

**PRINCIPLED EXCLUSIONS:  
A REVISED APPROACH TO ARTICLE 1(F)(A)  
OF THE REFUGEE CONVENTION**

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## INTRODUCTION

The 1951 *Convention relating to the Status of Refugees* (Refugee Convention or Convention)<sup>1</sup> is well known for its protective elements. Introduced in the aftermath of World War II, the Refugee Convention has assured basic civil and social rights to millions of people for over sixty years. The Refugee Convention has over 145 state parties,<sup>2</sup> numerous celebrity ambassadors,<sup>3</sup> and a supervising agency that is amongst the largest and most high profile in the international system.<sup>4</sup> With approximately fifteen million<sup>5</sup> individuals currently falling within its protective scope, the Refugee Convention is arguably one of the most successful and well-known human rights instruments ever created.

Less well known are the limits that the Refugee Convention places on its own protections. Not only does the Convention define the core term “refugee” in a way that renders its guarantees unavailable to many forcibly displaced persons,<sup>6</sup> it also specifies certain circumstances in which even

1 Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 [hereinafter Refugee Protocol]. The 1967 Protocol removed temporal and geographical restrictions limiting the Convention’s applicability to the aftermath of World War II. Unless otherwise specified, the terms “Refugee Convention” and “Convention” will be used to refer to the 1951 Convention as modified by the Protocol.

2 Refugee Convention, *supra* note 1, at 137, available at [http://treaties.un.org/pages/ViewDetailsII.aspx?&src=UNTSOnline&mtdsg\\_no=V-2&chapter=5&Temp=mtdsg2&lang=en](http://treaties.un.org/pages/ViewDetailsII.aspx?&src=UNTSOnline&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&lang=en); see Refugee Protocol, *supra* note 1, at 267, available at [http://treaties.un.org/pages/ShowMTDSGDetails.aspx?src=UNTSOnline&tabid=2&mtdsg\\_no=V-5&chapter=5&lang=en#Participants](http://treaties.un.org/pages/ShowMTDSGDetails.aspx?src=UNTSOnline&tabid=2&mtdsg_no=V-5&chapter=5&lang=en#Participants).

3 The UNHCR appoints celebrity Goodwill Ambassadors who advocate for the right of refugees and assist in raising funds and awareness. American actress Angelina Jolie, Italian fashion designer Giorgio Armani, and American-Swedish soprano Barbara Hendricks are Lifetime Goodwill Ambassadors. Notable past Ambassadors include Richard Burton, Sophia Loren, and Princess Märtha Louise of Norway. The UNHCR also has national and regional Ambassadors. *Goodwill Ambassadors*, UNHCR, <http://www.unhcr.org/pages/49c3646c3e.html> (last visited July 25, 2013).

4 The UNHCR operates in more than 125 countries, has over 7,600 staff members, and maintains an annual budget of approximately \$4.3 billion. *Governance and Organization*, UNHCR, <http://www.unhcr-centraleurope.org/en/about-us/governance-and-organization.html> (last visited May 17, 2013); *UNHCR Figures*, UNHCR, <http://www.unhcr.org/pages/49c3646c14.html> (last visited May 17, 2013).

5 The latest figures available show that the number of refugees of concern to the UNHCR stands at 10.4 million. An additional 4.8 million refugees are under the care of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). *Refugee Figures*, UNHCR, <http://www.unhcr.org/pages/49c3646c1d.html> (last visited July 13, 2013). The UNHCR also provides support to internally displaced persons, asylum seekers, returnees and stateless people. *Who We Help*, UNHCR <http://www.unhcr.org/pages/49c3646c1c.html> (last visited June 15, 2013).

6 Protection is only available to an individual who is unable to return to his or her country of origin due to a well-founded fear of being persecuted on one of five enumerated grounds: race, religion, nationality, political opinion, or membership in a particular social group. Refugee Convention, *supra* note 1, art. 1(A). The result is that other causes of mass displacement, such

those who meet the prima facie definition must be denied protection. Many of the most important of these restrictions are contained in Article 1(F), a provision which excludes individuals from the scope of the Convention where there are serious reasons for considering that they have been involved in international crimes, serious crimes outside the country of refuge, or are guilty of acts contrary to the purposes and principles of the United Nations.<sup>7</sup> As will be discussed, Article 1(F) ensures that refugee status is denied to those who are fundamentally undeserving of international protection and thus prevents the asylum system from being brought into disrepute.

The focus of this contribution is Article 1(F)(a), a section of the exclusion clause that has increased in both use and profile in recent years.<sup>8</sup> Article 1(F)(a) applies to individuals who may be implicated in crimes against peace (more commonly known today as crimes of aggression),<sup>9</sup> war crimes, or crimes against humanity as such crimes are defined in relevant international instruments. Where a decision maker finds that “there are serious reasons for considering that” an asylum seeker has committed one of these acts, the remainder of the Refugee Convention does not apply, and any protections to which the claimant would otherwise be entitled are consequently unavailable.<sup>10</sup> Article 1(F)(a) is a particularly important part of the exclusion clause because it applies to those who have committed acts so wrongful that the international community has agreed to standards of universal applicability.<sup>11</sup> It is a provision committed to ensuring that perpetrators of the worst international crimes do not subsequently benefit from the robust international protections available to refugees.

Unfortunately, current approaches to Article 1(F)(a) suffer from a series of critical deficiencies. A review of practices in a number of states reveals both a lack of harmonization among jurisdictions and widespread failure to draw consistently on international criminal law, despite Article 1(F)(a)’s specific directive that this occurs. In addition, exclusion decision makers are failing to either recognize or accommodate key structural and remedial differences between international criminal law and refugee law, thus undermining the object and purpose of the provision. The result is that the relationship between the two systems appears arbitrary rather than principled.

These concerns extend beyond the merely theoretical. As a result of current deficiencies, the scope of Article 1(F)(a) has now been broadened to such a degree that protection is routinely denied to individuals whose admission as refugees would not bring the asylum system into disrepute.

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as poverty or environmental catastrophe, do not trigger the Convention’s guarantees.

<sup>7</sup> *Id.* art. 1(F). Article 1(F) provides:

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 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.

<sup>8</sup> See discussion *infra* pp. 24-26.

<sup>9</sup> See discussion *infra* pp. 88-89 and accompanying footnotes.

<sup>10</sup> Refugee Convention, *supra* note 1, art. 1(F).

<sup>11</sup> I am grateful to James Hathaway for this observation.

This represents a significant deviation from the core commitments contained in the Refugee Convention and, given the persecution that some individuals will face in the absence of protection, is cause for grave concern.

The 2013 Michigan Colloquium on Challenges in International Refugee Law brought together experts committed to articulating a principled approach to exclusion under Article 1(F)(a). This paper was drafted as the background study for that meeting and was designed to provide general principles for study and debate. In particular, the paper calls for a revised paradigm for determining when an asylum seeker ought to be denied protection on the basis that he or she is individually responsible for the international crimes listed in Article 1(F)(a). In the pages that follow, I argue that a principled framework for exclusion must be consistent with established international criminal law. Further, denial of protection should not occur on the basis of contested norms: where the relevant international criminal law doctrine is unsettled, exclusion decision makers must adopt the approach that most narrows the sphere of individual responsibility. I also emphasize the importance of protecting the underlying purpose of exclusion throughout the analysis, and suggest that doing so requires recognizing and accommodating key structural and remedial differences between international criminal law and refugee law. Two potential approaches for doing so are provided as a starting point for discussion.

It is important to note at the outset what this paper does not do. Since the focus of this analysis is limited to Article 1(F)(a), there is no engagement here with the other mechanisms being used by some state actors to deny refugee status to those allegedly involved in serious international crimes.<sup>12</sup> It is worth noting, however, that these preliminary processes frequently allow states to circumvent the refugee claims process entirely and may in some circumstances be in violation of the fundamental commitment to consider refugee status prior to the denial of protection. Further, these mechanisms seem to disregard the careful balance contained within the Refugee Convention itself, where issues such as national security and serious criminality are already considerations.<sup>13</sup> Introduction of these additional domestic processes is thus often both superfluous and in violation of core commitments. While not the topic of this piece, they should be the subject of increased scrutiny.

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12 As a result of legislation in a variety of asylum states, some persons who have been accused of international crimes are effectively being excluded from protection through domestic processes other than the application of Article 1(F)(a). For example, in addition to the Article 1(F)(a) process, Australia demands that claimants must satisfy a “character test” that looks at factors such as a substantial criminal record, association with a criminal group, and danger to Australian community. *Migration Act 1958* (Cth) s 501 (Austl.). Similarly, New Zealand requires that all visa applicants be of good character and not pose a potential security risk. Applicants who have, or have had, an association with an organization committing war crimes or crimes against humanity are normally ineligible for a residence class visa. *Operational Manual ¶¶ A5.1, A5.30, IMMIGRATION NEW ZEALAND* (Nov. 29, 2010), available at <http://www.immigration.govt.nz/opsmanual/>. Canada also has a separate regime of “inadmissibility” where applicants may effectively be removed from Canada on grounds that overlap with Article 1(F), including alleged involvement in war crimes and crimes against humanity. See *Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 35*.

13 As will be discussed in further detail in Part II.1 below, Article 33(2) of the Refugee Convention delineates the rights and responsibilities of states when a claimant poses a security threat to the country of refuge. See discussion *infra* p. 26.

This Article also does not consider other structural issues relating to the refugee claims process for individuals being considered for exclusion. For example, there is no engagement here with debates about whether exclusion determinations should precede or follow inclusion determinations<sup>14</sup> or whether an overall balancing between the claimant's wrongdoing and the degree of persecution faced should always accompany a decision to exclude.<sup>15</sup> Instead, the focus is exclusively on re-formulating an approach for determining individual responsibility under Article 1(F)(a).

Four sections follow this introduction. Part II briefly describes the increased use of Article 1(F)(a) and identifies deficiencies in current approaches to the provision. Part III delineates and explains the four core principles that must underlie a principled approach to exclusion, while Part IV introduces a four-step framework that results from application of these principles. These latter two sections focus particularly on the need to accommodate systemic and remedial differences between exclusion and international criminal law, and they provide, respectively, concrete doctrinal illustrations to exemplify concerns and alternative approaches for development of this portion of the framework. Finally, the conclusion reminds participants of the important interests at stake in decisions under Article 1(F)(a) and urges prompt reform of current practices.

## I. CURRENT APPROACHES TO EXCLUSION UNDER ARTICLE 1(F)(A)

Despite initial agreement on the need to include Article 1(F)(a) in the Refugee Convention, the provision was rarely applied for many years. This changed in the mid-1990s, when a series of high profile atrocities led to

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<sup>14</sup> State practice tends to favor considering exclusion before inclusion. *See, e.g., Minister for Immigration and Multicultural Affairs v Singh* (2002) 209 CLR 533 ¶¶ 5, 31, 61, 85-87 (Austl.); *Gonzalez v. Canada (Minister of Employment and Immigration)*, [1994] 3 F.C. 646 (C.A.); *Refugee Appeal No 74796* [2006] NZRSAA at paras [69-85] (N.Z.); *Gurung v. Sec'y of State for the Home Dep't* [2002] UKIAT 04870 ¶¶ 64-91 (U.K.). The UNHCR, however, endorses the opposite approach in all but exceptional circumstances. *See* U.N. HIGH COMM'R FOR REFUGEES, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees* ¶ 199, (Sept. 4, 2003), [hereinafter *Background Note on the Application of the Exclusion Clauses*], available at <http://www.unhcr.org/refworld/docid/3f5857d24.html>. For commentary on this topic see, for example, Geoff Gilbert, *Current Issues in the Application of the Exclusion Clauses, in* REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 464 (Erika Feller et al. eds., 2003); Michael Bliss, 'Serious Reasons for Considering': *Minimum Standards of Procedural Fairness in the Application of the Article 1F Exclusion Clauses*, 12 INT'L J. REFUGEE L. 91 (2000); David Kosař, *Inclusion Before Exclusion or Vice Versa: What the Qualification Directive and the Court of Justice Do (Not) Say*, 25 INT'L J. REFUGEE L. 87 (2013).

<sup>15</sup> Courts in Canada, the United Kingdom, Australia, the United States, and New Zealand have explicitly rejected the balancing requirement. Matthew Zagor, *Persecutor or Persecuted: Exclusion under Article 1(F)(A) and (B) of the Refugees Convention*, 23 U. NEW S. WALES L.J. 164, 186 (2000). This position is also supported by some commentators. *See, e.g.,* James C. Hathaway & Colin J. Harvey, *Framing Refugee Protection in the New World Order*, 34 CORNELL INT'L L.J. 257, 309-13 (2001). Other commentators endorse some form of balancing in at least certain circumstances. *See, e.g.,* GUY GOODWIN-GILL & JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 165, 173 (2007). The UNHCR also supports balancing. *See Background Note on the Application of the Exclusion Clauses, supra* note 14, ¶¶ 76-78. For a helpful summary of the debate, *see* Matthew Zagor, *Persecutor or Persecuted: Exclusion under Article 1(F)(A) and (B) of the Refugees Convention*, 23 U. NEW S. WALES L.J. 164, 186 (2000).

concerns that mass inflows of asylum seekers contained both victims and perpetrators.<sup>16</sup> The need to end impunity and hold those responsible for mass human rights violations accountable became international priorities. So too did addressing increased concerns around terrorism.<sup>17</sup> During this period, the creation of two international criminal tribunals,<sup>18</sup> a special criminal court,<sup>19</sup> and a treaty to establish the International Criminal Court (ICC)<sup>20</sup> accompanied increased interest in the application of Article 1(F)(a). The Office of the United Nations High Commissioner for Refugees (UNHCR) responded to the changed environment by adopting its first public guidelines on Article 1(F) in 1996.<sup>21</sup>

Interest in the exclusion provision surged again in the aftermath of 9/11, when the world community became preoccupied with both national security and the perceived threat caused by “foreigners” crossing state borders.<sup>22</sup> Despite a complete lack of evidence linking refugees to the attacks,<sup>23</sup> the international asylum system became the subject of increased

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16 These concerns were particularly prevalent in the situations of Rwanda and the Former Yugoslavia.

17 As a result of a perceived shift in terrorist activities in the 1990s, state actors began identifying terrorism as one of the principal challenges to national and international security. See, e.g., Albert T. Bergesen & Omar Lizardo, *International Terrorism and the World-System*, 22 SOC. THEORY 38, 41-42 (2004); Peter Chalk, *The Evolving Dynamic of Terrorism in the 1990s*, 53 AUSTL. J. INT’L AFF. 151, 151-52 (1999).

18 The International Criminal Tribunal for the former Yugoslavia (ICTY) was introduced in 1993 in response to mass atrocities taking place in the Balkans. *About the ICTY*, INT’L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/sections/AbouttheICTY> (last visited May 17, 2013). The International Criminal Tribunal for Rwanda (ICTR) was introduced in 1994 in response to the genocide and other serious violations of international humanitarian law committed in Rwanda throughout 1994. *General Information*, INT’L CRIM. TRIBUNAL FOR RWANDA, <http://www.unict.org/AboutICTR/GeneralInformation/tabid/101/Default.aspx> (last visited May 17, 2013).

19 The Special Court for Sierra Leone was introduced in 2000 in response to serious violations of international humanitarian law and Sierra Leonean law committed in the country since November 30, 1996. *About*, SPECIAL CT. FOR SIERRA LEONE, <http://www.scl.org/ABOUT/tabid/70/Default.aspx> (last visited May 17, 2013).

20 Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute]. There are currently 122 state parties to the Statute. *The States Parties to the Rome Statute*, INT’L CRIM. CT., [http://www.icc-cpi.int/en\\_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx) (last visited May 17, 2013). The first prosecution of the ICC took place in 2009 against Thomas Lubanga Dyilo. *Lubanga Case*, COALITION FOR THE INT’L CRIM. CT., <http://www.iccnw.org/?mod=drctimelinelubanga> (last visited May 17, 2013).

21 *The Exclusion Clauses: Guidelines on their Application*, UNHCR (Dec. 2, 1996), available at <http://www.unhcr.org/refworld/docid/3ae6b31d9f.html>. These Guidelines are supplemented by a note. *Note on the Exclusion Clauses*, UNHCR (May 30, 1997), available at <http://www.unhcr.org/3ae68cf68.html>. Together, these documents provide guidance to both UNHCR field workers and parties to the Refugee Convention about how Article 1F ought to be interpreted and applied.

22 See, e.g., JOHN TIRMAN, *THE MAZE OF FEAR: SECURITY & MIGRATION AFTER 9/11*, at 1-2 (2004); Nancy Wonders, *Global Flows: Semi Permeable Borders and New Channels of Inequality*, in *BORDERS, MOBILITY AND TECHNOLOGIES OF CONTROL* 63, 81 (Sharon Pickering et al. eds., 2006).

23 Press Release, General Assembly, Refugees Victims of Terrorism, Not Its Perpetrators, High Commissioner Tells Third Committee, as Refugee Debate Opens, U.N. Press Release GA/SHC/3667 (Nov. 19, 2001), available at

scrutiny, and even the UNHCR suggested that “appropriate [security] mechanisms need[ed] to be put in place in the field of asylum as in other areas.”<sup>24</sup> In November 2001, the agency “encouraged” states to incorporate the exclusion clauses into national legislation and to “use the exclusion clauses rigorously, albeit appropriately.”<sup>25</sup>

The increased use and profile of Article 1(F)(a) has continued in the years since 2001. The UNHCR issued updated exclusion guidelines and an accompanying background note in 2003, and began another comprehensive review of these documents in 2011.<sup>26</sup> High courts in several major jurisdictions have recently considered the provision<sup>27</sup>, and contributions by commentators and scholars have multiplied quickly.<sup>28</sup> There have also been numerous media stories in a variety of states focusing on the complexities that arise when refugee claimants are suspected of having engaged in criminal behavior prior to seeking asylum.<sup>29</sup>

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<http://www.un.org/News/Press/docs/2001/GASHC3667.doc.htm>. There is a significant body of scholarship examining the relationship between 9/11 and the subsequent scrutiny on border security and asylum seekers. *See, e.g.*, Matthew J. Gibney, *Security and the Ethics of Asylum after 11 September*, 13 FORCED MIGRATION REV. 40 (2002); James Simeon, *Complicity and Culpability and the Exclusion of Terrorists from Convention Refugee Status Post-9/11*, 29 REFUGEE SURV. Q. 104 (2011); Monette Zard, *Exclusion, Terrorism and the Refugee Convention*, 13 FORCED MIGRATION REV. 32 (2002).

<sup>24</sup> *Addressing Security Concerns without Undermining Refugee Protection*, UNHCR (Nov. 2001), available at <http://www.unhcr.org/refworld/pdfid/3c0b880e0.pdf>.

<sup>25</sup> *Id.*

<sup>26</sup> *See* U.N. HIGH COMM’R FOR REFUGEES, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, ¶ 2, HCR/GIP/03/05 (Sept. 4, 2003) [hereinafter *UNHCR Article 1F Guidelines*], available at <http://www.unhcr.org/refworld/docid/3f5857684.html>; *see also* *Background Note on the Application of the Exclusion Clauses*, *supra* note 14.

