Refugees, to the 51st Session of the United Nations Commission on Human Rights, Geneva, 7 February 1995" as cited in Kjærum, above n 38, at 513.

46 Chetail, above n 37, at 26–27.

47 *Ward v Attorney-General of Canada* [1993] 2 SCR 689 at 733. Similarly, in the United Kingdom, in *Islam v Secretary of State for the Home Department* [1999] 2 AC 629 (HL) at 639, Lord Steyn was of the opinion that the preambles "show that a premise of the Convention was that all human beings shall enjoy fundamental rights and freedoms. Secondly, and more pertinently, they show that counteracting discrimination, which is referred to in the first preamble, was a fundamental purpose of the Convention".

48 Chetail claims that the originally restrictive approach to the granting of asylum has since been "substantially informed — and to some extent mitigated — by the subsequent development of human rights law". Chetail, above n 37, at 25. Wallace and Janeczko argue that while the Refugee Convention remains key, contemporary refugee law has evolved beyond the Convention. Wallace and Janeczko, above n 44, at 49. Juss argues that "[t]he Refugee Convention contains rights of dignity that are essential to the maintenance of human rights in the application of refugee law. The non-discrimination provisions of the ICCPR and the International Covenant on Economic and Social Rights complement and provide force to the rights set forth in the Refugee Convention." Juss, above n 44, at 348 (footnotes omitted).

interpreted as having a common purpose, and some have even argued that refugee law should be seen as a subsidiary of the wider *lex generalis*[49] of human rights law, rather than as a separate discipline.[50]

It is also notable that human rights law has been directly integrated into some aspects of refugee law. For example, one criterion for qualifying as a refugee under art 1A(2) is that the claimant must have a well-founded fear of persecution. While states adopt various approaches to determine if a person is at risk of persecution, most accept that "serious violations of human rights" will usually suffice.[51] For example, in New Zealand, the *DS (Iran)* case established a four-stage test to determine whether a person is at risk of being persecuted.[52] At the first stage, the claimant must establish that one of their human rights is being breached.[53] Then, the subsequent stages require a decision-maker to consider whether the claimant's human rights are being lawfully limited by the state (in which case there is no persecution) or, if the restriction is unlawful, whether that restriction is likely to result in serious harm to the claimant (in which case there is persecution).[54] Additionally, in most common law countries, human rights law is an important aspect of the *ejusdem generis* test[55] for determining whether a person is a member of a "particular social group".[56] Under this test, members of a particular social group must share an "immutable" or "fundamental" characteristic.[57] Guidance as to whether a certain characteristic (for example, age or disability) is immutable or fundamental is found in human rights law: if discrimination based on that attribute is prohibited under human rights law, then states will

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49 Law of general application.

50 Hathaway describes the Refugee Convention as "no more than a necessary means to a human rights end" and "a system for the surrogate or substitute protection of human rights". James C Hathaway *The Rights of Refugees Under International Law* (Cambridge University Press, Cambridge, 2005) at 5. McAdam argues that "the Convention acts as a type of *lex specialis.* It does not displace the *lex generalis* of international human rights law, but rather complements and strengthens its application". Jane McAdam "The Refugee Convention as a Rights Blueprint for Persons in Need of International Protection" in Jane McAdam (ed) *Forced Migration, Human Rights and Security* (Hart Publishing, Oxford, 2008) 263 at 268.

51 This is also the approach supported by the UNHCR. UNHCR *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status: Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* HCR/1P/4/ENG/REV3 (2011) at 13.

52 *DS (Iran)* [2016] NZIPT 800788.

53 At [128], the Court stated: "an heuristic approach which analyses 'being persecuted' based on the purely subjective perceptions of the decision-maker is to be rejected in favour of an approach which references the objective standards agreed by states in the form of international human rights law. Under this model*, human rights norms become the prism through which relevant forms of harm are identified*. However, a further analytical step is required, which inquires as to whether the harm arising from the anticipated breach of human rights is of a severity of impact to amount to 'being persecuted'." (emphasis added).

54 At [203].

55 A canon of statutory interpretation that presumes that a general term following a list of specific terms is limited to things of the same kind as the specific terms.

56 James C Hathaway and Michelle Foster "Membership of a Particular Social Group" (2003) 15 IJRL 477 at 480.

57 At 480–482.

generally accept that it is an immutable or fundamental characteristic of the individual.[58]

The integration of human rights and refugee law is also consistent with a broader trend towards a "general international law".[59] Whereas international law was once understood as consisting of discrete legal sectors (such as trade, environment and human rights), international legislatures and judiciaries are increasingly recognising the importance of employing rules and norms from various areas of international law to achieve a specific purpose.[60] As this body of general international law has developed, so too has the need for greater consistency between various international rules and norms.[61] Improved coherence between treaties and human rights norms is one way this can be achieved.[62] This is supported by the Vienna Convention on the Law of Treaties, which requires international treaties to be interpreted in a manner consistent with subsequent treaties and rules of international law that bind parties to that treaty.[63]

It is for all these reasons that this article takes a human rights-based approach to a refugee law issue. The Refugee Convention is now seen as an instrument whose fundamental purpose is driven by human rights; its application is both informed and complemented by human rights law. For the two systems to work well together, and to achieve coherence in the international legal system more broadly, there needs to be consistency between how the Refugee Convention works in practice, and its underlying human rights principles. Thus, it is both appropriate and necessary to assess the justifications for exclusion under art 1F from a human rights perspective.