<sup>27</sup> *See, e.g.*, Canada (Citizenship and Immigration) v. Ekanza Ezokola, [2011] F.C. 224, 224 (leave to appeal to the Supreme Court of Canada has since been granted); B v. Refugee Appeals Tribunal [2011] IEHC 198, [10] (H. Ct.) (Ir.); *Attorney General v Tamil X* [2010] NZSC 107 (SC) 1-2 (N.Z.); R (on the application of JS) (Sri Lanka) v. Sec’y of State for the Home Dep’t, [2010] UKSC [1] (U.K.); Sec’y of State for the Home Dep’t v DD (Afghanistan) [2010] EWCA (Civ) 1407 [1.];

<sup>28</sup> There are over 45 scholarly articles devoted exclusively to the exclusion clause, the majority of which have been published in the past 10 years. *See, e.g.*, Jennifer Bond, *Excluding Justice: The Dangerous Intersection between Refugee Claims, Criminal Law, and ‘Guilty’ Asylum Seekers*, 24 INT’L J. REFUGEE L. 37, 37 (2012); Catherine Dauvergne & Asha Kaushal, *The Growing Culture of Exclusion: Trends in Canadian Refugee Exclusions*, 23 INT’L J. REFUGEE L. 54, 54 (2011); Geoff Gilbert, *supra* note 14, *passim*; James C. Hathaway & Colin J. Harvey, *Framing Refugee Protection in the New World Order* 34 CORNELL INT’L L.J. 257, 257 (2001).

<sup>29</sup> *See, e.g.*, Greg Ansley, *Burmese Refugee: I’m a War Criminal*, THE NEW ZEALAND HERALD (July 20, 2011), [http://www.nzherald.co.nz/world/news/article.cfm?c\\_id=2&objectid=10739602](http://www.nzherald.co.nz/world/news/article.cfm?c_id=2&objectid=10739602); Martin Beckford, *200 War Criminals Identified by Britain but Only Three Deported*, THE TELEGRAPH (May 9, 2012), <http://www.telegraph.co.uk/news/uknews/immigration/9252423/200-war-criminals-identified-by-Britain-but-only-three-deported.html>; Bevan Hurley, *Genocide Suspect Gets Legal Aid*, THE NEW ZEALAND HERALD (July 24, 2011), [http://www.nzherald.co.nz/world/news/article.cfm?c\\_id=2&objectid=10740470](http://www.nzherald.co.nz/world/news/article.cfm?c_id=2&objectid=10740470); Vince McMahon, *Great Expectations of Immigration Defy the Realities of Border Protection*, THE SYDNEY MORNING HERALD (July 3, 2012), <http://www.smh.com.au/national/public-service/great-expectations-of-immigration-defy-the-realities-of-border-protection-20120702-21di8.html>. In Canada, the government’s introduction and promotion of a “30 most wanted list” drew significant and sustained public attention to individuals seeking to avoid deportation

While increased use of Article 1(F)(a) has been occurring simultaneously in a number of states, application of the clause has been inconsistent both within and among jurisdictions. One significant example of such inconsistency relates to the treatment of claimants who have been members in organizations deemed to have a particularly objectionable or violent purpose. At one extreme, Canadian jurisprudence has, since 1992, held that “where an organization is principally directed to a limited, brutal purpose . . . mere membership may by necessity involve personal and knowing participation in persecutorial acts.”<sup>30</sup> This approach, sometimes termed “mere membership,” was explicitly rejected by the Supreme Court of the United Kingdom in the 2010 *JS* case, with that Court holding that analysis should be devoted to the individual circumstances of each claimant rather than attempting to “categorize” organizations.<sup>31</sup> Australia and New Zealand have reached similar conclusions,<sup>32</sup> while the Netherlands has adopted a unique non-judicial approach that allows a Minister to designate certain positions in specific regimes in a way that imposes a rebuttable presumption of involvement in international crimes.<sup>33</sup> A similar presumption is endorsed and applied by the UNHCR, which reverses the burden of proof on the issue of individual responsibility for senior members of government actors that have “clearly engaged in activities that fall within the scope of Article 1F.”<sup>34</sup> The result is that these claimants must *disprove* their involvement in the relevant criminal activity.<sup>35</sup>

Significant discrepancies also exist in the frameworks used to interpret the required degree of individual responsibility for international crimes. The Supreme Court of New Zealand, for example, has chosen to adopt the *joint criminal enterprise* (JCE) approach, drawing directly on the use of this concept in international criminal law.<sup>36</sup> The United Kingdom’s Supreme Court, on the other hand, has rejected the JCE approach as being too narrow, and instead applies a framework of seven factors to determine

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subsequent to decisions to exclude. See, e.g., Will Campbell, *Wanted List of Alleged War Criminals Could Put Deportees at Risk*, THE CANADIAN PRESS (Jan. 9, 2012), <http://www.therecord.com/news/canada/article/651921--wanted-list-of-alleged-war-criminals-could-put-deportees-at-risk-documents-say>; Colin Freeze, *Tories Crack Down on Illegal Immigrants with US Style Most-Wanted List*, THE GLOBE AND MAIL (Canada) (July 21, 2011), <http://www.theglobeandmail.com/news/politics/ottawa-notebook/tories-crack-down-on-illegal-immigrants-with-us-style-most-wanted-list/article4415578/>; *Feds Add to ‘Most Wanted’ Deportation List*, CBC NEWS (Jan. 11, 2012), <http://www.cbc.ca/news/canada/story/2012/01/11/pol-cbsa-immigration.html>.

30 Ramirez v. Canada (Minister of Employment and Immigration), [1992] 2 F.C. 306, 311 at para 16.

31 R (Sri Lanka), [2010] UKSC [1], ¶¶ 29-30.

32 See, e.g., *SROOOO v Minister for Immigration & Multicultural & Indigenous Affairs* [2006] AATA 91 ¶ 56 (Austl.); *SHCB v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 229 ¶ 17 (Austl.); *X v Refugee Status Appeals Authority*, [2009] NZCA 488 (HC), ¶¶ 94, 106, 111 (N.Z.).

33 For a complete description of this process, see JOSEPH RIKHOF, *THE CRIMINAL REFUGEE: THE TREATMENT OF ASYLUM SEEKERS WITH A CRIMINAL BACKGROUND IN INTERNATIONAL AND DOMESTIC LAW* 265 (2012).

34 *Background Note on the Application of the Exclusion Clauses*, *supra* note 14, ¶ 58.

35 *Id.*

36 See *Attorney General v Tamil X*, [2010] NZSC 107, ¶ 57.

whether or not there was a significant contribution to a criminal purpose.<sup>37</sup> Meanwhile, the United States has its own domestic legislative framework, wherein a person can be excluded if they “ordered, incited, assisted, or otherwise participated in the persecution.”<sup>38</sup> And in Canada, the overall approach to individual responsibility is disjunctive, including a minimalist test of “personal and knowing participation,” the separate concept of “complicity by reason of association,” and a more recently developed six-factor “shared common purpose” test.<sup>39</sup>

The lack of consensus on these and other critical issues is indicative of the varying and untethered frameworks that have been developed for assessing excludability under Article 1(F)(a). This is contrary to the well-established general principle that it is necessary to determine the autonomous meaning of international treaty provisions in order to ensure that any guarantees are not undermined by unilateral state action. As noted by the UK House of Lords, “the Refugee Convention must be given an independent meaning. . . without taking colour from distinctive features of the legal system of any individual contracting state. In principle therefore there can only be one true interpretation of a treaty.”<sup>40</sup> It is clear that in the context of Article 1(F)(a), a consistent and principled framework that reflects the true autonomous meaning of the provision is entirely lacking.

## II. CORE PRINCIPLES

With a view to supporting the development of a consistent and principled approach to Article 1(F)(a), this Article proposes that four core principles must inform any framework for assessing a claimant’s excludability under the provision. First, exclusion must be narrowly applied to only those who are undeserving of protection as a refugee and whose recognition as such would bring the asylum system into disrepute. Second, exclusion must be based on international criminal law. Third, exclusion must not occur on the basis of unsettled norms of international criminal law. Finally, exclusion decisions must account for the structural and remedial differences between international criminal law and exclusion in the context of refugee status determination. While each of these principles is explained below, particular attention will be given to the fourth principle, which is novel and requires careful justification and delineation.

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37 R (on the application of JS) (Sri Lanka) v. Sec’y of State for the Home Dep’t, [2010] UKSC [1], ¶¶ 29-31 (U.K.).

38 8 U.S.C. §§ 1101(a)(42), 1158(b)(2)(A)(i), 1231(b)(3)(B)(i) (2012).

39 *Bedoya v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C. 1092, ¶ 17 (delineating the concept of a “shared common purpose”); *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433, 439 (defining “complicity by reason of association” as when “individuals may be rendered responsible for the acts of others because of their close association with the principal actors”); *Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 306, 311 (discussing “personal and knowing participation”).

40 R v. Sec’y of State for the Home Dep’t, *Ex Parte Adan, Ex Parte Aitseguer*, [2001] 2 WLR 143, 213 (UKHL) (further describing the principle that “it is necessary to determine the autonomous meaning of the relevant treaty provision” as “part of the very alphabet of customary international law”). *See also, e.g.*, *Case 34/82, Martin Peters Bauunternehmung GmbH v. Zuid Nederlandse Aannemers Vereniging*, 1983 E.C.R. 987, 1002, ¶¶ 9-10; *James Buchanan & Co. v. Babco Forwarding & Shipping (UK) Ltd.*, [1978] A.C. 141, 152.

A. *The purpose of Article 1(F)(a) is to protect the integrity of the asylum system; it must be narrowly applied only to those who are undeserving of refugee status.*

The authoritative Vienna Convention on the Law of Treaties (VCLT)<sup>41</sup> instructs that a treaty must be interpreted in “light of its object and purpose”<sup>42</sup> (the *general rule of interpretation*), which can be gleaned from its text, including preamble and annexes.<sup>43</sup> Supplementary materials, including “preparatory work,” may also be consulted.<sup>44</sup>

It is thus extremely relevant to the interpretation of Article 1(F)(a) that the clause is embedded in a treaty whose preamble commits to “extend[ing] the scope” of protection for refugees and ensuring that “human beings shall enjoy fundamental rights and freedoms.”<sup>45</sup> A decision to deny protection to a refugee claimant, notwithstanding a legitimate fear of persecution, represents a deviation from these commitments to protection and human rights. It follows that the exclusion clause must be interpreted narrowly to ensure that it does not undermine the overall objective of the Convention by denying fundamental protections on too broad a basis. A careful balance must be struck.

The UNHCR has insisted on this point, noting that exclusion must be “viewed in the context of the overriding humanitarian objectives of the 1951 *Convention*,” and, consequently, that “as with any exception to human rights guarantees, the exclusion clauses must always be interpreted restrictively and should be used with great caution.”<sup>46</sup> High courts in both Canada and the UK have similarly found that the Article 1(F) exceptions to refugee protection must be applied narrowly: the UK Supreme Court remarked explicitly that “the exclusion clauses in the Refugee Convention

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41 Vienna Convention on the Law of Treaties art. 1, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter VCLT] (providing authoritative instructions on the interpretation of international treaties). It has been recognized as a codification of existing customary law that “constitutes a comprehensive code of the main areas of the law of treaties.” IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 580 (6th ed. 2003).

42 VCLT, *supra* note 41, art. 31(1).

43 *Id.* art. 31(2).

44 *Id.* art. 32 (explaining that while preparatory work, or *travaux préparatoires*, is listed by the VCLT as “supplemental means of interpretation” in Article 32, as opposed to part of the “general rule of interpretation” in Article 31, a treaty’s historical record is frequently viewed as an essential interpretive tool). Justice Philip Jessup of the International Court of Justice emphasized this point: “In my opinion it is not necessary . . . to apologize for resorting to *travaux préparatoires* as an aid to interpretation. In many instances the historical record is valuable evidence to be taken into account in interpreting a treaty.” *South West Africa Case (Eth. v S. Afr.; Liber. v S. Afr.)*, 1966 I.C.J. 6, 325 (July 18) (Jessup, J., dissenting). James Hathaway reaches a similar conclusion with regard to the Refugee Convention in particular, finding that “there appears to be neither theory nor practice to justify the view that the designation of a treaty’s preparatory work as a supplementary means of interpretation requires that it be relegated to an inherently subordinate or inferior place in a comprehensive, interactive process of treaty interpretation.” JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 59 (2005).

45 Refugee Convention, *supra* note 1, pmb1.; *see also* Refugee Protocol, *supra* note 1, pmb1. James Hathaway notes the importance of interpreting treaties in a way that is both consistent with their objects and purposes and compliant with the general duty to ensure their effectiveness. He endorses an interpretive approach that “take[s] account of the historical intentions of its drafters, yet temper[s] that analysis to ensure the treaty’s effectiveness within its modern social and legal setting.” HATHAWAY, *supra* note 44, at 55.

46 *Background Note on the Application of the Exclusion Clauses*, *supra* note 14, ¶¶ 3-4.

must be restrictively interpreted and cautiously applied,”<sup>47</sup> while the Canadian Supreme Court found that “[t]he *a priori* denial of the fundamental protections of a treaty whose purpose is the protection of human rights is a drastic exception to the purposes of the Convention . . . and can only be justified where the protection of those rights is furthered by the exclusion.”<sup>48</sup>

The historical record surrounding the drafting of the exclusion clause also supports this narrow interpretation. Article 1(F)(a) was included in the Refugee Convention without significant debate or controversy. The *travaux préparatoires* indicate that while state representatives engaged in extended discussion on the contours of Articles 1(F)(b) and (c),<sup>49</sup> there was relatively immediate agreement on the inclusion of Article 1(F)(a).<sup>50</sup> The section resembles restrictions on asylum found in the Universal Declaration of Human Rights and the Constitution of the International Refugee Organization,<sup>51</sup> and, like those earlier instruments, codifies consensus that asylum should not be available to those who have committed serious international crimes.

The one notable point of disagreement surrounding the inclusion of Article 1(F)(a) in the Refugee Convention dealt with its mandatory nature, and the historical record on this point provides helpful insight into the original purpose behind the provision. During negotiations, the representative for the United States proposed that the relevant article should release states of their *obligations* towards war criminals, but not necessarily *prohibit* the granting of asylum.<sup>52</sup> This proposal was criticized on the “moral” ground that it would be troubling for a state to find that an individual was a “notorious war criminal” and nonetheless afford him

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47 *Al-Sirri v. Sec’y of State for the Home Dep’t*, [2012] UKSC 54 [75] (appeal taken from EWCA (Civ) 222).

48 *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, ¶ 74.

49 Articles 1(F)(b) and (c) provide additional grounds on which an asylum seeker may be denied access to the Refugee Convention. These articles state that:

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that . . .

(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.

Refugee Convention, *supra* note 1, art. 1(F)(b)–(c).

50 Observations based on review of the *travaux préparatoires*. See generally 1951 *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (Travaux préparatoires)*, UNHCR, <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=&comid=3c07a8642&cid=49aea9390&scid=49aea9398>.

51 See JAMES C. HATHAWAY & MICHELLE FOSTER, *THE LAW OF REFUGEE STATUS*, Ch. 7.0 (2nd ed. forthcoming) (noting the similarities between Art. 1(F)(a) of the Refugee Convention and both Art. 14(2) of the Universal Declaration of Human Rights and the Constitution of the International Refugee Organization).

52 U.N. ESCOR, *Ad Hoc Comm. on Statelessness & Related Problems*, 17th mtg., at 8, U.N. Doc. E/AC.32/SR.17 (Jan. 31, 1950) [hereinafter U.N. ESCOR 17th mtg.], available at [http://www.un.org/ga/search/view\\_doc.asp?symbol=E/AC.32/SR.17](http://www.un.org/ga/search/view_doc.asp?symbol=E/AC.32/SR.17).

refugee protection.<sup>53</sup> As the representative for Israel stated, the proposed formulation would have enabled the granting of “special benefits to a category of undesirable persons” and thus affect not only a lenient asylum state, but also the entire system created by the Convention’s mutual guarantees.<sup>54</sup> The United States conceded this concern but nonetheless wished for asylum states to retain authority to determine which claimants satisfied the criteria as international criminals.<sup>55</sup> Ultimately, the participants agreed that while state parties would bear responsibility for establishing whether a claimant was individually responsible for an international crime, a positive determination in this regard would require denial of refugee status.<sup>56</sup>

Two important points can be drawn out from this exchange: first, that the parties’ primary concern was that admitting those unworthy of protection would have an impact on the moral integrity of the asylum system; and second, that Article 1(F)(a) was intended to deny protection to “undesirables” and “notorious war criminals,” not to *reserve* protection only for those with impeccable moral standing.

The underlying purpose of Article 1(F)(a) has been consistently affirmed by leading commentators and international decision makers. The UNHCR states that despite the humanitarian objectives of the Refugee Convention, some individuals have committed such heinous acts that they are simply “undeserving of international protection as refugees,” emphasizing that “[t]he exclusion clauses must be applied ‘scrupulously’ to protect the integrity of the institution of asylum.”<sup>57</sup> Hathaway and Foster reach a similar conclusion, noting that:

[T]he goals of Art. 1(F) go beyond ensuring the interests of any one state, or indeed of rendering justice to any one person. Whatever a particular state’s level of tolerance for persons in flight from common law prosecution or punishment, whatever its views on the importance of denying shelter to persons who have committed international crimes or violated the purposes and principles of the United Nations, the *integrity of refugee law as a whole* requires that no such person be recognized as a *Convention refugee*.<sup>58</sup>

Hathaway and Foster support their conclusion with reference to numerous court decisions, including the Supreme Court of Canada’s finding that the exclusion provision follows from a “natural desire of states to reject unsuitable persons who by their conduct have put themselves ‘beyond the pale;’”<sup>59</sup> the New Zealand Supreme Court’s finding that “the purpose of the exclusionary provision was to ensure that the Convention was accepted by state parties and to maintain its integrity over time;”<sup>60</sup> and the European

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53 U.N. ESCOR, Ad Hoc. Comm. on Statelessness & Related Problems, 18th mtg., at 3, U.N. Doc E/AC.32/SR.18 (Jan. 31, 1950) [hereinafter U.N. ESCOR 18th mtg.], available at [http://www.un.org/ga/search/view\\_doc.asp?symbol=E/AC.32/SR.18](http://www.un.org/ga/search/view_doc.asp?symbol=E/AC.32/SR.18).

54 See U.N. ESCOR 17th mtg., *supra* note 52, at 9.

55 U.N. ESCOR 18th mtg., *supra* note 53, at 2-3.

56 *Id.* at 3.

57 UNHCR Article 1F Guidelines, *supra* note 26, ¶ 2.

58 HATHAWAY & FOSTER, *supra* note 51.

59 *Id.* (citing the Supreme Court of Canada in *Manickavasagam Singh v. Canada*, 2002 SCC 1, [2002] 1 R.C.S. 3, ¶ 102).

60 *Id.* (citing the New Zealand Supreme Court in *Attorney General v Tamil X*, [2010] NZSC 107 ¶ 33).

Court of Justice’s finding that Article 1(F) exists to “maintain the credibility of the protection system.”<sup>61</sup> Scholarly works by Zimmerman and Wennholz as well as Gilbert also recognize the provision’s mandate to deny protection to those deemed undeserving of protection.<sup>62</sup>

It is important to emphasize explicitly that this objective is entirely distinct from the objective of protecting the security of receiving states. Article 33(2) of the *Refugee Convention*, which permits an asylum state to abrogate the core duty of non-refoulement in, *inter alia*, situations where there are reasonable grounds for perceiving that a refugee claimant poses a threat to national security, explicitly contemplates and accommodates the latter.<sup>63</sup> The existence of this provision reinforces the fact that Article 1(F) is neither intended nor required to serve this function, and underscores the alternative nature of its role as preserver of the system’s integrity.<sup>64</sup>

A broad interpretation of Article 1(F)(a) is not supported by either a purposive reading that takes into account the broader objectives of the provision specifically and the Refugee Convention more generally, or the historical focus on “notorious war criminals” and “undesirables.” A narrow approach that excludes only those who are truly undeserving of protection as a refugee and pose a genuine threat to the integrity of the asylum system is required.

#### Deficiencies in current practice

It is significant that existing exclusion frameworks do not give adequate consideration to the unique purposes of Article 1(F)(a) or the Refugee Convention more generally. While exclusion decision makers on occasion mention the purpose of exclusion as part of an introduction to their substantive analysis,<sup>65</sup> there is no evidence that this purpose informs the decision-making process on either a case-by-case or systemic basis.<sup>66</sup> In addition, the increasingly common practice of excluding individuals who had only an extremely remote connection to an international crime, who were acting under some form of coercion, or who made a *de minimis* contribution indicates that the process is not oriented to ensuring that only those individuals will bring the asylum system into disrepute are denied the protections of the Refugee Convention.

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61 *Id.* (citing the European Court of Justice in Joined Cases C-57/09 and C-101/09, *Germany v. B(C-57/06) & D(C-101/09)*, ¶114, 2010 EUR-Lex 62009CA0057 (Nov. 9, 2010)).

62 Andreas Zimmerman & Philipp Wennholz, *Article 1 F: Definition of the Term ‘Refugee’*, in *THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY* 579, 583 (Andreas Zimmerman ed., 2011); Gilbert, *supra* note 14, at 428.

63 See *Refugee Convention*, *supra* note 1, art. 33(2).

64 See also HATHAWAY, *supra* note 44, at 342-55; *UNHCR Article 1F Guidelines*, *supra* note 26, ¶ 4; *Background Note on the Application of the Exclusion Clauses*, *supra* note 14, ¶ 10.

65 See, e.g., *Manickavasagam Singh v. Canada*, 2002 SCC 1, [2002] 1 R.C.S. 3, 43-50; *Attorney General v Tamil X*, [2010] NZSC 107 ¶¶ 32-34; Joined Cases C-57/09 and C-101/09, *Germany v. B(C-57/06) & D(C-101/09)*, 2010 EUR-Lex 62009CA0057 (Nov. 9, 2010).

66 One possible exception may be the process adopted and endorsed by the UNHCR. The agency relies on the “overriding humanitarian object and purpose of the 1951 Convention” as a key rationale for its balancing test. *Background Note on the Application of the Exclusion Clauses*, *supra* note 14, ¶¶ 76-77.

*B. Exclusion decisions must be based on international criminal law.*

Article 1(F)(a) requires that exclusion decisions be grounded in international criminal law.<sup>67</sup> The clear and unambiguous text of the provision stipulates that an individual will be excluded where there are serious reasons for considering that he or she has committed “a crime against peace, a war crime, or a crime against humanity, *as defined in the international instruments drawn up to make provision in respect of such crimes.*” This constitutes an explicit directive that international criminal law provides the parameters for establishing personal responsibility for the crimes in Article 1(F)(a), and it is incumbent on exclusion decisions-makers to found their analysis on these principles.<sup>68</sup>

There is no indication that Article 1(F)(a) was intended to reference only those instruments that were in existence at the time the Convention was drafted.<sup>69</sup> Rather, it is clear that the drafters intended that Article 1(F)(a) incorporate evolutions in the field of international criminal law, as evidenced by the choice to make general reference to international instruments instead of either importing existing definitions of the relevant crimes or listing the specific treaties to be consulted. It is significant that the latter approach was in fact considered during the drafting of the exclusion clause, but was ultimately rejected subsequent to disagreement about which instruments ought to be named. Language referring generally to “international instruments drawn up to make provision in respect of such crimes” was eventually proposed by a special working group tasked with resolving the concerns, and the current text reflects a decision to encourage broad consultation.<sup>70</sup> This history supports a conclusion that the many developments that have occurred in international criminal law since the

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67 International criminal law is applied and created in a variety of domestic and international spaces, and is neither homogenous across jurisdictions nor derived from a single pedigree. There are, however, common principles that have developed and which now form a recognized core for this area of law, and my use of the term in this context refers to that common core. The need for refugee law to accommodate the pluralist and constantly-evolving nature of international criminal law is reflected in my third proposed principle, which deals with unsettled norms. For a discussion on the heterogenous nature of international criminal law, see, for example, Alexander K.A. Greenwalt, *The Pluralism of International Criminal Law*, 86 IND. L.J. 1063, 1064, 1129 (2011); Elies van Sliedregt, *Pluralism in International Criminal Law*, 25 LEIDEN J. INT’L L. 847, 848-49 (2012).

68 I note that Joseph Rikhof reaches a similar conclusion about the need to link 1(F)(a) with international criminal law. See RIKHOF, *supra* note 33, at 272–74.

69 Particularly relevant international instruments at the time the Refugee Convention was drafted include the following: U.N. Charter; 1945 London Charter of the International Military Tribunal, Aug. 8, 1945, 82 U.N.T.S. 270; European Convention on the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221; 1948 Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277; Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

70 For details about this aspect of the drafting history, see RIKHOF, *supra* note 33, at 55-57.

Refugee Convention was drafted must be taken into account by decision makers considering Article 1(F)(a).<sup>71</sup>

The referential incorporation of international criminal law in Article 1(F)(a) also facilitates consistency between the two bodies of law. Maintaining such consistency is important for ensuring that the exclusion provision is applied evenly between jurisdictions and is based on universal norms. It is also important given the moral objective of ensuring that the asylum system is not brought into disrepute through the admission of those undeserving of protection as a refugee. This objective—and indeed the legitimacy of the entire Refugee Convention—would be undermined in the event that international protection was made available to individuals clearly viewed as serious criminals under well-established understandings of international law. This is precisely the outcome that Article 1(F)(a) seeks to avoid and the provision’s mandate can only be realized if modern understandings about what constitutes an international crime are incorporated into the asylum system. A purposive reading of the text thus requires consideration of ongoing evolutions in international criminal law.

The dynamic nature of Article 1(F)(a) was reiterated at the Global Consultations on International Protection.<sup>72</sup> This series of seminars and conferences was held to commemorate the 50th anniversary of the Refugee Convention, with the ultimate aim of strengthening the protection regime. The consultations included a series of expert meetings on various refugee law issues relevant to the interpretation of the Convention, with the express objective of promoting a “harmonized understanding of how [it] is to be applied in today’s world.”<sup>73</sup> The expert roundtable at these meetings affirmed that an “evolutionary approach” should be adopted by decision makers considering Article 1(F).<sup>74</sup>

#### Deficiencies in current practices

It is significant that current approaches to exclusion are not grounded in international criminal law. Joseph Rikhof’s recent and comprehensive survey of exclusion decisions in nine countries<sup>75</sup> led him to

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71 Particularly relevant international instruments introduced since the *Refugee Convention* was drafted include the following: Protocol Additional to the Geneva Convention of August 12 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391; Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 609, 16 I.L.M. 1442; Statute of the International Criminal Tribunal for the Former Yugoslavia, May 25, 1993, 32 I.L.M. 1192; Statute of the International Criminal Tribunal for Rwanda, Nov. 8, 1994, 33 I.L.M. 1602; Rome Statute, *supra* note 19; Statute of the Special Court for Sierra Leone, Jan. 16, 2002, 2178 U.N.T.S. 138.

72 For more information on these consultations generally, see *Global Consultations*, UNHCR, <http://www.unhcr.org/pages/4a16b14b6.html> (last visited July 24, 2013).

73 Erika Feller, *Preface* to REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION, *supra* note 14, at xvii, xviii.

74 *Summary Conclusions: Exclusion from Refugee Status in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION*, *supra* note 14, at 480. Participants also encouraged the use and application of “developments in other areas of international law since 1951, in particular international criminal law and extradition law as well as international human rights law and international humanitarian law.”

75 Rikhof surveys decisions from: Australia, Belgium, Canada, France, Germany, the Netherlands, New Zealand, United Kingdom, and United States. See RIKHOF, *supra* note 33.

conclude that while international criminal law has informed understandings of the scope of the relevant international crimes,<sup>76</sup> it is notably absent in the analysis surrounding whether claimants should be held individually responsible for those crimes:

Both areas of law [international criminal law and refugee law] developed their notion of who was indirectly culpable of committing international crimes independently from each other after a cautious foray into post-Second World War jurisprudence in some early refugee case-law, which has not been sustained in any meaningful and widespread manner since that time.<sup>77</sup>

While Rikhof notes that some change in this regard may be beginning,<sup>78</sup> his detailed analysis clearly establishes that in many cases existing exclusion frameworks do not exhibit consistent and holistic reliance on international criminal law. Approaches to exclusion that cherry-pick only particular pieces of international criminal law, or that reference the “essence” of international criminal law rather than incorporate its actual doctrine, are in direct violation of the express language of Article 1(F)(a), which, as we have seen, explicitly mandates that the former body of law be properly and fully considered.

*C. Exclusion must not occur on the basis of unsettled norms of international criminal law.*

The third core principle is my foundational conclusion that where there are unresolved doctrinal issues in international criminal law, decision makers in the exclusion context should adopt the approach that most restricts individual responsibility. This ensures that asylum seekers are not denied refugee status on the basis of contested legal standards.<sup>79</sup> In my view, it is inconsistent with the objectives of Article 1(F)(a) and the Refugee Convention more broadly to deny refugee status to individuals who are on the contested margins of criminal liability. The protection context in which exclusion decisions are made require that a cautious, rather than aggressive approach be adopted, and it is unprincipled for doctrine created under Article 1(F)(a) to widen the sphere of individual responsibility beyond that which has been firmly established in the international criminal law context.

In addition, the differing purposes between international criminal law and exclusion, the lowered standard of proof under Article 1(F)(a), and the lack of prosecutorial discretion and sentencing in the context of refugee claims, all support the view that exclusion should not impose individual responsibility on a more rigorous standard than that used in the international criminal system. Each of these differences is explained in more detail in the section that follows, but it is worth noting here the important reality that

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<sup>76</sup> *Id.* at 184.

<sup>77</sup> *Id.* at 263.

<sup>78</sup> Rikhof references changes in the United Kingdom and New Zealand in particular, where recent decisions have encouraged more reliance on ICL. See: *Attorney General v Tamil X* [2010] NZSC 107 ¶¶ 50-53, 70 (N.Z.); *R (on the application of JS) (Sri Lanka) v. Sec’y of State for the Home Dep’t* (2010) UKSC 15 [21]-[39] (appeal taken from EWCA).

<sup>79</sup> Note that my use of “contested” or “unsettled” refers to situations where the relevant international criminal law doctrine is unclear. This is distinct from situations where the doctrine is settled, but controversial.

refugee claimants being considered for exclusion are generally entitled to fewer procedural and substantive protections than individuals accused of international crimes—this in spite of the underlying humanitarian purpose of the Refugee Convention.<sup>80</sup> This further supports the principle that exclusion decision makers should not extend the boundaries of international criminal law through aggressive interpretation of unsettled norms.

I note too that Hathaway and Foster reach a similar conclusion on the basis of the serious reasons for considering threshold for applying Article 1(F). They argue that if “there is dispute or uncertainty about whether the facts found establish relevant criminality—taking account of both the elements of the offence, and the relevant defenses—that uncertainty negates the existence of ‘serious reasons for considering’ the person to be in an excluded category.”<sup>81</sup>

This Article mentions several specific areas where international criminal law norms are currently unsettled, noting in each instance that the lack of clarity prevents the particular legal rule from forming the basis of an exclusion under Article 1(F)(a). As these and other areas of uncertainty become clarified, they should be incorporated into the exclusion context. It is likewise incumbent on decision makers to recognize new uncertainties and ensure unsettled norms never form the basis for exclusion: while the precise content of the affected legal rules will change with time, the general principle that denial of refugee protection cannot be grounded on unsettled criminal norms must be consistently applied.

#### Deficiencies in current practice

The principle that claimants should not be denied refugee status on the basis of unsettled norms from international criminal law is not evident in current exclusion frameworks. Indeed, the ongoing failure to systematically consider international criminal law functions as a significant practical barrier to implementation of this principle in the current decision-making environment. These core principles offer each other mutual support: once exclusion decisions are grounded more firmly in international criminal law doctrine, it will be possible for exclusion frameworks to also incorporate an assessment of unsettled norms. Subsequently, applying the principle of unsettled norms will provide exclusion decision makers applying international criminal law with a valuable tool for addressing areas of uncertainty.

#### *D. Exclusion frameworks must account for structural and remedial differences between exclusion and international criminal law.*

The fourth core principle is that the exclusion framework must include a mechanism that protects the object and purpose of the Refugee Convention generally, and Article 1(F)(a) particularly, by explicitly taking into account key structural and remedial differences between international criminal law and exclusion. This section will first identify relevant differences between the two systems and then provide examples of the challenges these differences create when frameworks that have been

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<sup>80</sup> See discussion *infra* Part II.4.1.

<sup>81</sup> HATHAWAY & FOSTER, *supra* note 51, at Ch. 7.

developed in the specific context of international criminal law are imported directly into the context of exclusion assessments.

*1. Key differences between exclusion and international criminal law.*

There are many obvious differences between exclusions under Article 1(F)(a) and findings of liability under international criminal law. For example, it is obvious that these two systems vary in the structure and expertise of their decision-making bodies, in the nature of their proceedings, and in the consequences of a positive finding. While it is well beyond the scope of this Article to unpack and evaluate all of the implications of these differences, understanding certain key distinctions is critical to both this work and the broader project of ensuring that exclusion decisions are principled and pragmatic. The four differences discussed below lead to particular challenges for creating an exclusion paradigm that both fulfills the Refugee Convention's mandate that exclusion relies on international criminal law and ensures that Article 1(F)(a) is applied in a way that respects the provision's underlying objectives.

Differing purposes

Signatories to the *Rome Statute* have agreed that modern international criminal law aims to protect "peace, security, and [the] well-being of the world."<sup>82</sup> The purposes underlying this system are broad and ambitious, and include establishing that individuals have core duties based on the fundamental values of the international community, regardless of the norms in their individual nation-states.<sup>83</sup> The system thus tries and punishes international criminals with the goals of retribution and both general and specific deterrence.<sup>84</sup> The normative emphasis should not be understated: international criminal law is intended to contribute to the prevention of future human rights violations by ending impunity for the worst offenders and sending a message that the international community will not tolerate certain atrocious conduct.<sup>85</sup> It also serves to counter denials of systemic human rights violations in a high profile forum, providing an important truth-seeking mechanism. In short, the majority of decisions rendered by the international criminal law system aims to produce a normative message that extends far beyond the particular criminal accused.

Exclusion decisions, in contrast, are focused on maintaining the integrity of the asylum system by considering the individual responsibility of thousands of refugee claimants. While there is undoubtedly some normative value in denying access to the Convention to those responsible

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<sup>82</sup> Rome Statute, *supra* note 20, pmbl.

<sup>83</sup> See, e.g., ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 3 (2nd ed. 2008); GERHARD WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 27-28 (2009).

<sup>84</sup> See Rome Statute, *supra* note 20, pmbl. (stating that the parties to the statute are determined "to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes"); see generally ROBERT CRYER, ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 26-28 (2d ed. 2010). General deterrence is aimed at discouraging people generally from committing crimes, while specific deterrence is aimed at dissuading a particular offender from committing crimes again in the future. See BLACK'S LAW DICTIONARY 429 (9th ed. 2009).

<sup>85</sup> See, e.g., ANTONIO CASSESE, *supra* note 83, at 3, 6; GERHARD WERLE, *supra* note 83, at 26-28.

for international crimes, prevention and punishment are not the primary objectives of individual decisions under Article 1(F)(a). Indeed, the majority of exclusion decisions are made by the UNHCR or lower-level state administrative bodies, and many outcomes are not even available to the public as a result of privacy concerns. This places a significant limitation on their role as precedents and reinforces the notion that the normative and deterrent value of individual exclusion decisions is extremely limited.

#### Lack of prosecutorial discretion in the context of exclusion

The specific normative goals of international criminal law affect who is tried under the regime and for what crimes. The modern system is mandated to focus on the “most serious crimes of concern to the international community as a whole,”<sup>86</sup> and to restore and maintain peace in conflict areas by prosecuting and bringing to justice perpetrators who violate international humanitarian law.<sup>87</sup> This mandate is reflected in a number of procedural and jurisdictional mechanisms at the International Criminal Court, including broad prosecutorial discretion.<sup>88</sup> It is also significant that this court only gains jurisdiction when crimes exceed a certain degree of gravity<sup>89</sup> and that the United Nations has a specific power to trigger the Court’s jurisdiction when it identifies particularly egregious situations.<sup>90</sup>

Similar mechanisms can be found at the international tribunals, where rules again grant broad discretion to prosecutors.<sup>91</sup> The International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber has remarked explicitly on this discretion, noting that “[i]t is beyond question that the Prosecutor has a broad discretion in relation to the initiation of

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86 Rome Statute, *supra* note 20, pmb1.

87 *See, e.g.*, On the Establishment of an International Tribunal for the Prosecution of Persons Responsible for Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, S.C. Res. 808, U.N. SCOR, 48th Sess., U.N. Doc. S/Res/808 (Feb. 22, 1993); On the Establishment of an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, S.C. Res. 827, U.N. SCOR, 48th Sess., U.N. Doc. S/Res/827 (May 25, 1993). Both of these Security Council resolutions deal with the establishment of the ICTY, particularly the underlying purposes and goals of establishing such an international tribunal.

88 Rome Statute, *supra* note 20, arts. 15, 53-54.

89 *ICC at a Glance*, INT’L CRIM. CT., [http://www.icc-cpi.int/en\\_menus/icc/about%20the%20court/icc%20at%20a%20glance/Pages/icc%20at%20a%20glance.aspx](http://www.icc-cpi.int/en_menus/icc/about%20the%20court/icc%20at%20a%20glance/Pages/icc%20at%20a%20glance.aspx) (last visited June 2, 2013) (“[T]he ICC only tries those accused of the gravest crimes.”). For an excellent analysis of prosecutorial discretion at the ICC, including the gravity requirement, see WILLIAM SCHABAS, UNIMAGINABLE ATROCITIES 73-97 (2012).

90 *Jurisdiction and Admissibility*, INT’L CRIM. CT., [http://www.icc-cpi.int/en\\_menus/icc/about%20the%20court/icc%20at%20a%20glance/Pages/jurisdiction%20and%20admissibility.aspx](http://www.icc-cpi.int/en_menus/icc/about%20the%20court/icc%20at%20a%20glance/Pages/jurisdiction%20and%20admissibility.aspx) (last visited June 3, 2013).

91 Statute of the International Criminal Tribunal for the Former Yugoslavia art. 18, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute]; Statute of the International Criminal Tribunal for Rwanda art 17, S.C. Res. 955, Annex, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute]; *see also* Luc Côté, *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, 3 J. INT’L CRIM. JUST. 162, 165 (2005). Article 18(1) of the ICTY Statute and Art. 17(1) of the ICTR Statute state: “The Prosecutor shall initiate investigations ex-officio or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organisations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.” ICTY Statute, art. 18(1); ICTR Statute, art. 17(1).

investigations and in the preparation of indictments.”<sup>92</sup> Likewise, former Chief Prosecutor of the ICTY and International Criminal Tribunal for Rwanda (ICTR) Louise Arbour has remarked that “a domestic prosecutor is never really seriously called upon to be selective in the prosecution of serious crimes . . . By contrast, in the work of the international Tribunals, the Prosecutor has to be highly selective before committing resources to investigate or prosecute.”<sup>93</sup>

While prosecutors do not generally comment on those they have decided not to pursue, the Chief Prosecutor of the Special Court for Sierra Leone (SCSL) has explicitly addressed his decision not prosecute children for crimes they committed between the ages of fifteen and eighteen. David Crane has stated that in his view, “no child between 15 and 18 had the sufficiently blameworthy state of mind to commit war crimes in a conflict setting.”<sup>94</sup> He notes that he reached this decision despite the fact that the court clearly had jurisdiction over these individuals and, relatedly, he clearly had the authority to prosecute them.<sup>95</sup>

The gate-keeping function played by prosecutorial discretion in international criminal law is a critical mechanism for the system, especially where it is supplemented with additional judicial discretion to determine the decision maker’s docket.<sup>96</sup> As a result, international criminal law is able to focus its resources on cases that best support its mandate—primarily high-profile and high-level accused whose trials will help feed the normative discourse and encourage general deterrence.<sup>97</sup> In practice this means that limited resources are devoted primarily to “big fish” cases with a high

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92 Prosecutor v. Zdravko Mucic (Celebici Camp Case), Case No. IT-96-21-A, Judgment on Appeal, ¶ 602 (Int’l Crim. Trib. for the former Yugoslavia Feb. 20, 2001), available at <http://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf>.