IV QUESTIONING THE STATUS QUO

The three main justifications for the exclusion clauses are: that the suspected criminals are *undeserving* of asylum; that asylum would allow *impunity*; and that granting asylum to suspected criminals would undermine the *integrity* of the asylum system. This Part explores these justifications and appraises them for consistency with contemporary human rights discourse. This article argues that while each of these justifications may have been convincing when the Refugee Convention was first drafted in 1951, much of the reasoning behind those justifications is now outdated and inconsistent with current human rights and international criminal law norms. This calls into question the coherence and integrity of the refugee law system as a whole.

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58 The Supreme Court of Canada has stated that "[t]he association or group exists by virtue of a common attempt made by its members to exercise a fundamental human right." *Chan v The Minister of Employment and Immigration* [1995] 3 SCR 593 at [87].

59 Philippe Sands "Treaty, Custom and the Cross-fertilization of International Law" (1998) 1 Yale Hum Rts & Dev LJ 85 at 87.

60 At 88.

61 Juss, above n 44, at 347–348.

62 Sands, above n 59, at 104–105.

63 Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980), art 31(3)(c).

The "Undeserving" Justification

The characterisation of certain refugees as "undeserving" originates in the aftermath of the Second World War, and was based on the sentiment that those who have committed horrific atrocities forfeit their right to protection from persecution.[64] This article argues that it is inconsistent with human rights principles to label any individual "undeserving" of protection from persecution, because persecution entails serious and unjustifiable human rights violations.

1 What is Persecution?

The drafters of the Refugee Convention "intentionally left the meaning of 'persecution' undefined" in order to account for "all the forms of maltreatment" that might legitimately give rise to a need for victims to seek refuge.[65] Consequently, "[t]here is no universally accepted definition of 'persecution'".[66] This article draws on academic literature and guidelines issued by the UNHCR for an overarching direction as to what persecution may comprise.

Threats to "life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group", or other serious human rights violations, can always be inferred to be persecution.[67] There is a wide range of persecutory harm that a person can be subjected to, from torture or death at one end of the scale to, for example, sustained discrimination that invokes "a feeling of apprehension and insecurity" on the other.[68] Nonetheless, both academics and the UNHCR recognise that all forms of persecution involve a serious breach of an individual's human rights.[69]

2 The "Undeserving" Argument in Human Rights Terms

This article has established that persecution, by its very definition, involves serious breaches of human rights. It would therefore be difficult to morally justify subjecting anyone to such treatment, regardless of what offences they themselves might have committed. However, from a legal perspective, it is possible — and indeed necessary — to restrict or remove an individual's

64 UNHCR *Guidelines*, above n 4, at 493.

65 UNHCR *Background Note*, above n 22, at [3].

66 UNHCR *Handbook*, above n 51, at 13.

67 At 13.

68 At 14.

69 UNHCR *Handbook*, above n 51, at 13. Hathaway describes "persecution as the failure of basic state protection demonstrated through the denial of core, internationally recognized human rights". James C Hathaway "Reconceiving Refugee Law as Human Rights Protection" (1991) 4 JRS 113 at 122. Simeon writes that any form of persecution is "a severe breach" of that person's human rights and dignity, and that the type of harm caused by persecution is "undoubtedly, on the farthest end of the scale of harm and suffering that anyone can be confronted with or possibly be able to endure, short of losing their life". James C Simeon "Ethics and the exclusion of those who are 'not deserving' of Convention refugee status" in Satvinder Singh Juss and Colin Harvey (eds) *Contemporary Issues in Refugee Law* (Edward Elgar, Cheltenham (UK), 2013) 258 at 273.

rights in certain circumstances. An argument could be made in favour of the "undeserving" justification: that excluding an individual who is suspected of having committed a serious crime is justifiable because it is acceptable for the state to place rights restrictions on those who have demonstrated criminal behaviour. There are two issues with this argument. First, it overlooks a key distinction: that serious domestic criminals are people who have, in theory, undergone a fair trial process and who have been convicted of their crimes by a court of law, according to a criminal standard of proof. In contrast, individuals excluded under art 1F have not. Secondly, international law distinguishes between rights that can be permissibly derogated from and rights that cannot.[70]

3 Human Rights: Limitations and Derogability

In order to understand why persecution is not a justifiable limitation on human rights, it is helpful to first understand what human rights limitations *are* permissible under international law.

Most rights may be limited if there are sufficient justifications for doing so; for example, for public welfare or national security purposes, or where the exercise of those rights infringes upon the rights of others.[71] A common example of a permissible limitation is the incarceration of people who have committed certain crimes and who pose a danger to themselves or to society.[72] Another example is where a state might limit the exercise of certain cultural practices where those practices infringe upon other international human rights.[73] Some traditional or cultural practices that the United Nations has deemed to constitute a violation of human rights include female genital mutilation and ritualistic killings.[74]

Further, most rights may also be temporarily suspended in a state of emergency. A state of emergency is defined as a "public emergency which threatens the life of the nation and the existence of which is officially proclaimed".[75] In order to lawfully suspend a right in a state of emergency,

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70 See, for example, International Covenant on Civil and Political Rights 999 UNTS 171 (signed 16 December 1966, entered into force 23 March 1976) [ICCPR], art 4(2), which states that no derogation may be made from the following rights even in a state of emergency: the "right to life", the right to be free from "torture or cruel inhuman or degrading treatment or punishment", the right to be free from "slavery" and "servitude", the right to not "be imprisoned merely on the ground of inability to fulfil a contractual obligation", the right to be free from retroactive criminal punishment, the right to be recognised "as a person before the law", and "the right to freedom of thought, conscience and religion".