93 Louise Arbour, *Progress and Challenges in International Criminal Justice*, 21 FORDHAM INT’L L.J. 531, 534 (1997). Note that there is some disagreement over precisely how much discretion the ICTY and ICTR prosecutors possess after an investigation has been launched. Daniel Nsereko, for example, finds that “when it comes to the decision to prosecute, the Prosecutors have limited discretion,” since after an investigation is launched and a prima facie case is made out, the statutes provide that the prosecutor “shall prepare an indictment.” Daniel D. Ntanda Nsereko, *Prosecutorial Discretion before National Courts and International Tribunals*, J. INT’L CRIM. JUST. 124, 135-36 (2005). Regardless of the statutes’ formalities, it is clear that in practice, the prosecutors have, at a minimum, significant discretion in deciding when to launch an investigation.

94 David M. Crane, *Prosecuting Children in Times of Conflict: The West African Experience*, 15 HUM. RTS. BRIEF, no. 3, 2008, at 11, 15, available at <http://www.wcl.american.edu/hrbrief/15/3crane.pdf> (written by the chief prosecutor of the SCSL).

95 *Id.* at 14.

96 See Rome Statute, *supra* note 20, art. 15. Similar provisions can be found in the Statute of the ICTY, *supra* note 71, art. 19, and the Statute of the ICTR, *supra* note 71, art. 18.

97 William Schabas explains that the ICC and other major forums in international criminal law have as a main objective prosecuting major war-criminals – the “big fish.” See WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 101 (2nd ed. 2004). Examples of high profile accused in international criminal law include Charles Taylor, Slobodan Milosevic, and Joseph Kony. It is noteworthy that the proliferation of states who have claimed domestic jurisdiction over violations of international criminal law in recent years are also extremely judicious with their resources, and very few prosecutions have occurred. For example, Joseph Rikhof found that since 1992 there have been only nine attempts by domestic courts to take action against former heads of state. See Joseph Rikhof, *Fewer Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Impunity*, 20 CRIM. L. FORUM 1, 28-30 (2009).

likelihood of success.<sup>98</sup> Where there is deviation, and mid level actors are targeted, the accused tend to be very directly involved in the criminal act.<sup>99</sup> Significantly, international criminal law doctrine has not been developed through consideration of the many low level actors who are only remotely connected to an underlying crime. It is telling that since 2000, the major international criminal forums have prosecuted only 217 cases. A verdict has been reached in 170 of these and an impressive eighty-six percent of finished cases resulted in conviction.<sup>100</sup>

In contrast, *thousands* of refugee claimants are considered under Article 1(F)(a) each year, since the exclusion provision is contemplated each time a claim for protection under the Refugee Convention is considered and the facts reveal potential involvement, however remote, in an international crime. The majority of those seeking asylum have committed no crimes and are not excluded. Further, even where the exclusion clause warrants serious consideration, the majority of cases involve individuals with far lesser roles in international crimes than those prosecuted in the international justice system. This is in part because serious perpetrators are frequently able to avail themselves of greater financial and political resources than lower-level participants, and those who are of most interest to international criminal law are thus less likely to rely on the asylum system for protection since they can instead secure safety (including potential relocation) through private means. The result is again more than merely procedural: this means both that Article 1(F)(a) applies to many more individuals and to far fewer serious perpetrators than does international criminal law, and that the types of factual contexts that are most likely to be put before the decision maker in each system are radically different.

#### Lower standard of proof in the context of exclusion

International criminal law relies on the well-established “proof beyond a reasonable doubt” threshold that requires virtual certainty of guilt

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98 *See, e.g.*, Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Warrant of Arrest (May 23, 2008) (Former Vice President of the DRC); Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Warrant of Arrest (July 2, 2007) (Former leader of a militia/ political party in the DRC); Prosecutor v. Milosevic, Case No. IT-99-37, Indictment (Int’l Crim. Trib. for the Former Yugoslavia May 22, 1999) (Former President of Serbia); Prosecutor v. Karadzic, Case No. IT-95-5-I, Indictment (Int’l Crim. Trib. for the Former Yugoslavia July 24, 1995) (Former President of the Republika Srpska); Prosecutor v. Kambanda, Case No. ICTR 97-23-S, Indictment (Oct. 28, 1997) (Former Prime Minister of Rwanda).

99 *See, e.g.*, Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999); Prosecutor v. Drazen Erdemovic, Case no IT-96-22-A, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997).

100 These figures include cases decided at the ICC, ICTY, and ICTR where a verdict was reached at the trial level; cases where the accused died before the trial was completed or where the indictment was withdrawn are not reflected. Cases transferred to national jurisdictions are also not included. Where several accused were tried in one proceeding, the case against each individual is recorded separately. The figures reflect those cases that terminated after January 1, 2000, meaning that an acquittal, sentence, or appeal decision occurred after that date. Cases are considered finished on the liability issue when a trial verdict has been reached, even if an appeal of that verdict is currently pending. The status of cases was calculated using information available from the ICC, ICTY, and ICTR. *See All Cases*, ICC, [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/cases/Pages/cases%20index.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/cases/Pages/cases%20index.aspx) (last visited July 24, 2013); *The Cases*, ICTY, <http://www.icty.org/action/cases/4> (last visited July 24, 2013); *Status of Cases*, ICTR, <http://www.unictr.org/Cases/tabid/204/Default.aspx> (last visited July 24, 2013).

to establish liability.<sup>101</sup> The Refugee Convention, on the other hand, stipulates that exclusion will occur where there are “serious reasons for considering” that the claimant has committed an international crime.<sup>102</sup> The latter standard is not defined in the Convention (or elsewhere) and is the subject of varying interpretations. State practice is divided between those that view the appropriate standard as somewhere between “mere suspicion” and the “balance of probabilities,”<sup>103</sup> and those that describe it as a unique standard that cannot be defined with reference to other thresholds.<sup>104</sup> Meanwhile, the UNHCR advocates for an interpretation that puts the evidentiary standard for exclusion somewhere between balance of probabilities and proof beyond a reasonable doubt.<sup>105</sup> It is noteworthy that despite these various understandings, there does not appear to be a single decision-making body that considers exclusion decisions on a standard equivalent to the criminal law threshold.<sup>106</sup>

The consequences of this lowered evidentiary threshold for applying the exclusion clause are more than merely semantic. An individual facing persecution can be denied access to the Refugee Convention with far greater doubt about his or her involvement in criminal activity than would be permissible in the context of a conviction under international criminal law.

### Binary Nature of Exclusion Decisions

Decisions about both criminal liability and exclusion from refugee status are binary in nature: defendants are either guilty or not, while asylum seekers are either excluded or not. However, while the consequences of being excluded are the same for everyone—denial of the protections that would otherwise be available under the Refugee Convention<sup>107</sup>—the

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101 The common law standard of having to prove guilt “beyond a reasonable doubt” has largely been adopted in international criminal law. *See* Int’l Crim. Trib. for the Former Yugoslavia, Rules of Procedure and Evidence rule 87(A), U.N. Doc. IT/32/Rev.49 (May 22, 2013); Int’l Crim. Trib. for Rwanda, Rules of Procedure and Evidence, U.N. Doc. ITR/3/REV.1 (June 29, 1995); Rome Statute, *supra* note 20, art. 66(3); *see also* SCHABAS, *supra* note 97, at 155.

102 Refugee Convention, *supra* note 1, art. 1(F).

103 *See, e.g., SRYYY v Minister for Immigration and Multicultural Affairs* [2006] AATA 320, ¶¶ 57, 61-62 (Austl.) (referencing *Arquita v Minister for Immigration and Multicultural Affairs* [2000] FCA 1889 (Austl.) with approval); *Mugesera v. Canada* (Minister of Citizenship and Immigration), [2005] 2 S.C.R. 100; *Ramirez v. Canada* (Minister of Employment and Immigration), [1992] 109 F.C.J. ¶ 53.

104 *See, e.g., Attorney General v Tamil X* [2010] NZSC 107 (Aug. 27, 2010) ¶¶ 38-39 (N.Z.); *R (on the application of JS) (Sri Lanka) v. Sec’y of State for the Home Dep’t* (2010) UKSC 15 [39]. The UK Supreme Court recently reiterated its position that existing standards of proof should not be imported into refugee exclusion decisions. Rather, decision makers should apply the particular words of the exclusion clause, which require a standard of proof higher than reasonable grounds to believe, but lower than proof beyond a reasonable doubt. *See Al-Sirri v. Sec’y of State for the Home Dep’t*, (2012) 54 UKSC 54 [33-39].

105 *Background Note on the Application of the Exclusion Clauses*, *supra* note 14, ¶¶ 107-11.

106 Some academic commentators argue that the standards should be equivalent. *See, e.g., Gilbert, supra* note 14, at 470.

107 The consequences of being a failed refugee claimant vary across jurisdictions, of course, and treatment of an individual may be affected to a greater or lesser degree by a number of factors, including, for example, the operation of other domestic or international human rights instruments, including the *Convention Against Torture*. This variation does not, however, change the consequences of being *excluded*, which in every case must be denial of refugee status. Further, there is currently a lack of information about what actually happens to

consequences of being convicted of an international crime can vary significantly among offenders. This is because the sentencing aspect of the criminal process recognizes and responds to the specific circumstances surrounding each offense, including the characteristics of the offender and the nature of his or her participation in the crime. Thus while the liability portion of the criminal process does not give weight to, for example, the role an individual took in supporting the commission of a crime, this and many other factors are relevant in determining the appropriate sentence.<sup>108</sup> Because exclusion decisions do not contain a sentencing component, Article 1(F)(a) frameworks relying exclusively on liability paradigms are unable to consider any of these nuances.

The binary nature of exclusion decision-making also affects the relevance of distinguishing between certain modes of participation. The complex forms of participation that exist in modern international criminal law have evolved around the general principle that supporting actors should bear a lower degree of responsibility than principal perpetrators.<sup>109</sup> The results of this distinction are both normative and material: international criminal law has typically deemed it more serious to have directly committed a crime than to have supported one<sup>110</sup> and sentences for supporting actors have consequently been consistently less severe than for principals.<sup>111</sup> Application of such a hierarchical approach has led to complications where collective criminal activity is involved because to hold “all those who made it possible for the perpetrator physically to carry out [the] criminal act . . . liable only as aiders and abettors might understate the degree of their criminal responsibility.”<sup>112</sup> Cassese elaborates on the issue:

if all those who take part in a common criminal action are aware of the purpose and character of the criminal action and share the requisite criminal intent, they must perforce share criminal liability, whatever the role and position they may have played in the commission of the crime. . . it would be difficult to distinguish between the degree of criminal liability.<sup>113</sup>

Responses to these concerns are evident throughout modern international criminal law, and have exerted great influence on the development of

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individuals who fear persecution but are denied refugee protection on the basis of Article 1F(a). Additional study on the ultimate fate of individuals who are denied status on this basis is needed to more fully understand the ultimate implications of these decisions.

<sup>108</sup> See, e.g., *Prosecutor v. Kvočka*, Case No. IT-98-30/1-A, ¶ 28 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28 2005); *Prosecutor v. Mile Mrksic*, Case No. IT-95-13/1-A, ¶ 407 (Int'l Crim. Trib. for the Former Yugoslavia May 5, 2009) (citing *Prosecutor v. Anto Furundija*, Case No. IT-95-17/1-A, ¶ 249 (Int'l Crim. Trib. for the Former Yugoslavia July 21, 2000)); *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, ¶ 182 (Int'l Crim. Trib. for the Former Yugoslavia May 24, 2000).

<sup>109</sup> For a discussion about the differing approaches to this issue at the tribunals and the ICC, see ELIES VAN SLIEDREGT, *INDIVIDUAL CRIMINAL RESPONSIBILITY IN INTERNATIONAL LAW* (2012).

<sup>110</sup> *Id.* at 78.

<sup>111</sup> Barbora Hola et al., *International Sentencing Facts and Figures: Sentencing Practice at the ICTY and ICTR* 9 J. INT'L CRIM. JUST. 411, 417 (2011).

<sup>112</sup> *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, ¶ 192 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

<sup>113</sup> ANTONIO CASSESE, *supra* note 83, at 182.

extended forms of liability including joint criminal enterprise (JCE) and indirect perpetration.<sup>114</sup>

Both the normative and pragmatic implications of recognizing a hierarchy amongst various modes of participation are irrelevant to exclusion decisions. Claimants are excluded anytime there are serious reasons for considering that they are individually responsible for an international crime, regardless of their own level of participation, and neither the normative value of the decision to exclude nor the implications of the exclusion are impacted by the way the claimant's involvement is categorized. As a result, the fundamental concerns motivating the creation of certain modes of participation in international criminal law have no bearing on decisions under Article 1(F)(a).

It is also significant that the frameworks developed to determine liability under international criminal law have been specifically created to work in tandem with the sentencing process that follows. Since the system as a whole has mandated that certain factors form part of the overall decision-making process—some under liability and some under sentencing—it is difficult to speculate about how the doctrine would have developed if only the first of these steps were available. It is, however, impossible to ignore the likelihood that at least some of the factors currently situated under the sentencing portion of the analysis would instead form part of the liability framework rather than be discarded entirely. This creates a challenge for those tasked with incorporating international criminal law principles into the exclusion context, where the assumed second part of the decision-making process is indeed completely absent.

The cumulative effect of these four differences should not be understated as together they render exclusion decisions and consequences fundamentally different from the decisions and consequences of a finding of liability under international criminal law. It is also critical to note that as a result of these differences, exclusion decision makers are in many cases asked to extend international criminal law doctrine into factual contexts that have not been the subject of robust consideration in international criminal law and that are far removed from the context in which international criminal law has been developed. Again, it is difficult to speculate about how international criminal law doctrine would be developed if it were routinely applied to low level or secondary actors, or to situations where

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114 Perhaps most influentially, the Appeals Chamber of the ICTY elevated participation in a common plan that ultimately results in the commission of a crime to the same stature as physical involvement in the criminal act itself. This was accomplished through an expansive interpretation of the term “committed.” The result was that joint criminal enterprise (JCE) became an accepted mode of liability before the tribunal, despite the fact that this form of participation had not been included in the tribunal's statute. It is noteworthy that there is currently some uncertainty about how the ICC will treat modes of liability for the purposes of sentencing and, in particular, whether there is a “hierarchy of blameworthiness” encapsulated in Article 25 of the *Rome Statute*. Prosecutor v. Mathieu Ngudjolo Chui, Case No. ICC-01/04-02/12, Concurring Opinion of J. Van den Wyngaert, ¶¶ 22-30 (Dec. 18, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1529537.pdf>. See, e.g., Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute, ¶¶ 917-23 (Mar. 14, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf>; Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Separate Opinion of Judge Fulford, ¶¶ 7-8 (Mar. 14, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1379838-A.pdf>; ILIAS BANTEKAS, INTERNATIONAL CRIMINAL LAW 52 (4th ed. 2010); WERLE, *supra* note 83, at 169; see also VAN SLIEDREGT, *supra* note 109, at ch. 4-5.

there is no mitigation available through sentencing. Specific situations where these concerns arise are discussed below.

2. *Examples of situations where structural and remedial differences with international criminal law may cause concerns for Article 1(F)(a).*

Concerns resulting from the key differences between international criminal law and exclusion may arise on either a case-by-case or systemic basis. Examples of each of are provided below.

Case-by-case Concerns

In certain situations, the particular facts of a case may lead to the conclusion that the object and purpose of Article 1(F)(a) are not served by denying the claimant refugee protection, notwithstanding the fact that direct application of international criminal law norms may indicate that there are indeed serious reasons for considering that he or she has committed an offense. Examples may include cases involving child soldiers and other claimants who were minors when offenses were committed<sup>115</sup> or situations where the claimant's contribution was so small or remote it is deemed by the decision maker to be *de minimis* in nature,<sup>116</sup> such as knowingly paying a nominal amount to join a political party engaged in international crimes because membership was the only way to attend university. There may also be situations where the particular circumstances surrounding the claimant's involvement are compelling for other reasons, such as a police officer who legally arrested individuals to prevent murder or rape, but did so knowing that upon arrest the accused would be subjected to "physical interrogation

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115 There is growing agreement on the need to protect children from involvement in armed forces and to hold to account those responsible for their recruitment into combat. Further, while there is no clear consensus on the appropriate legal response for those who committed international crimes as children, there are indications that the international community does not view prosecution as the best response. For example, the *Rome Statute* explicitly denies jurisdiction over perpetrators under the age of 18 at the time of commission, and there have been no attempted prosecutions of a person under 18 by any international court. Rome Statute, *supra* note 20, art. 26. For a detailed discussion of this issue, see Matthew Happold, *The Age of Criminal Responsibility for International Crimes Under International Law in INTERNATIONAL CRIMINAL ACCOUNTABILITY AND THE RIGHTS OF CHILDREN* 69, 72 (Karin Arts & Vesselin Popovski eds., 2006). There is, however, no exception in Article 1(F)(a) that takes children out of the purview of the exclusion clause. Thus while the UNHCR identifies a number of factors that must be considered before excluding a child (including his or her age and mental capacity, as well as any evidence of duress or involuntary intoxication), the agency notes that if *mens rea* is found, and none of the normal defenses are triggered, exclusion should result. In the exceptional case of child soldiers the agency goes on to stipulate that "even if no defence is established, the vulnerability of the child, especially those subject to ill-treatment, should arguably be taken into account when considering the proportionality of exclusion for war crimes or serious non-political crimes." The UNHCR Guidelines on Exclusion (and accompanying Background Note) do not mention the need to give special consideration to child soldiers who have committed other 1F(a) crimes, including crimes against humanity. See *Background Note on the Application of the Exclusion Clauses*, *supra* note 14, ¶¶ 91-92; *UNHCR Article 1F Guidelines*, *supra* note 26. As has been mentioned, decision makers outside of the UNHCR do not apply a proportionality assessment, and there is therefore no part of the 1F(a) process where the vulnerability of children is explicitly and systemically taken into account.

116 The concept of *de minimis* is familiar in law and is defined as "involvement so insignificant that a court may overlook it in deciding an issue or case," from *de minimis non curat lex* which translates to "the law does not concern itself with trifles." BLACK'S LAW DICTIONARY (9th ed. 2009).

techniques” as part of the state’s routine questioning of criminal suspects; or, even, an individual who paid a tax to a government knowing that it was being levied to fund weapons that were being used to kill civilians.<sup>117</sup> In each of these situations, the exclusion decision maker is asked to extend international criminal law doctrine into factual contexts that have not been the subject of robust consideration by international criminal law decision makers, and that are far removed from the context in which the doctrine was developed. Direct application of international criminal law in some of these cases may result in the exclusion of individuals who are deserving of protection and will not bring the asylum system into disrepute. Exclusion in such circumstances violates a purposive reading of Article 1(F)(a) and is cause for concern.

### Doctrinal Concerns

In some circumstances, direct application of a particular aspect of existing international criminal law doctrine may regularly and systemically result in exclusions that are inconsistent with the object and purpose of Article 1(F)(a). Decision makers must be aware of these areas and of the potential for systemic injustices if the structural and remedial differences between the systems are not properly considered and accounted for. An assessment of current doctrine reveals that this may presently be the case for individuals whose involvement in a crime is based on the margins of extended liability and for those whose criminal actions were ordered or coerced. Each is explained below.

### JCE III and Other Forms of Extended Liability

JCE III is a form of individual responsibility that holds a criminal accused responsible for acts that fall outside of the common plan to which he or she subscribed. The ICTY Appeals Chamber in *Tadic* held that such liability is possible where criminal acts are a “natural and foreseeable consequence” of a common purpose.<sup>118</sup> Accordingly, all participants in a common enterprise can be held responsible for such acts even where they neither participated in the relevant crime nor intended for it to occur. All that is needed to establish liability is a finding that the accused was “reckless or indifferent” to the risk of certain outcomes.<sup>119</sup> Intent and knowledge are not required.<sup>120</sup>

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117 A direct application of existing international criminal law would likely find that such claimants were secondary actors as a result of having knowingly and intentionally aided and abetted in, or contributed to a group with a plan to commit, a war crime or crime against humanity. See, for example, the discussion on secondary participation in BANTEKAS, *supra* note 110, at 67-70; CASSESE, *supra* note 83, at 181-89; VAN SLIEDREGT, *supra* note 109, at 131-47.

118 Prosecutor v. Tadic, Case No. IT-94-1-A, Judgement, ¶ 204 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999).

119 *Id.*

120 The language provided in *Tadic* suggests that an objective standard of negligence may be sufficient to establish JCE III, although the judgment itself specifies that “more than negligence is required.” *Id.* ¶ 220. There is suggestion in some (but not all) post-*Tadic* cases that negligence will indeed suffice. For further discussion on the expanding scope of JCE III post-*Tadic*, including with regard to the *mens rea* requirements, see VAN SLIEDREGT, *supra* note 105, at 136-41.

JCE III has been the subject of significant controversy, with commentators questioning the legal basis for its recognition, the scope of the liability it imposes, and its awkward application to specific intent crimes.<sup>121</sup> One of the most frequently expressed concerns is that JCE III “dispenses too quickly with the protections of the criminal law that seek to ensure that an individual is convicted for his own deliberate wrongdoing” thus “rais[ing] the specter of guilt by association.”<sup>122</sup> Despite persistent and numerous critiques, use of JCE III is prominent throughout several international criminal forums and this form of participation has now been recognized by the ICTY, the ICTR, the Special Court for Sierra Leone, the Special Panel considering crimes in East Timor, the Special Tribunal for Lebanon, and the Supreme Iraqi Criminal Tribunal.<sup>123</sup>

The result of applying JCE III in the exclusion context, however, is a widened scope of liability that is inconsistent with a purposive reading of Article 1(F)(a). Direct application of JCE III to asylum seekers results in denying access to the Refugee Convention to individuals who had only a very minor connection to a criminal group and who neither participated in, nor intended to support the international crime for which they are being held responsible. Frequently, such individuals will not be undeserving of protection as refugees and will not bring the asylum system into disrepute.

My conclusion on this point is also supported by the fact that the factors potentially justifying use of JCE III in international criminal law are absent in the exclusion context. As has been discussed, distinctions between primary and secondary actors are irrelevant to Article 1(F)(a) because there is no normative value to individual decisions, and the consequences of exclusion are the same regardless of the mode of participation that leads to a finding of individual responsibility. This effectively eliminates any need to rely on JCE III in situations where another mode of participation would be equally applicable. In addition, while expansive interpretations of JCE III have enabled international criminal law to ensure that those most responsible for mass atrocities do not escape liability because of the collective nature of their crimes, the exclusion system applies primarily to lower-level actors, meaning that concerns about the need to prosecute key players to the full extent of the law are far less pronounced. Further, while

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121 For a summary of these grounds of concern, see VAN SLIEDREGT, *supra* note 109, at 141–42. Regarding concerns about the scope of liability in particular, see SCHABAS, *supra* note 97, at 104.

122 See, e.g., Allison Marston Danner & Jenny S. Martinez, *Guilt by Association: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 137, 146 (2005). Mohamed Badar also identifies concerns with JCE III, noting that “under both the objective and subjective standards, the participant is unfairly held liable for criminal conduct that they did not intend and in which they did not participate” with the result that if someone is successfully convicted of a specific purpose crime on the basis of JCE III, it “will alter the JCE doctrine to become a device used to ‘just convict everyone.’” Mohamed Elewa Badar, *Participation in Crimes in the Jurisprudence of the ICTY and ICTR*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIMINAL LAW 247, 256–57 (William Schabas & Nadia Bernaz eds., 2011). The trial chamber in *Bardanin* was also critical of the doctrine, holding that the specific intent required for genocide cannot be reconciled with the *mens rea* standard in extended forms of JCE. Significantly, this decision was overturned on appeal. Prosecutor v. Bardanin, Case No. IT-99-36-T, Decision on Motion for Acquittal Pursuant to Rule 98, ¶ 57 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 28, 2003).

123 Danner & Martinez, *supra* note 111, at 154–56; see also VAN SLIEDREGT, *supra* note 109, at 143–45 (“Despite the criticism, JCE has gained ground outside the ICTY.”).

prosecutorial discretion and nuanced sentencing help to lessen the severe impact of JCE III in international criminal law, both of these mechanisms are absent in the exclusion context. The result is that many individuals who would never be charged under international criminal law, or who would receive extremely mitigated sentences as a result of their lack of intent or physical involvement in a crime, can nonetheless be excluded on the basis of a direct application of JCE III.

Similar concerns may apply to other forms of participation in international criminal law where they too rely on a very remote degree of physical participation, intent, or knowledge. I note in particular that while the status of JCE III in the *Rome Statute* is unclear,<sup>124</sup> the pre-trial chamber of the ICC has recently indicated a willingness to extend the concepts of co-perpetration and indirect perpetration to hold an accused responsible for acts committed by a third party over which he exercised no control.<sup>125</sup> Like JCE III, this developing doctrine may hold individuals responsible for the acts of others in the absence of a direct contribution, and may be cause for concern if imported directly into the exclusion context. Similar concerns may also exist with evolving international criminal law doctrine on inchoate offenses<sup>126</sup> and the potential revival of liability on the basis of membership

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124 Article 25 provides an alternate approach to common purpose liability and does not refer to the concept of JCE. The intersection between JCE and the *Rome Statute* thus remains unclear; some commentators suggest that it may not be possible to subsume the entirety of JCE III into Art. 25, while others view the concepts as entirely distinct. Meanwhile, early decisions from the ICC itself seem to suggest that while the jurisprudence surrounding JCE may be “of assistance” to the interpretation of Art. 25, there are important differences among the modes of liability. *See, e.g.*, Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Separate Opinion of Judge Fulford, ¶¶ 10-11 (Mar. 14, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1379838-A.pdf>; Prosecutor v. Callixte Mbarushimana, Case No. ICC-01/04-01/10, Decision on the Confirmation of Charges, ¶¶ 280-282 (Dec. 16, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1286409.pdf>. One particularly notable difference is that the *mens rea* requirement of recklessness has thus far not been adopted in the context of the *Rome Statute*. *See, e.g.*, Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges, ¶¶ 357-69 (June 15, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc699541.pdf>. For varying perspectives on the relationship between JCE and the *Rome Statute*, see, for example, BANTEKAS, *supra* note 114, at 53-58; VAN SLIEDREGT, *supra* note 109, at 145-47; Kai Ambos, *Joint Criminal Enterprise and Command Responsibility*, 5 J. INT’L CRIM. JUST. 159, 172 (2007).

125 *See* The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, ¶¶ 490-93 (Sept. 30, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc571253.pdf>. For commentary on these forms of liability, see, for example, Neha Jain, *The Control Theory of Perpetration in International Criminal Law*, 12 CHI. J. INT’L L. 159, 167-71 (2011); Thomas R. Lieflander, *The Lubanga Judgment of the ICC: More than just the First Step?*, 1 CAMBRIDGE J. INT’L & COMP. L. 191, 203-08 (2012).

126 Recognition of inchoate offenses always presents the potential for a rapid broadening of criminal liability and this area must be treated with extreme caution. There are four general categories of inchoate offenses in international criminal law: conspiracy, planning and preparation, direct and public incitement, and attempt. These offenses are recognized to varying degrees across instruments and in limited jurisprudence, and the law in this area is still under development. Inchoate offenses are generally most broadly recognized with respect to genocide, and to a lesser extent for other international crimes. For example, direct and public incitement is generally seen as only prohibited with respect to genocide, the most serious international crime, because of concerns about excessively broadening what is considered criminal conduct outside of that context. *See* CASSESE, *supra* note 83, at 193. Similarly, the differences in the civil law and common law concepts of conspiracy have led to a reluctance to completely embrace the broader common law view of this concept at the international level. The ICTY and ICTR statutes (in Article 4(3)(b) and Article 2(3)(b), respectively) explicitly criminalize conspiracy to commit genocide. The *Rome Statute*, on the other hand, does not include conspiracy as such, and Article 25(3)(d) requires commission of an explicit act as

in a criminal organization.<sup>127</sup> In each case, development of modes of participation on the basis of attenuated mens rea and actus reus in order to ensure the conviction of high-level accused in the international criminal law context may raise significant problems for low-level actors in the exclusion context. Where forms of extended liability such as JCE III are the only sources of individual responsibility for an international crime, exclusion should generally not occur.

### Superior Orders

The defense of superior orders is both one of the most well-known,<sup>128</sup> and one of the most controversial, in international criminal law. The statutes of both the ICTY and the ICTR prohibit a claim of superior orders as a defense to liability but allow it to be considered as a mitigating factor in sentencing.<sup>129</sup> The *Rome Statute*, on the other hand, allows superior orders to be claimed both as a mitigating factor and, in certain limited circumstances, as a complete defense for individuals who were under a legal obligation to obey the order.<sup>130</sup>

Given that many asylum seekers being considered for exclusion occupied low-ranking positions with military or rebel groups, it is likely that claims of superior orders will be frequently relevant to decisions under Article 1(F)(a). Exclusion decision makers facing these cases from members of state militaries should apply the defense as articulated in the *Rome Statute*, in accordance with my core principle that contested norms should not be used to exclude. In the context of defenses, this requires that a lack of clarity result in application of the norm that makes the defense most

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evidence of “a group of persons acting with a common purpose.” Rome Statute, *supra* note 20, art.25. See SCHABAS, *supra* note 97, at 215; WERLE, *supra* note 83, at para. 490. Attempts of any international crime are explicitly criminal under Article 25(3)(f) of the *Rome Statute*. As the *Statute* does not criminalize planning and preparing, the zone of criminality created by this provision may only begin once the perpetrator has taken a significant step toward carrying out the crime. See THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY vol. 1, at 807 (Antonio Cassese et al. eds., 2002). It is also noteworthy that the *Rome Statute* allows accused persons the opportunity to plead voluntary abandonment of an attempt as a defense. See SCHABAS, *supra* note 97, at 105.

127 Liability for membership in a criminal organization was first developed as part of the Nuremberg Trials as a means of prosecuting the large numbers of people involved in various branches of Nazi organizations. It was a controversial form of liability and has not since been applied, despite its close doctrinal ties to JCE. See Danner & Martinez, *supra* note 122, at 117-18. Joseph Rikhof finds that although this form of liability has fallen into disuse, the reasoning for “not applying this concept” is unclear, noting further that rejection of the principle of membership at the ICTY could be seen as merely a jurisdictional ruling. Such reasoning suggests that the notion of membership could be revived in other international forums with different jurisdictional boundaries. See RIKHOF, *supra* note 33, at 206-207, (discussing Prosecutor v. Stakić, Case No. IT-97-24, Judgement (Int’l Crim. Trib. for the Former Yugoslavia July 31, 2003).

128 Van Sliedregt notes that the defense of superior orders has been raised more frequently in war crimes trials than any other plea. VAN SLIEDREGT, *supra* note 109, at 287 (citing U.N. War Crimes Comm’n, 15 LAW REPORTS OF THE TRIALS OF WAR CRIMINALS 157 (1949)).

129 ICTY Statute, *supra* note 93, art. 7; ICTR Statute, *supra* note 93, art. 6.

130 Article 33 stipulates that an individual can be relieved of criminal responsibility where he or she was under a legal obligation to obey the superior order; did not know that the order was unlawful; and did not fulfill a manifestly unlawful request. The provision also clarifies that orders to commit genocide or crimes against humanity are manifestly unlawful and as a result, an individual cannot use superior orders as a defense to these crimes. For varying commentary on use of superior orders as a full defense, see, for example, CASSESE, *supra* note 83, at 241; VAN SLIEDREGT, *supra* note 105, at 296.

available to the claimant. The inability of exclusion decisions to accommodate the well-established mitigating effect of superior orders also militates in favor of applying a robust interpretation during assessment of individual responsibility.

There are, however, two additional challenges for decision makers relying on international criminal law in this area. The first is that the *Rome Statute* limits the defense of superior orders to individuals who were “under a legal obligation to obey orders,”<sup>131</sup> rendering it functionally unavailable to all those who follow orders in the context of a structure that is not sanctioned by the state. Given the prevalence of “rebel groups,” “freedom fighters,” and “irregular armed forces” in many refugee-producing states,<sup>132</sup> it is deeply problematic for a refugee status determination process founded on political neutrality to offer a defense to individuals only on one side of an armed conflict. As a result, in the exclusion context the defense of superior orders must be available to combatants in both state militaries and other organized forces engaged in armed conflict.

The second issue is that the *Rome Statute* places an absolute bar on the use of superior orders in situations involving crimes against humanity and genocide.<sup>133</sup> This bar has been developed in an international criminal law system that is preoccupied primarily with principal offenders and, specifically, with ensuring that those who commit truly atrocious acts are unable to avoid liability by claiming that they were merely following the instructions of a superior. Such an absolute rule based exclusively on the nature of the crime fails, however, to account for secondary actors whose very small degree of contribution may militate in favor of applying the defense, even where a crime against humanity has ultimately been committed.<sup>134</sup> This may be the case, for example, for a soldier who is ordered to drive a commander to a known torture camp, or a police officer who is ordered to file behavior reports on detainees while knowing that this may result in mistreatment. Such low-level secondary actors have not been considered during the development of international criminal law doctrine but appear frequently in the context of exclusion. In such cases, importing the international criminal law bar on use of the defense solely on the basis of the category of crime ultimately committed does not enable exclusion decisions-makers to give appropriate weight to the extremely relevant factor of the claimant’s actual degree of involvement.

### Duress

As will be explained under the defenses section of the framework proposed below, international criminal law allows duress as a complete

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131 Rome Statute, *supra* note 20, art. 33(1)(a).

132 Examples include: the Free Syrian Army, the Revolutionary United Front in Sierra Leone, the FARC in Columbia, and the LRA in Uganda, Sudan, and the DRC.

133 Article 33(2) of the *Rome Statute* states: “For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.” This completely excludes orders to commit genocide or crimes against humanity from being used as a defense under Article 33(1). Rome Statute, *supra* note 20, art. 33.

134 A similar concern does not exist in the case of genocide because the specific intent requirement for this crime ensures that very low-level secondary actors will not be held liable. For a detailed explanation on the *mens rea* requirements for genocide, see, for example, ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 208-28 (2nd ed. 2010); SCHABAS, *supra* note 97, at 38.

defense to culpability in certain circumstances. In that section, I argue that it is extremely important duress be fully considered and applied in the context of exclusion decisions. This does not mean, however, that direct use of the duress doctrine developed in international criminal law is sufficient to ensure that the purposes of Article 1(F)(a) are protected. Two specific areas of potential concern are identified here: the imminence requirement and the proportionality assessment.

#### The imminence requirement

Article 31(1)(d) of the *Rome Statute* codifies the principle that duress only applies where the actor is facing a threat that is deemed “imminent.” This temporal requirement is consistent with traditional notions of duress in international criminal law and is justified by the need to ensure that the criminal behavior is motivated by the threat, not some other factor. It thus ensures that the defense does not apply where the perpetrator could have taken other evasive action, including the attainment of state protection.<sup>135</sup> Although the imminence requirement is a clear part of international law, its appropriateness is questionable since it seems to function primarily as an imperfect proxy for the more relevant question of whether the actor could have escaped the threatened harm: while it is true that duress should be unavailable where wrongdoing can be avoided through escape, it is not equally true that a lack of temporal proximity to the pending harm means escape is possible. Thus, while the availability of alternative courses of action is a relevant consideration when determining whether duress should apply, the timing in which the harm will be executed is only one possible indicator of whether an alternative course of action was actually available. Imposing a strict requirement of temporal proximity may wrongly deny the defense of duress to accused whose actions were truly coerced.<sup>136</sup>

While imminence continues as an element of the defense of duress in international criminal law, the limited utility of a temporal requirement has been recognized by a number of domestic criminal systems around the world.<sup>137</sup> For example, review of state practice in this regard indicates that the majority of civil codes do not contain a temporal requirement.<sup>138</sup> In addition, the Supreme Court of Canada has noted that a “substantial consensus” has developed in the common law countries of Canada, England, and Australia that a “strict criterion of immediacy is no longer a generally

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<sup>135</sup> See ONDER BAKIRIOGLU, SELF-DEFENCE IN INTERNATIONAL AND CRIMINAL LAW: THE DOCTRINE OF IMMINENCE 55 (2011) (focusing primarily on imminence in the context of self-defense, but also noting its applicability in the context of duress); Stanley Yeo, *Considerations of Time and Space in Duress*, 16 SINGAPORE ACAD. L.J. 354, 362 (2004).

<sup>136</sup> The precise meaning of the term imminence and the implications for the imposition of a temporal requirement in international criminal law are discussed further in: Jennifer Bond & Meghan Fougere, *Omnipresent Threats: A Comment on the Defence of Duress in International Criminal Law*, [Periodical Title] (forthcoming 2013).

<sup>137</sup> For more examples of state practice with regard to the temporal requirement, see: Jennifer Bond & Meghan Fougere, *Omnipresent Threats: A Comment on the Defence of Duress in International Criminal Law*, [Periodical Title] (forthcoming 2013).

<sup>138</sup> Exceptions include Germany and the Former Yugoslavia. See *Prosecutor v. Erdemovic*, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 59 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997), <http://www.icty.org/x/cases/erdemovic/acjug/en/erd-asojmcd971007e.pdf>.

accepted component of the defense.”<sup>139</sup> The court also confirmed that in moving away from this aspect of the assessment, courts are refocusing on more salient issues: “[t]he operative test in the English and Australian cases is whether the threat was effective to overbear the accused’s will at the moment he committed the crime. Moreover, the safe avenue of escape test and the proportionality principle also appear to be key elements of the defense.”<sup>140</sup> The Canadian high court subsequently struck down a temporal requirement as unconstitutional and endorsed an alternate focus on avenues of escape, noting in particular the relevance of this modified approach to situations where a person believes it would be “useless or dangerous” to seek assistance from authorities, since a focus on time is particularly ill-suited in such situations.<sup>141</sup>

Despite strong arguments in favor of a duress analysis focused on the availability of a safe avenue of escape, rather than on imminence,<sup>142</sup> it would be inaccurate to suggest that this issue is currently the subject of uncertain doctrine in international criminal law. Indeed, the recent articulation of the defense of duress in Article 31(1)(d) serves to reinforce the continuation of a temporal requirement in that system. This does not, however, justify a direct incorporation of a literal reading of this concept into the exclusion context. Given that many asylum seekers are fleeing environments filled with violence, coercion, and a lack of state protection, the potential for injustices to result from a strict application of the imminence requirement is even more acute when applied to decisions under Article 1(F)(a).