71 See, for example, art 18(3), which states that "[f]reedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others." See generally Kris Gledhill *Human Rights Acts Compared* (Hart Publishing, Oxford, 2015) at 20–30.

72 Simeon, above n 69, at 278.

73 *General comment No 21: Right of everyone to take part in cultural life (art 15, para 1(a), of the International Covenant on Economic, Social and Cultural Rights)* E/C12/GC/21 (2009) at [17]–[20].

74 *An Assessment of Human Rights Issues Emanating from Traditional Practices in Liberia* (United Nations Mission in Liberia, Office of the United Nations High Commissioner for Human Rights, December 2015).

75 ICCPR, art 4; and International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (signed 16 December 1966, entered into force 3 January 1976), art 4.

states must meet certain strict criteria.[76] However, there are some rights that cannot ever be justifiably suspended in a free society, no matter the circumstances.[77] These are known as *non-derogable* rights, and include the right to be free from "torture or cruel, inhuman or degrading treatment or punishment"[78] and "the right to freedom of thought, conscience and religion".[79] Some non-derogable rights may still be limited where it is necessary and reasonable to do so, and where the limitation is proportionate to the potential harm to be avoided. The right to freedom of religion, for example, is a non-derogable right, but it may be subject "to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others".[80]

4 Undeserving of Protection?

Excluding a person from refugee status means that he or she is denied protection from persecution. Could denial of this protection be a rightful limitation or suspension of that individual's rights, similar to the limitations placed on the rights of convicted criminals described above? The answer can be found in refugee law. The most widely adopted approach to the exclusion clauses is to apply the art 1A(2) refugee definition before considering the art 1F exclusion. Therefore, candidates for exclusion will have already met the refugee definition. As part of the art 1A(2) status determination process, the assessor will consider questions of scope, nature, legality and impact.[81] The assessor will usually begin by asking whether the claimant's circumstances indicate a risk of interference with, or restriction on, their basic human rights on one of the Refugee Convention grounds. If there is an interference with the claimant's basic human rights, the assessor then asks whether the right may, in principle, be restricted. If the restriction is not permitted in principle, or is permitted in principle but applied unlawfully, and the resulting breach of rights would cause harm to the claimant, then the art 1A(2) test will be met.

This assessment means that once a claimant meets the definition of a refugee under art 1A(2), they would have already established a well-founded fear of persecution. The very definition of persecution entails that the imperilled human rights in question are not rights which can be permissibly limited or suspended, or are rights which are non-derogable. The individual cannot be said to be "undeserving" of those rights, because human rights may only be legally limited or suspended if they meet the specific criteria above.

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76 For example, ICCPR, arts 4(1) and 4(3) require that a state may only derogate from rights "to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin". The state must also inform other state parties to the Covenant of how and why it is derogating from those rights.

77 Art 4(2).

78 Art 7.

79 Art 18(1).

80 Art 18(3).

81 See *DS (Iran)*, above n 52, at [203].

5 Conclusion

Justifying the denial of asylum to individuals who would otherwise meet the criteria for refugee status on the basis that they are "undeserving" is inconsistent with human rights principles. No individual, regardless of their past actions, should be labelled "undeserving" of protection from persecution, because the persecution entails an infringements of rights that is indefensible under human rights law. The principle of non-refoulement guarantees that states shall not return a person to any place where they have a well-founded reason to fear persecution.[82] This principle ought to apply equally to those persons listed in art 1F, as they too have a well-founded fear of persecution.

The Impunity Justification

The second justification provided for the exclusion clauses is that people who have committed contemptible crimes should not be able to use asylum as an escape from criminal justice.[83] This article advances a counterargument on three grounds. First, the exclusion of individuals from refugee status does not necessarily prevent impunity, and in some cases may actually mean that an individual is *less* likely to be held accountable for their crimes. Secondly, even if exclusion were an effective means of guarding against impunity for heinous crimes, the process through which claimants' criminality is assessed under art 1F is inconsistent with principles of international criminal and human rights law. Finally, there are more effective means of ensuring international justice for the most serious crimes than excluding suspected wrongdoers from refugee status.

1 Exclusion Does Not Prevent Impunity

Holding perpetrators of serious crimes accountable for their actions is certainly a worthy cause, and in a world where it is increasingly easy to move from state to state, a system through which the international community can bring the worst criminals to justice is desirable.[84] However, there are two reasons why excluding individuals suspected of such crimes from refugee status is not the solution to this problem.

(a) Prosecution by Receiving State or International Community Unlikely

The first reason that exclusion is not an effective means of holding wrongdoers accountable for serious crimes is that nothing in the Refugee Convention obliges a receiving state to ensure that an excluded individual is

82 UNHCR *Note on Non-Refoulement (Submitted by the High Commissioner)* EC/SCP/2 (1977).
83 Ogg, above n 27, at 84–85; and Gilbert, above n 18, at 428.
84 *Soering v United Kingdom* (1989) 11 EHRR 439 (ECHR) at [89].

prosecuted.[85] Although the receiving state is *entitled* to return the excluded individual to the state where the alleged art 1F offence was committed, they are not *required* to do so. Even if a receiving state chooses not to refoul an excluded person, there are also no established pathways (legal, conceptual or practical) from status exclusion to domestic prosecution, extradition or rendition to international tribunals.[86] Therefore, when an individual is excluded from refugee status, they are not guaranteed to be actually held accountable for their crimes through a judicial process.[87]