There are some important analogies to be drawn from work examining the application of traditional defenses to battered women. While the circumstances facing abused women who resort to violence against their partners are obviously entirely distinct from those facing asylum seekers who participate in international crimes, some of the principles underlying the former are directly applicable to the latter. Feminist scholars have been arguing for decades that a temporal requirement in self-defense fails to recognize the unique realities of battered women and places an unjust restriction on application of the defense. Domestic violence, they argue, “cannot be understood as a series of isolated incidents detached from the overall pattern of power and control within which the violence is situated,”<sup>143</sup> and the difficulties women face in escaping their assailants and

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139 R. v. Ruzic, [2001] 1 S.C.R. 687, 733.

140 *Id.*

141 *See id.* at 733-34, 739. A similar conclusion was reached in a British case involving seven Shiite Muslims who hijacked an airplane to avoid deportation back to Iraq. *See R v. Abdul-Hussain*, [1998] EWCA (Crim) 3528, 1999 CRIM. L. REV. 570. Although the interpretation of imminence in this latter case has subsequently been revisited by the House of Lords, it is significant that the High Court continues to emphasize that imminence is an indicator of whether or not commission of the crime could be avoided “whether by going to the police or in some other way.” *R v. Hasan*, [2005] UKHL 22 at para 28, [2005] 2 Crim. App. 22 (H.L.) (Lord Bingham).

142 This view will be more fully explained in an article to be released in 2013. There, I argue that “imminence” in the *Rome Statute* should be read down such that the impact of the temporal requirement is minimized. Jennifer Bond & Meghan Fougere, *Omnipresent Threats: A Comment on the Defence of Duress in International Criminal Law*, [International Criminal Law Review] (forthcoming 2014).

143 Rebecca Bradfield, *Understanding the Battered Woman who Kills her Violent Partner: The Admissibility of Expert Evidence of Domestic Violence in Australia*, 9 PSYCHIATRY, PSYCHOL. & L. 177, 178 (2002).

in receiving meaningful protection from the relevant authorities must be given appropriate consideration.<sup>144</sup> This latter point is particularly salient in the context of asylum seekers and is worth emphasizing:

For the battered woman, escape from the abusive situation may not be a viable alternative. Frequently, [she will] have no access to money, alternate shelter, or means of transportation or support for herself or her children. . . . Further, the idea that the battered woman's act of self-help is unjustified because the law will protect her may be similarly ill-formed. The failure of the current legal system to deal effectively with domestic violence cases is well-documented.<sup>145</sup>

In light of these complexities, calls have consistently been made for the law to give more robust assessment of what actions are “reasonable” for women facing the threat of ongoing violence, such that the “social context” and “structural realities” of their lives informs the assessment of whether there were alternatives to the harms they ultimately caused.<sup>146</sup> A strict temporal requirement is deemed to be at odds with this more contextual evaluation.

The unique circumstances facing many asylum seekers render a similarly contextualized approach to duress particularly important in the context of exclusion decisions under Article 1(F)(a). The ongoing violence, extreme coercion, and lack of state assistance that is present in many refugee-producing states suggest that the assumption that a non-imminent threat can be easily avoided must be re-visited. Just as domestic criminal law risks maintaining biases against women by failing to recognize the realities of those who are battered, so too does exclusion law risk infusing decisions with Western biases<sup>147</sup> by failing to recognize the realities of those who have had to survive under extreme coercion, violence, and state failure. In order to uphold the purposes of Article 1(F)(a) and avoid denying protection to those whose admission as refugees would not bring the asylum system into disrepute, it is essential that exclusion decisions take into account the continuous threats that exist in many refugee-producing countries. This can only occur if the imminence requirement that exists in international criminal law is read in the context of exclusion decisions as requiring a more contextualized assessment of whether the individual could access a safe avenue of escape.

#### The proportionality requirement

Duress in modern international criminal law requires proportionality between the harm the perpetrator caused and the harm sought to be avoided:

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144 See generally M.J. Willoughby, *Rendering Each Woman Her Due: Can a Battered Woman Claim Self-Defence When She Kills Her Sleeping Batterer?*, 38 U. KAN. L. REV. 169 (1989).

145 *Id.* at 186–87 (footnotes omitted).

146 See Julie Stubbs & Julia Tolmie, *Battered Women Charged with Homicide: Advancing the Interests of Indigenous Women*, 41 AUSTL. & N.Z.J. CRIMINOLOGY 138, 143 (2008).

147 James Hathaway outlines the historical development of the international refugee system, and notes that it has been largely defined by, and in support of, Western interests, especially around controlling unwanted migration. James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 HARV. INT'L L.J. 129, 162-64 (1990).

the crime committed [can] not [be] disproportionate to the evil threatened (this would, for example, occur in case of killing in order to avert an assault). In other words, in order not to be disproportionate, the crime committed under duress must be, on balance, the lesser of two evils<sup>148</sup>

This proportionality requirement has typically been measured objectively in international criminal law, as evidenced by the discourse around the applicability of duress to murder or crimes against humanity. In both instances, the basic principle that “human life is such a sacred asset that its taking may never be justified”<sup>149</sup> underlies the debate about whether the presence of duress can negate liability where death or crimes against humanity have resulted, or, rather, whether it can only serve to mitigate the accused’s sentence in such circumstances.<sup>150</sup> In the case of murder, the essential inquiry is whether, objectively speaking, there is any threatened harm that can be proportionate to taking the life of another. Likewise, amidst debate about the legal availability of duress for crimes against humanity, even those who argue that the defense should in theory be

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148 Prosecutor v. Erdemovic, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese, ¶ 16 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997), <http://www.icty.org/x/cases/erdemovic/acjug/en/erd-adojcas971007e.pdf>. *Accord* Prosecutor v. Erdemovic, Case No. IT-96-22-A, Joint Separate Opinion of Justice MacDonald and Justice Vohrah, ¶ 37 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997), <http://www.icty.org/x/cases/erdemovic/acjug/en/erd-asojmcd971007e.pdf>; CASSESE, *supra* note 8379, at 250. That proportionality is a requirement of a successful plea of duress in international criminal law is also supported by other authors. *See* BANTEKAS, *supra* note 110, at 63; GEERT-JAN ALEXANDER KNOOPS, DEFENSES IN CONTEMPORARY INTERNATIONAL CRIMINAL LAW 131 (2nd ed. 2008); WERLE, *supra* note 83, at 146-47; Shane Darcy, *Defences to International Crimes in ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIMINAL LAW*, *supra* note 122, at 231, 234-35 (citing Justice Cassese’s reasons in *Erdemovic*). It is significant to my argument surrounding proportionality that many national civil law systems recognize two distinct defenses that relate to the international criminal law defense of duress: duress as an excuse and “choice of evils” as a justification. This is distinct from the division in Anglo-American law between duress based on human threats and duress based on environmental circumstances, and instead distinguishes between situations which forgive a particular actor and those in which the act itself loses its criminal character. As Lawrie Reznick clearly explains, “[j]ustifications show that the action was not evil, and excuses show that the agent doing the harmful act was not evil.” LAWRIE REZNEK, *EVIL OR ILL: JUSTIFYING THE INSANITY DEFENCE* 42 (1997). While the distinction between these two concepts is well-known, authors such as Cassese and Gerhard Werle note that in practice the distinction has been rendered largely irrelevant due to both a lack of cases requiring that a defense be precisely characterized, and the failure of the *Rome Statute* to distinguish between defenses in this way. *See* CASSESE, *supra* note 83, at 259; WERLE, *supra* note 83, at 204. As a result of a general blurring of these concepts at the international level, articulations in both the majority of international criminal cases and the *Rome Statute* call for a consideration of proportionality. For a review of relevant cases in international criminal law, see VAN SLIEDREGT, *supra* note 109, at 249–58. It is also significant that even a strict application of duress as excuse seems to require some consideration of proportionality in situations where the most serious crimes are committed. *Id.* at 252 (discussing the *Einsatzgruppen* case).

149 CASSESE, *supra* note 83, at 285.

150 For discussion on this issue, see, for example, *id.* at 285-89; KNOOPS, *supra* note 146, at 47. *See generally* Luis E. Chiesa, *Duress, Demanding Heroism and Proportionality* 41 *VAND. J. TRANSNAT’L L.* 741 (2008); Stephen C. Newman, *Duress as a Defence for War Crimes and Crimes Against Humanity – Prosecutor v Drazen Erdemovic* 166 *MIL. L. REV.* 158 (2001); Illan Rua Wall, *Duress, International Criminal Law and Literature* 4 *J. INT’L CRIM. JUST.* 724 (2006).

available recognize that there is nonetheless an objective proportionality requirement that must be met.<sup>151</sup>

There is some confusion about the way the proportionality requirement is articulated in the *Rome Statute*. Article 31(1)(d) introduces a subjective element by requiring that the accused “does not intend to cause a greater harm than the one sought to be avoided.”<sup>152</sup> Such an approach may be entirely new to international criminal law formulations of duress<sup>153</sup> and it is unclear whether this is in lieu of, or in addition to, the traditionally recognized objective requirement, which may itself be preserved by the provision’s “reasonableness” requirement.<sup>154</sup>

Regardless of whether a subjective or objective approach is adopted, the proportionality requirement places a significant limiting factor on the availability of duress in international criminal law, particularly where an accused has been involved in the commission of serious crimes. As Elies van Sliedregt notes, “the problem with duress and international crimes is the same as the problem with duress and murder: the concept of proportionality is incompatible with the weighing of human lives.”<sup>155</sup> As such, whether the proportionality of the accused’s act is evaluated objectively—by asking whether the act actually was proportional to the harm threatened—or subjectively—by asking whether the accused believed it to be so—the outcome of the analysis will be the same in most cases. Without consideration of more, the harm resulting from commission of a crime against humanity will almost always be objectively considered the greater one. Likewise, where the accused contributed to serious harm with knowledge and intent, duress will be unavailable even if he or she truly believed that the course of action taken was the only one available. This is the limiting effect of a strict proportionality requirement.

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151 Cassese speculates that this may mean that the defense will never succeed, while Bantekas notes that where there is a very high probability that the accused would not have been able to save the life of their victim regardless of his actions, the proportionality requirement would, objectively, be met. *See* BANTEKAS, *supra* note 110, at 64; CASSESE, *supra* note 83, at 288. For discussions of the contradictory case law on this issue see CASSESE, *supra* note 83, at 285-89; WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 242 (4<sup>th</sup> ed. 2011).

152 Rome Statute, *supra* note 20, art. 31(1)(d).

153 Gerhard Werle, *supra* note 83, at 208. Van Sliedregt argues that this formulation “leaves room” for subjective considerations usually associated with duress as an excuse to be considered under Article 31(1)(d) such that compulsion and “a will that is overborne by overwhelming pressure” can be recognized. VAN SLIEDREGT, *supra* note 109, at 259.

154 According to Albin Eser, the new intent element means that “in objective terms, it is not required that the person concerned in fact avoids the greater harm by his criminal conduct, but in subjective terms he must intend to do so.” Albin Eser, *Article 31 – Grounds for Excluding Criminal Responsibility in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 537, ¶ 40 (Otto Triffterer ed., 1999). *Accord* BANTEKAS, *supra* note 110, at 111. Arguing in favor of the latter interpretation, Werle points to the *Rome Statute*’s requirement that the accused’s actions are necessary and reasonable to avoid the threat, suggesting that an action will only be reasonable if it, *inter alia*, caused “no disproportionate consequences.” WERLE, *supra* note 83, at 146. In addition, although Cassese does not explicitly address this issue, he continues to view an objective proportionality assessment as a requirement under international criminal law. CASSESE, *supra* note 83, at 281.

155 van Sliedregt goes on to note that duress as an excuse does not contain this limitation because the proportionality assessment is absent. She notes that if “duress was recognized and accepted as an actor-oriented excuse rather than justifying his act, duress might not have such a contested and uncertain status in murder cases.” VAN SLIEDREGT, *supra* note 109, at 258-59.

Given that Article 1(F)(a) applies only to individuals implicated in war crimes, crimes against humanity, or crimes against peace, a direct application of this principle could render duress functionally unavailable to most—if not all—individuals seeking asylum.<sup>156</sup> On a direct reading of the current requirements of duress in international criminal law, so long as an individual was intentionally implicated in one of the crimes listed in Article 1(F)(a), duress will be unavailable and he or she will likely be excluded. Such an automatic denial in every instance fails to recognize both the realities from which many asylum seekers have fled and the structural differences between international criminal law and exclusion. Indeed, many of the world’s asylum seekers are dislocated as a result of conflict, generalized violence, or the consequences of living in failed or fragile states. Coercive or absent state authorities<sup>157</sup>, brutal rebel groups<sup>158</sup>, and powerful mafias<sup>159</sup> are amongst the elements that force millions of individuals to flee their homes and claim the protection of the international community each year. While it is the presence of these extreme dangers that underpins the entitlement to international protection,<sup>160</sup> direct application of the existing proportionality assessment as part of the exclusion framework risks ignoring the actual consequences of these forces for individuals struggling for survival in extreme circumstances. The potential hypocrisy of this situation cannot be understated: on the one hand, the international community recognizes the severe threat caused by these elements and offers robust forms of protection as a direct result, while on the other, it fails to appreciate the actual impact of those threats on the choices available before escape occurs.

It is also extremely relevant that there appear to be no cases in international criminal law where duress has been considered for a secondary, rather than principal, actor.<sup>161</sup> International criminal law has thus not specified whether, or how, an actor’s individual degree of involvement in the crime should be evaluated as part of the proportionality assessment. Since the majority of exclusion cases involve low-level, secondary actors,

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156 I agree with van Sliedregt’s conclusion that recognition of duress as an excuse in international criminal law would render it more available in situations of murder (and indeed other serious international criminal behavior) because duress may then excuse the accused even if the wrongful act itself is not justified—i.e. even if it was not objectively proportional to the harm threatened.

157 For example, Saddam Hussein’s government in Iraq, which ran the country with strict requirements of allegiance and used coercive force, including many violations of humanitarian law, to maintain power and control dissent.

158 For example, the Lord’s Resistance Army which operates in Uganda, South Sudan, the DRC and Central African Republic, and is notorious for its brutal use of force against civilians.

159 For example, the drug cartels in Mexico that have been involved in ongoing armed conflict and violence in an attempt to control the illegal international drug trade and put pressure on the government.

160 Recall that Article 1 of the Refugee Convention requires that an individual have a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.” Refugee Convention, *supra* note 1, art. 1.

161 One possible exception is the case of Prosecutor v. Simic, Case No. IT-95-9-T, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Oct. 17, 2003), <http://www.icty.org/x/cases/simic/tjug/en/sim-tj031017e.pdf>, in which the accused were accessories in facilitating forced deportations. Writing in dissent, Justice per Lindholm suggests that duress may have been available to one of the accused, but no detailed analysis is provided. *Id.* at 319.

exclusion decision makers considering duress will be asked to apply the proportionality assessment in a much more complicated context than the direct, principal perpetrators that have to date been most frequently considered by international criminal law.

Constant fear is a reality for many refugee claimants, some of whom are coerced to play a minor role in elaborate criminal regimes in their attempt to survive horrific circumstances. Justice requires that these situations not be dismissed out-of-hand without due consideration to the actual threats, choices, and contributions of each individual.<sup>162</sup> This necessitates avoidance of a proportionality assessment that looks only at the ultimate harm caused by the crime in which the claimant participated. Instead, the proportionality assessment must also consider the nature and extent of the claimant's actual contribution to that harm. Likewise, this assessment should include consideration of not only the nature and severity of the harm that would have resulted from a failure to act, but also the circumstances of the threat itself, such as the source from which it was delivered, the degree of specificity that was provided about both the required act and the consequences of failing to perform, and the general environment facing the actor at the time the threat appeared. It is simply insufficient in the context of exclusions to categorically refuse all claims involving a serious underlying crime.

A nuanced proportionality assessment will allow the full circumstances of the threat to be considered against the full circumstances of the criminal behavior that was performed in avoidance of that threat. Ultimately, this may mean that an individual who pulls the trigger in a mass killing or who orders genocide may only benefit from duress where there is a clear and explicit threat, while an individual who joins a terrorist organization by paying a nominal membership fee may be able to benefit from a credible general understanding that those who do not join are tortured or kidnapped. Recognition that many asylum seekers have experienced "omnipresent threats"<sup>163</sup> that may excuse low-level participation is necessary to ensure that those who are not morally blameworthy, and would not bring the asylum system into disrepute, are not unfairly denied access to protection under the Refugee Convention.

This nuanced proportionality assessment is also supported by the fact that duress is frequently claimed as a mitigating factor in sentencing under international criminal law, even where it is not a full defense to

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162 I note, too, Michael Resman's observation that it may be inappropriate to attribute individual responsibility to even those most implicated in international criminal behavior given the morally ambiguous environment in which many international crimes are committed. He observes that

[i]n many of the most hideous international crimes, many of the individuals who are directly responsible operate within a cultural universe that inverts our morality . . . After years or generations of acculturation to these views, the perpetrators may not have had the moral choice that is central to our notion of criminal responsibility.

W. Michael Reisman, *Legal Responses to Genocide and Other Massive Violations of Human Rights* 59 *LAW & CONTEMP. PROBS.*, 75, 77 (1996).

163 The concept of "omnipresent threats" (in both international criminal law and in the context of exclusion) will be developed further in a series of forthcoming pieces by the author. In brief, this term refers to situations in which an actor is under a constant general threat of harm, rather than a temporally acute, specific one.

liability.<sup>164</sup> With no comparable opportunity for mitigation in the exclusion context, a nuanced proportionality assessment helps ensure that the actual circumstances surrounding the claimant's contribution to criminal behavior are not completely absent in decisions under Article 1(F)(a). As Justice Cassese noted in *Erdemovic*, the criminal law must always assess the blameworthiness of the accused and should not set "intractable standards of behaviour which require mankind to perform acts of martyrdom, and [then] brand as criminal any behaviour falling below those standards."<sup>165</sup> Demanding martyrdom is even less appropriate in the context of a humanitarian regime dedicated to providing protection.

### Deficiencies in Current Practice

It is not surprising that exclusion frameworks that fail to draw on international criminal law in a principled way also fail to acknowledge key differences between the two systems, and there is no evidence of exclusion decision makers reflecting on, for example, the fact that important elements of international criminal law such as prosecutorial discretion and sentencing are completely absent in the exclusion context. The result is that the relationship between exclusion law and international criminal law is arbitrary and discrepancies between the systems bear no connection to the need to recognize and accommodate situations where direct importation of existing criminal law norms relating to liability will undermine a purposive reading of Article 1(F)(a).

In my view, the fundamental challenge is to develop an exclusion framework that protects the object and purpose of Article 1(F)(a) by accommodating the key structural and remedial differences between international criminal law and exclusion, while simultaneously respecting the provision's explicit directive that the two systems be complementary. A proposed framework that attempts to meet this goal is provided below.

### III. PROPOSED FRAMEWORK

This Article aims to promote a framework that both is anchored in international criminal law and recognizes key differences between the two systems such that the broader objectives of Article 1(F)(a) are not lost through mechanical and un-thoughtful application. As has been discussed above, current approaches to exclusion decisions fail in both respects.