(b) Prosecution in the State of Origin is Not Always Possible or Desirable

Returning an asylum seeker suspected of committing a serious crime to their state of origin will not necessarily result in prosecution in that state, and even if it does, the prosecution may not be one that follows due process.[88] Indeed, Joan Fitzpatrick describes it as "a matter of chance" whether a refouled asylum seeker will be prosecuted for their suspected crimes upon return.[89] The criminal justice system in the excluded individual's state of origin may well be severely under-resourced or lack integrity; asylum seekers are often fleeing war-torn or politically unstable regions.[90] These institutional deficiencies may mean that the accused might never face any consequences for their actions.[91] Alternatively, if proceedings are brought, the excluded individual may be subjected to unfair treatment, or arbitrary or indefinite detention.[92] The risk of an unfair trial is heightened in situations where the excluded individual has a well-founded fear of persecution *by the state*, as the state may use their *prosecution* as a guise for *persecution*.[93]

2 Procedural Problems

The situations outlined above also conflict with fundamental principles of international criminal and human rights law.[94] Prosecution by a potentially biased court is a breach of the right to trial by a competent court, and potential

85 UNHCR *Guidelines*, above n 4, at [3]–[4]; and James C Simeon "Article 1F(a) Exclusion and the Determination of Those Who Are 'Underserving' of Convention Refugee Status in International Law" (2011) 11 ISIL YBIHRL 273 at 297–298.

86 Joan Fitzpatrick "The Post-Exclusion Phase: Extradition, Prosecution and Expulsion" (2000) 12(Special Supplementary Issue) IJRL 272 at 274.

87 At 274.

88 The European Council on Refugees and Exiles, above n 28, at [62].

89 Fitzpatrick, above n 86, at 274.

90 Simeon "Article 1F(a) Exclusion", above n 85, at 275; and Sarah Creedon "'The Exclusion Clause' and the Intersection of International Criminal Law and the Refugee Convention" (2015) 18 TCLR 84 at 105–106.

91 Creedon, above n 90, at 105.

92 For example, following the Rwandan Genocide, while the most serious criminals were dealt with by an international tribunal, lower level perpetrators were left to be dealt with domestically. However, the Rwandan judiciary was severely under-resourced, and it soon became apparent that accused individuals were being subjected to disappearances, extrajudicial killings, arbitrary arrests and a lack of fair trial rights. Creedon, above n 90, at 90. See also Fitzpatrick, above n 86, at 278.

93 Creedon, above n 90, at 90.

94 At 90.

arbitrary detention is a breach of the right to trial without delay.[95] Obviously, the return of an individual to potentially face persecution rather than prosecution is also indefensible because persecution, as discussed earlier, is not a justifiable form of rights-limitation under human rights law.[96]

Of course, there will be circumstances in which an exclusion decision *does* result in the proper and fair prosecution of the excluded individual. Nonetheless, even in those limited situations, the impunity justification cannot be upheld because the process of exclusion itself is contrary to international criminal law and human rights law principles. There are two main issues arising from the administrative process of exclusion: the standard of proof when determining whether a person can be excluded, and the lack of due process protections in place for an individual facing exclusion.

(a) The Standard of Proof

Determining refugee status is fundamentally an administrative process, conducted by UNHCR officers or the status determination authority of the receiving state. However, because of the nature of the inquiry required by arts 1F(a)–IF(b), which concern an individual's likelihood of having committed a certain crime or offence, the status determination process becomes "quasi-criminal" in the context of exclusion.[97] There is a high standard of proof in a criminal trial; the prosecution must prove "beyond reasonable doubt" that the accused is guilty of the crime.[98] The starting point of any criminal trial is the assumption that the accused is "innocent until proven guilty".[99] However, in the case of exclusion under art 1F, the standard of proof only requires that the decision-maker have "serious reasons for considering" that the claimant has committed one of the excludable offences. There is disagreement between states as to what this means. Some states, such as Canada,[100] interpret the standard as sitting "somewhere between 'mere suspicion' and the 'balance of probabilities'".[101] Others, including New Zealand[102] and the United Kingdom,[103] argue that it is "a unique standard that cannot be defined with

95 ICCPR, art 14.

96 Ben Saul "Protecting Refugees in the Global 'War on Terror'" (University of Sydney, Legal Studies Research Paper No 08/130, October 2018) at 13.

97 Bliss, above n 19, at 99; and Bond "Excluding Justice", above n 24, at 59.

98 AP Simester and WJ Brookbanks *Principles of Criminal Law* (4th ed, Brookers, Wellington, 2012) at 37–39.

99 ICCPR, art 14(2).

100 See *Minister of Citizenship and Immigration v Mugesera* [2005] 2 SCR 100. The Court "agree[d] that the 'reasonable grounds to believe' standard requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities". At [114].

101 Bond "Principle Exclusions", above n 35, at 38–39.

102 See *Attorney-General (Minister of Immigration) v Tamil X* [2010] NZSC 107, [2011] 1 NZLR 721. The Court found that "[t]he 'serious reasons to consider' standard must be applied on its own terms read in the Convention context". At [39].

103 *Al-Sirri v Secretary of State for the Home Department* [2009] EWCA Civ 222, [2009] Imm AR 624 at [33] per Sedley LJ as cited in *Regina (JS (Sri Lanka)) v Secretary of State for the Home Department* [2010] UKSC 15, [2011] 1 AC 184. The Court considered that "[Article 1F] clearly 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". At [39].

reference to other thresholds".[104] The UNHCR recommends that the evidentiary standard should be higher than the balance of probabilities but lower than proof beyond all reasonable doubt.[105] Regardless, the threshold is indisputably lower than what is required to establish criminal culpability.[106]

Basic criminal law principles require a strong case in favour of guilt to justify the imposition of sanctions on an individual because those sanctions inevitably involve some form of rights infringement and thus cannot be applied lightly.[107] Although an excluded asylum seeker is not directly subjected to criminal punishment due to their exclusion, the consequences of exclusion may be equally, if not more, severe. Therefore, a higher standard of proof than "serious reasons for considering" ought to be in place.[108] Low evidential thresholds in "quasi-criminal" investigations are deeply unsatisfactory and demonstrate that the process required when applying the exclusion clause is inconsistent with international criminal law and human rights principles.

(b) Due Process

The consequences flowing from a *guilty* determination are severe: the accused is denied refugee status and risks being sent back to a place where they could face serious physical or mental harm. Thus, when dealing with status exclusion — a quasi-criminal proceeding — we should expect that certain procedural rights that are guaranteed to a criminally accused individual in domestic and international criminal proceedings would also apply.[109] However, the administrative nature of exclusion decisions means that they lack many of the important safeguards which, in a truly criminal context, would normally minimise the risk of wrongful conviction and punishment.

The concept of due process, or procedural fairness, is well-established in international law. There is a large body of international instruments and guidelines that set out the expectations that an individual can have in the context of a criminal trial, in order to ensure that a fair and just legal determination is reached.[110] Specifically in the refugee law context, the UNHCR notes that "[t]he right to seek asylum also requires that individual asylum-seekers be given access to fair and efficient procedures for the determination of their claims."[111] However, practically, it may not be possible to safeguard all of these rights when determining whether an asylum seeker ought to be excluded from refugee status under art 1F.

More generally, refugee status determinations are not easy administrative decisions to make, as officials must attempt to measure the

104 Bond "Principled Exclusions", above n 35, at 39.
105 UNHCR *Background Note*, above n 22, at [107].
106 Peter J van Krieken (ed) *Refugee Law in Context: The Exclusion Clause* (TMC Asser Press, The Hague, 1999) at 7.
107 Simester and Brookbanks, above n 98, at 39.
108 Creedon, above n 90, at 106–107 and 109.
109 Bliss, above n 19, at 99.
110 At 93.
111 *Note on International Protection* EC/48/SC/CRP27 (1998) at [15].

likelihood that an individual will be subjected to persecution in a state and cultural context different to the officials' own. Officials must often base this decision on limited evidence, much of which is anecdotal.[112] These difficulties are exacerbated when trying to determine whether an individual might have committed a certain serious offence outside the receiving state. For example, it is difficult to find and access credible witnesses to those offences, particularly due to the disorienting and traumatic contexts in which art 1F offences are often committed.[113] Evidential difficulties are perhaps inevitable whether in the context of status determination or in an actual criminal trial. However, Jennifer Bond argues that the risk of decisions being made on inaccurate evidence is heightened in the status determination context because the specific difficulties asylum seekers face.[114] These difficulties include poor camp conditions, language barriers, inadequate legal representation and recent experiences of violence that can cause asylum seekers to be retraumatised.[115]

There is evidence to suggest that, in practice, many states fail to provide appropriate procedural safeguards to ensure due process is followed when determining refugee status.[116] However, it is not only states that fail to ensure due process for claimants. The UNHCR is responsible for determining the majority of asylum seekers' refugee status; it processed 75,188 submissions for resettlement in 2017 alone.[117] Somewhat ironically, it has in many instances fallen short of the standards that it sets for states, likely in no small part due to it being under-resourced and underfunded.[118]

Allowing a quasi-criminal determination of an individual's guilt to be made in this less than satisfactory context is troublesome, especially given that the consequences of exclusion are severe. The lack of due process safeguards in the exclusion determination process is another reason why the process, as well as the operation of the exclusion clauses themselves, are inconsistent with international criminal law and human rights law standards.

3 Accountability for International Crimes: Alternative Solutions

Exclusion may not be an effective means of guaranteeing criminal justice, but this does not mean that serious criminals need go unpunished. Since the Refugee Convention was drafted in 1951, the field of international criminal law has developed significantly. This article will examine two ways by which it is possible to hold suspected international criminals accountable.

112 Bliss, above n 19, at 95–96.
113 Creedon, above n 90, at 101–102.
114 At 102.
115 At 102.
116 Bliss, above n 19, at 97; and Creedon, above n 90, at 101–102.
117 UNHCR "Resettlement Data" <www.unhcr.org>.
118 Martin Jones and France Houle "Building a Better Refugee Status Determination System" (2008) 25(2) Refuge 3 at 5.