While the framework proposed in this piece is novel, it takes into account many of the considerations that have already been identified by exclusion decision makers as salient to determinations under Article 1(F)(a).<sup>166</sup> These various considerations have, however, been re-attached to

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164 Perhaps most notably, the ICTY in *Erdemovic* was unanimous that the accused's sentence should be mitigated as a result of the threat he faced when he killed dozens of civilians as part of a crime against humanity. He was ultimately sentenced to 5 years. Prosecutor v. Erdemovic, Case No. IT-96-22-Tbis, Sentencing Judgment, ¶ 23 (Int'l Crim. Trib. for the Former Yugoslavia March 5, 1998), <http://www.icty.org/x/cases/erdemovic/tjug/en/erd-tsj980305e.pdf>.

165 Prosecutor v. Erdemovic, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese, ¶ 47 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997), <http://www.icty.org/x/cases/erdemovic/acjug/en/erd-adojcas971007e.pdf>.

166 In some jurisdictions these considerations appear as a formal list of "factors" to be weighed in every case. See, e.g., *Torres Rubianes v. Canada* (Minister of Citizenship and

the broader criminal law doctrine from which they originate—and to which Article 1(F)(a) directs reference—such that the entirety of relevant principles are considered. This revised approach will help minimize arbitrary and inconsistent decision making by ensuring that exclusion decisions are founded on complete and robust principles rather than on a series of fragmented rules that are taken out of context, as is currently the common practice. The mandated incorporation of international criminal law into the exclusion context does not legitimize either “cherry-picking” rules in an arbitrary fashion, or introducing new and *ad hoc* approaches for determining questions of individual responsibility.

The proposed framework consists of four steps:

1. Identify and assess the physical components of the claimant’s contribution to a relevant international crime (*actus reus*);
2. Identify and assess the nature of the claimant’s knowledge and intent (*mens rea*);
3. Assess the applicability of potential defences; and
4. Determine whether a mechanical application of existing international criminal law would lead to an exclusion that is contrary to the object and purpose of the Refugee Convention.

The first three of these steps are inquiries integral to a finding of culpability under international criminal law, while the fourth accounts for key structural and remedial differences between the two systems. Each step is discussed in detail below.

*A. Identify and assess the physical components of the claimant’s contribution to a relevant international crime (actus reus).*

International criminal law has established specific physical and mental requirements for each of the crimes it encompasses, and both kinds of criteria must be fulfilled before individual responsibility is established. All but the mental elements are captured under the term *actus reus* and are considered independently from the accused’s state of mind at the time the crime was committed. A similar approach should likewise be applied in the exclusion context, and this step is thus concerned only with establishing the physical circumstances surrounding the claimant’s behavior. Mental elements are considered in step 2 of the inquiry.

1. Identify the relevant war crime, crime against humanity, or crime against peace.

Exclusion under Article 1(F)(a) is only considered when a war crime, crime against peace, or crime against humanity has been committed.

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Immigration), [2006] F.C. 1140; *Bedoya v. Canada (Ministry of Citizenship and Immigration)*, [2005] F.C. 1092; *R (on the application of JS) (Sri Lanka) v. Secretary of State for the Home Department* [2010] UKSC 15 (17 March 2010) at paras. 29-31.

The first step in the exclusion analysis is thus to establish that one of these crimes has occurred during a period in which the asylum seeker may have been implicated.

Given the various ways that liability can be found, it is possible that the relevant international crime takes the form of either a specific criminal act or a pattern of criminal activity. Decision makers must thus consider evidence relating to both very specific events, such as a mass execution on a particular date,<sup>167</sup> and evidence of systemic and ongoing violations during an extended period, such as the ongoing crimes against humanity that have occurred during many prolonged conflicts.<sup>168</sup> At this stage in the analysis the decision maker is not required to consider whether the claimant was actually involved in any of these crimes, only to determine that offenses relevant to Article 1(F)(a) were occurring at a time and place when the claimant might have been implicated.

There is ongoing debate in international criminal law over the three forms of criminal activity referenced by Article 1(F)(a). For example, when considering crimes against humanity, there is uncertainty about what constitutes a “widespread or systematic attack,” what kind of policy, if any, might be required to support the systemic attack, who is included in the civilian population that suffered the attack, and what connection between the individual inhumane act and the overall attack is required.<sup>169</sup> There is likewise some uncertainty about both what specific acts should be considered “war crimes”<sup>170</sup> and, until recently, whether war crimes can ever occur in the context of non-international armed conflicts.<sup>171</sup> Perhaps most notably, “crimes against peace” —or the modern equivalent, “crimes of aggression” —is an under-utilized category in international criminal law and detailed consideration of its contours is almost completely lacking.<sup>172</sup>

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167 For example, exclusion decision makers could be required to consider evidence showing that the slaughter of thousands of Bosnian Muslims occurred at Srebrenica between July 11 and July 22, 1995; that gas was dropped on Kurdish villages during the end of the Iran-Iraq war in March, 1988; that thousands of Tutsis were killed while seeking refuge in a church between April 15 and April 18, 1994; or that thousands were killed in the Sabra and Shatilla refugee camps between September 16 and September 18, 1982.

168 For example, exclusion decision makers could be required to consider evidence showing that a variety of war crimes and crimes against humanity were occurring in Rwanda in 1994; in Iraq in 2003; or in Sri Lanka in 2008.

169 For more discussion on the difficulty of defining what constitutes a “widespread systematic attack,” see for example: Margaret M. deGuzman, *Crimes Against Humanity in ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIMINAL LAW*, *supra* note 111, at 121, 130-32.

170 For example, enlisting children into armed groups or forces is only explicitly identified as a war crime in the Rome Statute, *supra* note 20, art. 8(2)(b)(xxvi).

171 War crimes have historically only been recognized in the context of international armed conflicts. The ICTY formally dispensed with this requirement for the first time in the *Tadic* case, and it is now widely accepted that war crimes can be located in either international or non-international armed conflict. See *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, (Int’l Crim. Trib. for the Former Yugoslavia 1995). For a helpful summary of the debate about the applicability of war crimes outside of international armed conflicts, the *Tadic* decision, and its subsequent adaptation in international criminal law, see generally Anthony Cullen, *War Crimes*, in *ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIMINAL LAW*, *supra* note 122, at 139.

172 The offense of “crimes against peace” has not been actively used in international law since the Nuremberg trials. Further, despite several attempts to precisely define the term, there has been a lack of consensus between state actors on its definition. As a result, specificity about its scope and applicability is almost completely lacking. For discussion of this crime, see generally Henry King Jr., *Nuremberg and Crimes against Peace*, 41 CASE W. RES. J.

Further, while parties to the *Rome Statute* recently agreed on a working definition of the crime, they also determined that the ICC will not have jurisdiction over this offense until January 2017.<sup>173</sup> As a result, further clarity will not be forthcoming in the near future.

Neither this Article—nor the framework it proposes—will resolve these uncertainties. It is, however, important to reiterate the core principle that decisions to exclude under Article 1(F)(a) should only be founded on well-established legal norms. As result, where there is a lack of consensus around the scope of a particular international crime, the most narrow definition should be applied until there is agreement on a broader formulation.<sup>174</sup> This will ensure that exclusions do not occur on the contested margins of international criminal law and are consistent with a purposive reading of Article 1(F)(a).

## 2. Assess the nature of the claimant’s contribution to the international crime.

Given the mandated link between Article 1(F)(a) and international criminal law, exclusion decision makers should refer to the latter to identify the specific physical requirements for particular criminal acts. Many of these are now codified in Articles 6-8 of the *Rome Statute* or the accompanying Elements of Crimes. Actus reus requirements are most easily identified where an individual has directly and physically perpetrated a crime because in such situations the inquiry is generally into whether or not the claimant’s own act meets the necessary standards. Where a case involves indirect commission or co-perpetration, international criminal law also provides guidance on, respectively, the requisite nature of the relationship between the accused and the agent used to commit the criminal act, and the degree of control that the accused must have exerted over an essential element of the crime.<sup>175</sup> These standards can be directly incorporated into the exclusion context. Note that while JCE has been considered a form of direct perpetration under international criminal law, it does not require evidence that the claimant physically participated in the commission of a crime. JCE will be discussed in more detail below.

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INT’L L. 273 (2009); Nicolaos Strapatsas, *Aggression*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIMINAL LAW, *supra* note 121, at 155.

<sup>173</sup> Parties to the *Rome Statute* agreed to a definition in June 2010 during attendance at the Kampala conference. A crime of aggression was defined as “the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.” Amendment to the Rome Statute of the International Criminal Court on the Crime of Aggression, Resolution RC/Res. 6, June 11, 2010, 2187 U.N.T.S. 90. For commentary on this amendment, see generally Stefan Barriga & Leena Grover, *A Historic Breakthrough on the Crime of Aggression*, 105 AM. J. INT’L L. 517 (2011).

<sup>174</sup> I note that this principle should also apply to uncertainty about the temporal scope of liability. For example, there is currently uncertainty about whether an accused could be convicted in accordance with principles that existed at the time he committed the act but had been modified in his favor by the time he was charged. Until international criminal law provides clear guidance on this issue, a refugee claimant should be able to benefit from any changes in law that occur prior to the date her excludability under Article 1(F)(a) is considered.

<sup>175</sup> For a discussion and critique of the requirements for various modes of liability in international criminal law, see generally VAN SLEDREGT, *supra* note 109, ch. 4-6.

Exclusion decision makers considering claimants who supported the commission of a particular crime should refer to international criminal law norms to determine whether or not their involvement meets the well-established requirements of any of the various modes of participation that deal with supporting actors. Currently recognized forms of participation to be considered include: ordering, instigating, inducing, soliciting, planning, aiding, abetting, and command responsibility. Participating in a group with a common criminal design or purpose through a JCE I or II is also appropriately considered a form of “supporting a crime,” since these forms of participation require a significant contribution to a common criminal objective or system<sup>176</sup> by, for example, “inflicting non-fatal violence upon the victim, or . . . providing material assistance to or facilitating the activities of his co-perpetrators.”<sup>177</sup> The actus reus components are: a) the existence of an organized system or plan effected by a plurality of persons; and b) active participation by the accused in enforcing the system or plan, such that he or she “encouraged, aided and abetted or in any case participated in the realization of the common criminal design.”<sup>178</sup> These elements clearly describe situations in which the perpetrator supported the commission of a particular criminal act, thus confirming that JCE I and II should be considered alongside other forms of supporting contributions.

It should be noted that while JCE is firmly established in international criminal law, this form of participation has been the subject of considerable critique.<sup>179</sup> The controversies surrounding JCE I and II, however, relate primarily to their peripheries. In particular, there is concern about “whether even a *de minimis* contribution to a JCE suffices to place an individual within the criminal enterprise, and whether there are any limits on the prosecution’s discretion to define the scope of the enterprise.”<sup>180</sup> The exclusion framework proposed in this paper addresses these concerns in step four, which requires decision makers to ensure that asylum seekers are not denied access to the Refugee Convention on the basis of *de minimis* involvement or unreasonably expansive understandings of the scope of various organizations. This step therefore minimizes concerns about importing JCE I and II into the exclusion context. Nonetheless, exclusion decision makers should only resort to using JCE concepts where other forms of liability—including aiding and abetting—are unavailable on the facts of the particular case.

As has been explained above, exclusion decision makers may also face claimants who fall within the most controversial modes of participation in international criminal law: situations where an accused did not physically contribute to any criminal activity or plan but is nonetheless held individually responsible. As has been discussed, these forms of participation

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176 See Prosecutor v. Krajisnick, Case No. IT-00-39-A, Judgment, ¶ 662 (Int’l Crim. Trib. for the Former Yugoslavia March 17, 2009); see also Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, ¶ 196 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999).

177 Tadic, Case No. IT-94-1-A, ¶ 196.

178 *Id.* at ¶ 202.

179 For examples of such critiques, see generally Danner & Martinez, *supra* note 121; Mohamed Elewa Badar, *Just Convict Everyone! Joint Perpetration: from Tadic to Stakic and Back Again*, 6 INT’L CRIM. L. REV. 293 (2006); Jens David Ohlin, *Three Conceptual Problems with the Doctrine of JCE*, 5 J. INT’L CRIM. JUS. 69 (2007); Harmen van der Wilt, *Joint Criminal Enterprise: Possibilities and Limitations*, 5 J. INT’L CRIM. JUS. 91 (2007).

180 Danner & Martinez, *supra* note 121, at 108.

are not easily imported into the exclusion context and such cases should be flagged for careful scrutiny at the final stage of the inquiry.

Where there is uncertainty about the actus reus requirements for behavior that involves either direct commission of a crime or supporting the commission of a crime, exclusion decision makers should rely on the foundational principle that unsettled norms cannot form the basis of exclusion under Article 1(F)(a). For example, there is a noteworthy difference between the actus reus requirements for aiding and abetting under the *Rome Statute* and those found in other sources of international criminal law. In particular, while the ICTY and ICTR have included a requirement that the contribution of the individual accused must have had a “substantial effect” upon the perpetration of the crime,<sup>181</sup> Article 25(3)(c) of the *Rome Statute* does not provide for any causation standard.<sup>182</sup> This is an important issue, as the scope of liability encapsulated by Article 25(3)(c) will be broadened significantly if jurisprudence of the ICC ultimately finds that aiding and abetting no longer require “substantial effect” causation. Until there is clear resolution of this issue, the causation requirement should continue to apply in the context of exclusions under Article 1(F)(a).

It is worth specifically noting that there is some inconsistency in refugee jurisprudence over the degree to which acquiescence, omission, failure to act, or toleration can be used to ground an exclusion decision under Article 1(F)(a).<sup>183</sup> International criminal law, however, clearly recognizes that failure to act when in a position of authority over individuals committing international crimes leads to individual responsibility in certain circumstances.<sup>184</sup> There will also be liability where an individual failed to meet clear positive duties imposed by international humanitarian law.<sup>185</sup> These well-established principles should thus form part of the analysis where exclusion decisions involve individuals who occupied certain

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181 VAN SLIEDREGT, *supra* note 108, at 122; see also SCHABAS, *supra* note 97, at 102 (noting that “[t]he judges of the ad hoc tribunals have read a ‘direct and substantial’ requirement into the complicity provisions of their statute, despite the silence of their statutes” on this point).

182 VAN SLIEDREGT, *supra* note 108, at 127-28. van Sliedregt notes, however, that the requirement of substantial effect has traditionally been developed through case law rather than statute so it could very well become a part of the ICC’s version of aiding and abetting once jurisprudence around the defense begins to develop. *See id.* at 128.

183 *Ramirez*, a leading Canadian complicity case, acknowledges that mere presence or passive acquiescence are not generally sufficient to invoke exclusion; however, it may be sufficient where the organization has a limited brutal purpose. *Ramirez v Canada (Minister of Employment & Immigration)*, [1992] 2 F.C. 306, paras. 16-18. Meanwhile, presence at the commission of an international crime, which can be viewed as a form of tolerance, can attract liability in some jurisdictions if it was with authority (France), with influence (Netherlands), or for a significant period of time and with the purpose of encouraging the perpetrators (New Zealand). U.N. High Comm’r for Refugees, *Exclusion at a Crossroads: The Interplay between International Criminal Law and Refugee Law in the Area of Extended Liability*, 15, U.N. Doc. PPLA/2011/06 (June 2011), available at [www.uhrc.org/4elff0a19.html](http://www.uhrc.org/4elff0a19.html) (by Joseph Rikhof).

184 This has now been codified in Article 28 of the *Rome Statute*. *Rome Statute*, *supra* note 20, art. 28. For commentary, see, for example, Evan Wallach & I. Maxine Marcus, *Command Responsibility*, in 3 INTERNATIONAL CRIMINAL LAW 459, 468 (M. Cherif Bassiouni, ed., 3d ed. 2008); Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, 93 AM. J. INT’L L. 573, 575 (1999).

185 For example, by breaching certain sections of the Geneva Conventions through failing to provide such things as food to prisoners of war. *See Geneva Convention Relative to the Treatment of Prisoners of War* art. 26, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. Cassese notes that serious violations of these kinds of positive humanitarian obligations amount to war crimes under customary international law. CASSESE, *supra* note 83, at 202.

positions of authority or neglected clear legal duties, and such claimants may be implicated in the international crime on the basis of omission.

There is, however, uncertainty in international criminal law about omissions outside of the context of clear authority or in the absence of a specific positive duty. Although early drafts of the *Rome Statute* indicate that state parties considered liability for general omissions, the final document is silent on this point, suggesting that agreement could not be reached.<sup>186</sup> Commentators are now divided about the implications for international criminal law: some argue that mere failure to act does not give rise to criminal liability; others claim that it does; and still others conclude that the issue remains unsettled.<sup>187</sup> There is also disagreement about whether omission only applies where a clear and explicit “duty to act” has been identified and, further, about what sources can be used for establishing that the requisite duty exists and has been violated.<sup>188</sup> Meanwhile, a review of recent decisions reveals that international criminal law cases recognizing omission as a ground for liability tend to involve only accused who were in some position of actual or perceived authority, even where this element did not form an overt part of the analysis.<sup>189</sup>

All of this uncertainty means that exclusion decision makers must proceed with extreme caution. While a failure to act should be recognized in the context of command responsibility, or where there was violation of a clear duty, it should not be used as grounds to exclude in other

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186 U.N. General Assembly, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, art. 28, U.N. Doc A/AC.249/1998/CRP.7 (June 15–July 17, 1998); see also Mohamed Elewa Badar, *The Mental Element In The Rome Statute Of The International Criminal Court: A Commentary From A Comparative Criminal Law Perspective*, 19 CRIM. L.F. 473, 481 (2008); Donald K. Piragoff & Darryl Robinson, *Article 30 – Mental Element*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 849, 852, 858-59 (2d ed., 2008).

187 There is a lack of consensus about whether liability in international criminal law can be found on the basis of omission. Amidst a lack of case-law on this point, commentators disagree. See SCHABAS, *supra* note 97, at 102 (“[A]side from the specific provision dealing with responsibility of . . . superiors, there is no criminal liability established in the [Rome] Statute for mere failure to act.”); William Schabas, *General Principles of Criminal Law in the International Criminal Court Statute (Part III)*, 4 EUR. J. CRIME, CRIM. L., & CRIM. JUST. 400, 412 (1998). Ilias Bantekas, on the other hand, claims that “the notion of ‘committing’ is generally perceived as encompassing omissions . . .” See ILIAS BANTEKAS, *supra* note 114, at 51; see also Lars Berster, ‘Duty to Act’ and ‘Commission by Omission’ in *International Criminal Law*, 10 INT’L CRIM. L. REV. 619, 620 n.5 (2010) (summarizing various divisions on this point by noting that there is a split amongst commentators and authorities about “whether ‘commission by omission’ forms part of customary international law (Werle), constitutes a general principle of international law (Duttweiler), or flows from both sources (Berster),” while other scholars “reject the notion that commission by omission has already crystallized into a legal rule (Ambos; Eser),” and still others find the issue “unsettled to be eventually resolved in the case law (Saland, Weigen, Satzger)”). For another helpful analysis of omissions in international criminal law, see generally Michael Duttweiler, *Liability for Omissions in International Criminal Law*, 6 INT’L CRIM. L. REV. 1 (2006).

188 See Kai Ambos, *Joint Criminal Enterprise and Command Responsibility*, 5 J. INT’L CRIM. JUST. 159, 176 (2007); Badar, *supra* note 184, at 481; Duttweiler, *supra* note 182, at 1.