(a) Universal Jurisdiction

Traditionally, states only have jurisdiction to prosecute an individual for crimes committed within their own territory (territorial jurisdiction),[119] or for crimes committed against, or by, their own citizens (extraterritorial jurisdiction).[120] The principle of universal jurisdiction expands the ability of states to prosecute people who have committed certain serious international crimes regardless of where, and by whom, those crimes were committed.[121] This right to prosecute is asserted by states on the basis of an international *obligatio erga omnes*[122] to prosecute international criminal acts that have *jus cogens* status.[123] *Jus cogens* crimes form part of customary international criminal law. They are crimes that the international community accepts as being so abhorrent that they "[strike] at the whole of mankind and … are grave offences against the law of nations itself".[124] International crimes that have attained this status include crimes of aggression, crimes against humanity, genocide, war crimes, slavery, piracy and torture.[125] Many states have adopted domestic legislation that codifies the jurisdiction of their domestic courts to prosecute these serious international crimes.[126] For example, under the International Crimes and International Criminal Court Act, New Zealand courts can prosecute individuals for war crimes, crimes against humanity, and genocide, regardless of their immediate connection to New Zealand.[127]

(b) The Complementary Jurisdiction of the International Criminal Court

The most serious international criminals may also be brought to justice through the International Criminal Court (ICC). The ICC established by the Rome Statute of the International Criminal Court (Rome Statute) and became active in 2002.[128] Since then, the Court has heard 26 cases.[129] The ICC is responsible for investigating and trying individuals charged with the gravest crimes concerning the international community, such as genocide, war crimes and crimes against humanity.[130] The ICC has complementary jurisdiction: it acts as a forum of last resort when there is no individual state that is willing

119 M Cherif Bassiouni "The History of Universal Jurisdiction and Its Place in International Law" in Stephen Macedo (ed) *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (University of Pennsylvania Press, Philadelphia, 2004) 39 at 40.

120 At 41–42.

121 Michael Byers *War Law: Understanding International Law and Armed Conflict* (Grove Press, New York, 2005) at 143.

122 Obligation to all.

123 M Cherif Bassiouni *Introduction to International Criminal Law* (2nd ed, Martinus Nijhoff, Leiden (Netherlands), 2014) at 236–238.

124 *Attorney-General of the Government of Israel v Eichmann (The Individual in International Law)* (1961) 36 ILR 5 at 26.

125 Bassiouni, above n 123, at 240.

126 Mohammed, above n 31, at 16–17.

127 International Crimes and International Criminal Court Act 2000, s 8(1)(c). See also Crimes Against Humanity and War Crimes Act 2000 (Canada).

128 Rome Statute, art 1.

129 International Criminal Court "About — Facts and Figures" <www.icc-cpi.int>.

130 Rome Statute, arts 17(2) and 17(3). The ICC can only prosecute crimes that were committed on or after 1 July 2002. See art 11.

or able to investigate or prosecute a certain case.[131] The Rome Statute therefore impliedly invokes an *aut dedere aut judiciare* obligation[132] for all of its state parties (of which there are 123),[133] and reinforces the concept that the primary responsibility for prosecuting genocide, war crimes and crimes against humanity lies with individual states.

(c) Limitations on International Accountability Mechanisms

Not all the crimes listed in the exclusion clauses can be effectively prosecuted in a refugee context. This is partly because the exclusion clauses cover a wide range of crimes, including crimes that are usually considered domestic, such as serious non-political crimes.[134] Because international criminal law is not concerned with domestic crimes, it is mainly the art 1F(a) offences that will be prosecutable under international law,[135] along with some of the offences in art 1F(c).[136] Further, asylum seekers who are suspected of excludable crimes tend to be lower-level offenders, and thus their actions may not meet the criminal threshold anticipated by the international criminal law mechanisms discussed above.[137] Higher-level offenders tend to have access to finances and resources such that they do not need to depend on the asylum system for safety.[138]

The present inability of the international community to prosecute certain serious crimes through international criminal law indicates one of two things: either international law will eventually recognise "serious non-political crimes" as grave enough to warrant universal jurisdiction or *aut dedere aut judicare* treatment, or those crimes are not in fact serious enough to require international prosecution. If the latter is true, then we ought to question whether these crimes truly belong in the same category as crimes against humanity and the other particularly egregious offences listed in art 1F.

4 Conclusion

In practice, the exclusion clauses rarely prevent criminals from escaping impunity for serious crimes. Further, the procedural aspects of exclusion are incompatible with international criminal and human rights law principles, considering the consequences of exclusion are severe. There exist more effective avenues for prosecuting suspected international criminals that can ensure proper due process rights for the accused, do not involve questionable

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131 Articles 17(2) and 17(3).
132 Either extradite or prosecute.
133 John Dugard and Christine van den Wyngaert "Reconciling Extradition with Human Rights" (1998) 92 AJIL 187 at 209; and International Criminal Court "The States Parties to the Rome Statute" <www.icc-cpi.int>.
134 Dugard and van den Wyngaert, above n 133, at 209.
135 Handmaker, above n 6, at 681.
136 As discussed above, there will inevitably be some overlap between the types of activities which fall under the ambit of Articles 1F(a) and 1F(c).
137 Bond "Principled Exlcusions", above n 35, at 38.
138 At 38.

evidentiary standards and do not place the accused at risk of persecution. Of course, despite these mechanisms, there will inevitably be individuals who commit heinous crimes and escape the consequences. That is the frustrating reality of any justice system, and one which we as a society must accept in light of the alternative: a system in which the innocent are wrongfully punished. The international community cannot let its fear that some individuals might escape punishment for their crimes override its commitment to the principles of human rights.

The Integrity Justification

The third justification for the exclusion clauses is that they purportedly protect the asylum system's *integrity*. But the concept of integrity can be interpreted in multiple ways. Indeed, the UNHCR has offered two possible explanations of what *integrity* means in the context of asylum.

The first interpretation of *integrity* is as legal coherence, and the second is as protection from persecution.[139] This section will also examine a third interpretation of *integrity* as the protection of states and their citizens from individuals that pose a threat to national security. This section concludes by considering whether the integrity of the asylum system may nonetheless be maintained through the complementary protection regime. It will be argued that although complementary protection ameliorates the deficiencies of exclusion to an extent, it is an incomplete solution.

1 Integrity as Legal Coherence

One interpretation of *integrity* focusses on coherence and consistency within the international legal system. The UNHCR has stated:[140]

> If the protection provided by refugee law were permitted to afford protection to perpetrators of grave offences, the practice of international protection would be in direct conflict with national and international law, and would contradict the humanitarian and peaceful nature of the concept of asylum. From this perspective, exclusion clauses help to preserve the *integrity* of the asylum concept.

This statement implies that the UNHCR's primary concern is legal coherence — that the asylum system should operate in a manner consistent with domestic and international law, and with its humanitarian purpose. The first criticism of this statement is that it condemns "afford[ing] protection to perpetrators of grave offences"; yet an exclusion determination cannot determine the criminal culpability of an individual. At best, an exclusion determination indicates that there is a strong suspicion that the claimant has committed the crime. However, since asylum seekers are not subjected to a proper criminal trial with proper due process rights — and perhaps never will be — we cannot

139 *Note on the Exclusion Clause*, above n 25, at [3] and [5].
140 At [3] (emphasis added).

know if they are "perpetrators of grave offences". Rather than affording protection to criminals, the absence of the exclusion clauses would actually afford protection to individuals with a well-founded fear of persecution, some of whom may have committed serious crimes — a different situation altogether.

Secondly, this article has already established that the concept of exclusion is inconsistent with well-established principles of international criminal and human rights law. Accordingly, the exclusion clauses achieve the *opposite* of international legal coherence because exclusion is inherently at odds with international law standards. Further, the "humanitarian nature" of asylum is undermined by the very possibility that a receiving state could send an individual back to a place where they have a well-founded fear of persecution. Therefore, the exclusion clauses fail to preserve the integrity of the asylum system in this sense.

(a) Reputation, Reputation, Reputation!

Underlying the UNHCR's focus on coherence is a concern with the *image* of the institution of asylum; in other words, how the asylum system is outwardly perceived by states and their citizens. This is understandable: the asylum system relies on cooperation from states, who in turn are sensitive to feedback from their populations. However, if the asylum system is to be grounded in principle and normative coherence, then public opinion cannot be allowed to sway that commitment. Michael Kingsley Nyinah argues that in recent years, asylum has become increasingly politicised, such that exclusion has been incorrectly portrayed as a means of suppressing and punishing the worst criminals.[141] This, combined with public condemnation of the many horrific crimes committed in conflict zones worldwide, and a growing fear of terrorism, places significant political pressure on states and institutions to adopt a "'hard line'" approach to refugee issues and employ exclusion more frequently.[142] These social and political pressures threaten the principled and objective basis on which the asylum system ought to operate. Thus, it is ironic that this underlying motivation behind the UNHCR's desire for "coherence" may ultimately undermine the asylum system's compatibility with fundamental legal principles, and thus, the system's coherence and integrity.

2 Integrity as Protection from Persecution

The UNHCR has also offered a second, alternative meaning of *integrity* as ensuring that asylum seekers are not wrongfully excluded:[143]

141 Nyinah, above n 20, at 302.
142 At 302.
143 *Note on the Exclusion Clause*, above n 25, at [5] (emphasis added).

> Denying protection against return to the country of origin to someone with a well-founded fear of persecution can result in their continued persecution, or even worse … Exclusion clauses must be interpreted within narrow limits and in a manner which does not undermine the *integrity* of international protection.

This statement reveals a concern with limiting the risk that asylum seekers will be exposed to persecution. In practice, given the particularly serious nature of the offences that a person must be suspected of in order to qualify for exclusion under art 1F, the percentage of asylum seekers who are excluded under that provision is likely to be low. Nonetheless, each instance of exclusion results in an individual being either exposed to the risk of persecution in their state of origin, or caught in a legal limbo in the receiving state with only minimal rights guarantees. Each case of exclusion is one case too many. If the asylum system is to maintain its integrity by minimising the risk that an individual will be exposed to persecution, then the exclusion clauses should be the first to go.

3 Integrity as Security

A third interpretation of *integrity* can be seen when Governments use the term to justify restrictive immigration and asylum policies. They employ the concept to refer to inviolable territorial borders and to policies that allow them to control who is permitted to enter their territory and to benefit from their social systems.[144] For example, Human Rights First, an American refugee advocacy group, lists a number of "Integrity Measures in the Asylum Process" conducted by the United States government, such as background checks, security checks, identity-establishing procedures, fraud detection and screening measures, in order to eliminate undesirable or fraudulent asylum seekers.[145]

At its core, this interpretation of integrity involves weighing the costs and benefits to the community in receiving refugees. An asylum system that has integrity in this sense is one that upholds state interests and national security, and protects its citizens from potentially dangerous or undesirable asylum seekers. This is a statist approach, and one that — in the author's opinion — should not be privileged over the human rights of individuals. Just as public support for asylum is in decline, so, inevitably, is state support. In a post-9/11 climate, states are increasingly wary of incomers, and this permeates into their attitudes toward refugee protection and, particularly, exclusion.[146] The tension between humanitarianism and national security is one of the central issues in contemporary international law, and Natalie Baird argues that, in practice, "the interests of state security have tended to trump the

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144 This phenomenon is commonly referred to as the "securitization of asylum". Matt McDonald "Deliberation and Resecuritization: Australia, Asylum-Seekers and the Normative Limits of the Copenhagen School" (2011) 46 Australian Journal of Political Science 281 at 281.

145 Human Rights First "Integrity Measures in the Asylum Process" (10 February 2014) <www.humanrightsfirst.org>.

146 Nyinah, above n 20, at 303–304.

humanitarian approach".[147] However, in the same way that public perceptions should not sway the core principles of asylum, nor should states be permitted to cite their desire to control their borders to justify the over-zealous rejection of genuine victims of persecution.[148]

4 The Role of Complementary Protection

It may be argued that the human rights concerns raised by the exclusion clauses are compensated for by the complementary protection regime. Under international law, even where international refugee law cannot offer protection, non-refoulement is guaranteed to all individuals who are in danger of torture or other cruel, inhuman or degrading treatment (CIDT).[149] This is the concept of complementary protection. Arguably, the Refugee Convention's exclusion clauses can continue to operate because complementary protection will act as a fail-safe for those who are in serious need of sanctuary. However, there are two issues with that argument.

First, the substance of the protection offered under complementary protection is not as comprehensive as under the Refugee Convention. An individual who is recognised as a refugee would be granted, in addition to asylum, all the same rights and assistance as a legal foreign resident in the receiving state and, in respect of some rights, they are entitled to the same protections as citizens of that state.[150] States may also grant refugees permanent residence or citizenship.[151] However, an individual who has been excluded from refugee status but is protected from refoulement by complementary protection is entitled only to the core human rights available to all people irrespective of nationality.[152] Some of the rights that are therefore not guaranteed to a recipient of complementary protection include the right to family unity, access to residency permits, eligibility for travel documents, access to employment, social welfare, health care benefits and integration assistance.[153]

147 Baird, above n 9, at 413–414.

148 Nyinah, above n 20, at 303–304.

149 For example, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987), art 3(1) states that "[n]o State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.". ICCPR, art 7 states that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." These protections are absolute and apply to all individuals without exclusion.

150 James C Hathaway and Michelle Foster *The Law of Refugee Status* (2nd ed, Cambridge University Press, Cambridge, 2014). The rights guaranteed to refugees under the Refugee Convention include: arts 4 (right to freedom of religion), 16 (right to access the courts), 17–19 (right to work), 21 (right to housing), 22 (right to education), 23 (right to public relief and assistance), 26 (right to freedom of movement), and 27–28 (right to be issued identity and travel documents).

151 The Refugee Convention, art 34 grants a refugee the right to be considered for assimilation or naturalisation in the receiving state. In New Zealand, refugees are usually granted permanent residence, and the UNHCR has praised this approach. Baird, above n 9, at 410.

152 Ruma Mandal *Protection Mechanisms Outside of the 1951 Convention ("Complementary Protection")* (Department of International Protection, UNHCR, PPLA/2005/02, June 2005) at 28–29.

153 McAdam, above n 24, at 5.

Secondly, complementary protection does not offer the same scope or level of protection from human rights abuse that the Refugee Convention does. While torture and CIDT are particularly serious violations of human rights, even the broadest interpretations of CIDT do not cover all forms of persecution, such as the denial of a person's rights to education or to freely exercise their religion.[154] Therefore, the complementary protection regime cannot fully remedy the problems caused by the exclusion clauses.

5 Conclusion

So, do the exclusion clauses give the current asylum system integrity? Individuals who are excluded under art 1F are people who would otherwise qualify for refugee status. Therefore, they would have already demonstrated a well-founded fear of persecution. If *integrity* means to be consistent with domestic and international norms, then the current asylum system lacks integrity because the exclusion clauses conflict with established human rights principles. If *integrity* means protecting individuals from persecution wherever possible, then the asylum system similarly fails because the exclusion of even one otherwise legitimate refugee may result in their persecution, and is avoidable. Both these interpretations are legitimate from a human rights perspective, but on either interpretation, the exclusion clauses cannot be said to uphold the integrity of the asylum system. Nor can *integrity as security* be justifiably used to override the rights of an individual who has a legitimate claim to asylum, as it privileges the national security of states over the rights of individuals. Finally, although the system of complementary protection has developed to protect the rights of some asylum seekers that would otherwise be excluded under art 1F, complementary protection cannot protect all victims of persecution. Therefore, despite the safety net afforded by complementary protection, there remain too many issues with the exclusion system for the integrity justification to hold any water.

V CONCLUSION

None of the three main justifications most commonly offered for the continued operation of the Refugee Convention's exclusion clauses are compatible with human rights principles. This is a problematic state of affairs because, while the Refugee Convention may not have initially been drafted as a "human rights treaty", it is now seen as such by the international community. Thus, it is desirable for the refugee law system and human rights principles to work together. Inconsistencies between the two regimes impair the integrity of the modern asylum system and dilute its potency as an instrument whose primary

154 European courts have found that sustained and severe political persecution, or an accumulation of relatively minor human rights violations, might be brought within the definition of cruel, inhuman or degrading treatment. See *C v the Netherlands* (1984) 38 DR 224 at 226 as cited in Chetail, above n 37, at 36; and *The Republic of Ireland v The United Kingdom* (1978) 2 EHRR 25 (ECHR) at [162] and [167] as cited in Chetail, above n 37, at 36.

purpose is to promote and protect fundamental human rights. While the author acknowledges that there are many practical and political reasons why the exclusion clauses are likely to continue to be used, the author hopes that this article has invited readers to at least question the assumptions that underlie this practice.