189 See, e.g., Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgment, ¶ 663 (Int’l Crim. Trib. for the Former Yugoslavia July 29, 2004); Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment, ¶ 1123 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998); Prosecutor v. Limaj, Case No. IT-03-66-A, Judgment, ¶ 652 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005); Prosecutor v. Orić, Case No. IT-03-68-T, Judgment, ¶ 304 (Int’l Crim. Trib. for the Former Yugoslavia June 30, 2006); Prosecutor v. Rutaganira, Case No. ICTR-95-1C-T, Judgment, ¶ 78 (Mar. 14, 2005); Prosecutor v. Vasiljević, Case No. IT-98-32-T, Judgment, ¶ 72 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 29, 2002).

circumstances while there remains uncertainty in international criminal law. Once norms in this regard have been firmly established, they can be appropriately incorporated into exclusion decisions under Article 1(F)(a). Denying refugee protection on the basis of omission before that time requires reliance on the controversial margins of international criminal law and is inconsistent with a proper reading of the Refugee Convention. It is incumbent on exclusion decision makers to identify uncertainties such as these and to ensure that refugee claimants are not denied protection on the basis of contested norms.

*B. Identify and assess the nature of the claimant's knowledge and intent (mens rea).*

It is well established in international criminal law that an individual is not responsible for criminal acts that were committed in the absence of a guilty mind.<sup>190</sup> Commonly referred to as *mens rea*, this requires consideration of what the individual knew and intended at the time the wrongful act was committed.<sup>191</sup> As with *actus reus*, international criminal law specifies particular knowledge and intent requirements for various kinds of criminal activity as well as for various forms of participation. It is therefore necessary for exclusion decision makers to consider *mens rea* requirements vis-à-vis both the specific act that was committed and the role that the accused played in execution of that act.

The general principle that individual responsibility for serious crimes depends on an assessment of an accused's subjective state of mind should be noted and applied in the exclusion context. This means that unless otherwise specified by a clear international norm, the inquiry is not into what a perpetrator's state of mind "ought to have been" but rather into what his or her state of mind actually was at the time the crime was committed.<sup>192</sup>

Modes of participation relating to a claimant who committed the crime directly will generally require both intent that a specific outcome would result from the act, and knowledge that particular circumstances existed. Particulars are provided for in the definitions of each crime. Where

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190 This is the psychological element of the crime; the culpable frame of mind required for the conduct to be blameworthy and punishable. CASSESE, *supra* note 109, at 53.

191 For general information on the requirements of *actus reus* and *mens rea*, see, for example, *id.*; and BETH VAN SCHAACK & RONALD C. SLYE, *INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT* 204-05 (2d ed. 2010).

192 The subjective *mens rea* requirement is codified in Article 30 of the *Rome Statute*, which sets a general standard from which deviation is only permissible where a lower *mens rea* is specifically provided for. *Rome Statute*, *supra* note 20, art. 30. An example of such an exception can be found in Article 28, which specifies that a military commander can be held responsible for the crimes committed by forces under his control if he "knew or, owing to the circumstances at the time, should have known" that such individuals were committing international crimes. *Id.* art. 28. A recklessness standard has also been read into some offenses, particularly where the *mens rea* requirement of the act is denoted as "willful." This practice is controversial, however, and there is still debate in international criminal law on the conditions under which an exception to the general standard is permissible. As a result, exclusion decision makers should use caution when applying a recklessness standard, and only do so where deviation from the general standard is explicitly required. For details about *mens rea* requirements in international criminal law see, for example, SCHABAS, *supra* note 97, at 108-10; Kai Ambos, *General Principles of Criminal Law in the Rome Statute* 10 CRIM. L.F. 1, 20-22 (1999); Roger Clarke, *Mental Element in International Criminal Law* 12 CRIM. L.F. 291, 302-03 (2001). For a discussion of this and other *mens rea* requirements under the *Rome Statute*, see generally Badar, *supra* note 184.

indirect commission or co-perpetration may be relevant, international criminal law provides additional mens rea requirements that exclusion decision makers will also need to consider. Likewise, each of the modes of participation relevant to a claimant who supported commission of the crime have their own specific mens rea requirements that will need to be applied in conjunction with the requirements that relate to the offense itself.<sup>193</sup> As with other areas, any uncertainty about the nature of the mens rea requirement should be resolved in the exclusion context by referencing the most narrow of the possibilities so as to ensure that exclusions do not occur on the basis of unsettled norms. For example, the mens rea standard required for aiding and abetting in international criminal law has not been well-established. Several of the Nuremberg trials,<sup>194</sup> as well as the ICTY,<sup>195</sup> and the International Law Commission's (ILC) 1996 "Draft Code of Crimes Against the Peace and Security of Mankind,"<sup>196</sup> recognize knowledge as the necessary mens rea for aiding and abetting: the perpetrator must have knowledge that his or her actions will facilitate the commission of the crime.<sup>197</sup> However, this standard has not been universally adopted,<sup>198</sup> and under Article 25(3)(c) the *Rome Statute*, for example, a perpetrator must aid or abet for the *purpose* of facilitating the commission of the crime.<sup>199</sup> Given the principle that exclusions should not occur on the basis of unsettled norms, the purpose requirement should be adopted in the exclusion context until clear guidance is provided on this issue by international criminal law.

As was discussed above, JCE I and II should be considered as forms of participation falling within the ambit of "supported a crime," since the actus reus requirements involve supporting a criminal act. The mens rea requirements for these forms of participation stipulate that the accused must have had knowledge of the criminal plan or system, and have intended to assist with the criminal objectives.<sup>200</sup> This is consistent with other forms of participation involving support: in all cases, individual responsibility requires that the individual was both aware of the crime and intended to participate in its execution. As has also been mentioned, JCE III holds an individual responsible for a crime that was a foreseeable consequence of a

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<sup>193</sup> For a discussion and critique of the requirements for various modes of liability in international criminal law, see generally van Sliedregt, *supra* note 109, ch. 4-6.

<sup>194</sup> *United States v. Otto Ohlendorf (Einsatzgruppen)*, 4 T.W.C. 411 (1949); *Trial of Bruno Tesch and Two Others (The Zyklon B Case)*, I.T.W.C. 93, 102 (1947).

<sup>195</sup> *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, ¶ 236 (Int'l Crim. Trib. for the former Yugoslavia Dec. 10, 1998).

<sup>196</sup> *Draft Code of Crimes Against the Peace and Security of Mankind*, [1996] 2 Y.B. INT'L L. COMMISSION 15, 18, 21, U.N. Doc. A/CN.4/SER.A/1996/Add.1 (Part 2).

<sup>197</sup> Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. J. INT'L HUM. RTS. 304, 308 (2008).

<sup>198</sup> For example, in the *Ministries Case*, an American military court at Nuremberg rejected a knowledge test. *United States v. von Weizsaecker (The Ministries Case)*, 14 T.W.C. 308, 622.

<sup>199</sup> It is uncertain how this provision will be interpreted. For example, it has been argued that Article 25(3)(c) of the *Rome Statute*: a) does not supersede customary international law, which only requires that an aider and abettor act with the mens rea of knowledge, *not* purpose; and b) could reasonably be interpreted by the ICC to reflect a knowledge standard consistent with customary international law. See Brief for International Law Scholars William Aceves et al. as Amici Curiae Supporting Petitioners at 1, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, *cert. denied*, 131 S. Ct. 79 (2011), (No. 09-1262).

<sup>200</sup> *Prosecutor v. Kvočka*, Case No. IT-98-30/1-A, Judgment, ¶¶ 95-99, 109-10 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2005). See also *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, ¶ 196 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

plan in which he participated. Cases triggering only this form of responsibility require careful scrutiny under step 4 of the framework.

Finally, it is worth noting explicitly that since international criminal law requires an inquiry into what the claimant actually knew and intended at the time the crime occurred, exclusion must likewise consider whether there are “serious reasons for considering” that the claimant had the requisite knowledge and intent. This determination cannot be based on presumptions, explicit or implied.

Unfortunately, this basic tenet of establishing liability has become distorted by exclusion decision makers around the world. Since this deviation from well-established norms of international criminal law is not necessary to fulfill the mandate of Article 1(F)(a)—and in fact represents an unprincipled broadening of the scope of liability running contrary to the *Convention*—correction is required to ensure consistency between exclusion and basic principles of individual responsibility. More specifically, this correction requires rejection of: Canada’s cases dealing with membership in an organization with a limited and brutal purpose; the UNHCR’s endorsement of presumptions on the basis of seniority and membership; and the focus in a number of jurisdictions on the nature of the organization rather than on what the individual knew and intended in relation to the criminal activity.

This correction does not mean that general information regarding the nature of an organization or group to which the claimant belonged is irrelevant to an exclusion assessment. Such information continues to be useful in so far as it provides helpful *indications* about what the claimant knew and intended with respect to the relevant crime. There are, however, no grounds for creating a legal presumption that every member of every organization involved in international crime had the requisite knowledge and intent to be held individually responsible for these activities. As a result, a purely objective assessment of the nature of an organization is not relevant simply for its own sake. Avoiding such presumptions also recognizes that delineating the character of an organization is frequently imbued with political considerations that run contrary to even application of the law and have nothing to do with basic notions of individual responsibility.

Other pieces of evidence which may help to show that the requisite degrees of intent and knowledge were present in a given circumstance could include: the claimant’s level of personal involvement and role in the organization; how and why the claimant became involved in the organization; the length of time the claimant was with the organization; and the degree of public information available to the claimant regarding the organization’s involvement in international crimes. Again, none of these indicators are conclusive in any way. This is a non-exhaustive list that should not be mechanically applied, as it serves merely to provide examples of the type of considerations that may be relevant to establishing the *mens rea* in a particular case.

Once the exclusion decision maker is satisfied that both the *actus reus* and *mens rea* requirements have been met, she must turn her mind to factors which might negate the mental element of the crime. For ease of reference, these factors are discussed together with other possible defenses in step three below.

### *C. Assess the applicability of potential defenses.*

It is well established in international criminal law that individual responsibility will not be found where a defense applies. It is therefore incumbent on decision makers applying Article 1(F)(a) to consider carefully defenses when determining whether an asylum seeker should be excluded from protection on the basis of involvement in an international crime. Further, the principle that exclusion should not occur on the basis of contested norms requires that any uncertainty surrounding the scope of a particular defense be resolved in favor of the broadest interpretation until such a time as the relevant doctrine is clarified by international criminal law. Factors that may negate a claimant's mens rea as well as the defences of superior orders and duress are each considered briefly below.

#### Negation of mens rea

Exclusion decision makers must consider circumstances that negate the claimant's mens rea and render the individual not criminally responsible for the wrongful act. Several specific factors affecting an accused's state of mind are well established in international criminal law and are now codified in the *Rome Statute* as grounds for excluding criminal responsibility. These include: mistake of fact, mental incapacity, intoxication, and self-defense.<sup>201</sup> Each of these factors must be fully considered in the exclusion context through application of well-established norms of international criminal law.

It is significant that the international justice system has the capacity to recognize circumstances that do not rise to the level of negating mens rea, but nonetheless affect a perpetrator's state of mind and, thus, degree of moral blameworthiness. Such factors are recognized in international criminal law as mitigating circumstances and are directly relevant to the severity of the sentence that a perpetrator will receive. The fact that exclusion determinations are unable to acknowledge these considerations outside of the assessment of individual responsibility militates in favor of careful and robust application of such factors as possible defenses. In addition, cases where these factors arise but do not meet the threshold necessary to negate mens rea under international criminal law should be subjected to careful scrutiny under step four.

#### Superior orders

As has been discussed, the defense of superior orders is controversial as a complete defense in international criminal law but does

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<sup>201</sup> Mistake of fact refers to situations where an accused is either unaware of, or misconceives, the factual circumstances or consequences that constitute material elements of the crime in which he or she was involved. Mental incapacity applies where the defendant lacks the capacity to understand or control his or her conduct, while intoxication requires that this lack of control results from involuntary intoxication. Self-defense deals with situations where an accused acted reasonably and proportionally to protect him or herself against an imminent and unlawful use of force. These defenses are each codified in Articles 31 and 32 of the *Rome Statute*. *Rome Statute*, *supra* note 20, arts. 31-32. For additional description and commentary on these defenses, see, for example, Albin Eser, *Mental Elements – Mistake of Fact and Mistake of Law*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 889, 889 *supra* note 126; Schabas, *supra* note 185; Elies van Sliedregt, *Defences in International Criminal Law*, Paper Delivered at Convergence of Criminal Justice Systems: Building Bridges Bridging the Gap (Aug. 25, 2003).

appear in limited form in the *Rome Statute*. It should be given consideration in the context of exclusion in accordance with the conditions set out above. In addition, situations that do not meet the requirements for this defense even though a claimant was following an order when he or she committed the relevant criminal act should be given careful consideration under step 4. It is also important that where the defense of superior orders is raised, the applicability of duress (and necessity) are also considered, as frequently the reason for obeying a superior order is fear of the consequences of failing to do so.

### Duress

Both necessity and duress have deep roots in international criminal law, and both defenses are well-established. Although the distinction between these two concepts has been poorly delineated at times,<sup>202</sup> it is generally understood that duress involves coercion due to a threat by a third party, while necessity involves coercion by virtue of external circumstance. In both situations, the accused's behavior must have been motivated by the threat that he or she would face if the criminal act was not committed. The similarities between traditional notions of necessity and duress have resulted in a recent blurring of the two concepts, and there is agreement amongst many commentators that necessity has now been subsumed within a broadened defense of duress.<sup>203</sup> This blended approach is reflected in Article 31(1)(d) of the *Rome Statute*, which addresses necessity and duress in the same provision.<sup>204</sup> For ease of reference, the term "duress" in the remainder of this section will refer to coercion resulting from both human and situational factors.

Behavior motivated by fear of physical harm is a major consideration for many refugee claimants since the asylum system is often dealing with individuals from failed or fragile states, or who have survived major conflict zones or repressive regimes. Signs of duress should be carefully considered in all exclusion cases, including in situations where superior orders may also be raised. This does not, however, appear to be occurring, and although duress is one of the most frequently argued defenses in international criminal law,<sup>205</sup> it features rarely in exclusion decisions. The

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202 As was explained in footnote 146 above, this distinction is different from the distinction between duress as excuse and choice of evils as justification. Article 31(1)(d) blurs the boundaries between *both* excuse and justification *and* duress and necessity. *Rome Statute*, *supra* note 20, art. 31(1)(d).

203 See BANTEKAS, *supra* note 114, at 109; CLAIRE DE THAN & EDWIN SHORTS, *INTERNATIONAL CRIMINAL LAW AND HUMAN RIGHTS* 11 (2003); WERLE, *supra* note 83, at 144.

204 Article 31(1)(d) provides that an individual will not be criminally responsible if:

The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be: (i) Made by other persons; or (ii) Constituted by other circumstances beyond that person's control.

*See Rome Statute*, *supra* note 20, art. 31(1)(d).

205 GEERT-JAN ALEXANDER KNOOPS, *supra* note 144, ch. 3; WERLE, *supra* note 83, at 144.

absence of claims based on coercion is surprising and troubling, particularly since a preliminary review of Canadian exclusion cases confirms that there have indeed been numerous situations where the defense of duress could clearly have been relevant but was never considered.<sup>206</sup>

The formulation of duress now codified in the *Rome Statute* is reasonably consistent with four conditions that Cassese sees emanating from a long history of domestic and international case law.<sup>207</sup> There are two notable exceptions. First, the *Rome Statute* fails to limit the defense to situations where the perpetrator did not voluntarily expose himself to the relevant risks;<sup>208</sup> and second, the *Statute* is silent on the applicability of the defense of duress to crimes involving death. The latter issue is extremely controversial in international criminal law, and generated a split decision at the ICTY in the landmark case of *Erdemovic*, where three of five judges ultimately concluded that the defense of duress should not be available to those who kill.<sup>209</sup> A strong dissent reaching the opposite conclusion has received wide acclaim, however, and many commentators have endorsed the latter reasons as a superior reading of the law in this area.<sup>210</sup> The tribunal in *Erdemovic* was unanimous that where not available as a complete defense,

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206 A recent review of exclusion decisions at the Canadian Federal Court and Federal Court of Appeal located several situations where duress could ostensibly have been argued based on the facts, but did not appear to have been raised. One of the more egregious examples is *Thurairajah v. Canada (Citizenship and Immigration)*, 2011 F.C. 891. Mr. Thurairajah, an asylum seeker of Sri Lankan origin, claimed that he repeatedly refused to join the Liberation Tigers of Tamil Eelam until members of the group took him to their camp, beat him, and threatened him with death. It is also noteworthy that Joseph Rikhof's comprehensive review of exclusion decisions in nine jurisdictions revealed only six cases where a claim of duress was successful. See RIKHOF, *supra* note 33, at 278-87.

207 Cassese notes the following requirements:

the act charged is done under an immediate threat of severe and irreparable harm to life or limb; there is no adequate means of averting such evil; the crime committed is not disproportionate to the evil threatened . . . ; the situation leading to duress or necessity must not have been voluntarily brought about by the person coerced.

See CASSESE, *supra* note 83, at 281.

208 Instead, the issue of voluntary risk was left to the ICC to resolve on a case-by-case basis, using the discretion made available to the Court under Article 31(2) to determine in what situations defenses will apply. Numerous draft versions of the provision contained language suggesting that the accused could not rely on duress if they 'voluntarily,' 'knowingly,' or 'recklessly' exposed themselves to the threat at issue. See Massimo Scaliotti, *Defences before the international criminal court: Substantive grounds for excluding criminal responsibility – Part I* 1 INT'L CRIM. L. REV. 111, 153 (2001).

209 The distinction between theories of justification and excuse partly underlies the controversial decision in this case: the majority concluded that choosing to sacrifice one life to save another can never be justified as the "correct" choice, while the dissent emphasized that where circumstances prevent an individual from making an autonomous decision about commission of the wrongdoing, the actor should be excused on the basis that he or she is not blameworthy. *Prosecutor v. Erdemovic*, Case No. IT-96-22-A, Judgment on Appeal (Int'l Crim. Trib. for the Former Yugoslavia Oct. 8, 1997).

210 The majority judgment was authored by Justice McDonald, who was joined by Judges Vohrah and Li. Justice Cassese wrote the dissent, and was supported by Justice Stephen. For commentary on the case see, for example, Robert Cryer, *One Appeal, Two Philosophies, Four Opinions and a Remittal: The Erdemovic Case at the ICTY Appeals chamber*, 2 J. CONFLICT SECURITY L. 193 (1997); Peter Rowe, *Duress as a Defence to War Crimes After Erdemovic: A Laboratory for a Permanent Court?*, 1 Y.B. INT'L HUMANITARIAN L. 210 (1998); David Turns, *The International Criminal Tribunal for the Former Yugoslavia: The Erdemovic Case*, 47 INT'L COMP. L.Q. 461 (1998); Sienho Yee, *The Erdemovic Sentencing Judgment: A Questionable Milestone for the International Criminal Tribunal for the Former Yugoslavia*, 26 GA. J. INT'L & COMP. L. 263 (1997).

duress may function as a significant mitigating factor, even where the most serious crimes have been committed. The accused in that case was found guilty of crimes against humanity due to his involvement in the deaths of dozens of civilians at the massacre in Srebrenica. He received a sentence of five years.<sup>211</sup>

Duress, like superior orders, requires a robust application in the context of exclusion decisions in order to ensure that the underlying purposes of Article 1(F)(a) are met. This means, at a minimum, that the claimant's role in exposing him-or herself to a threat must be considered on a case-by-case basis, and that the defense should not be banned in situations involving death. These readings are consistent with the *Rome Statute* and ensure that exclusions will not occur on the basis of unsettled norms. As jurisprudence develops, other areas of uncertainty about the defense of duress are sure to materialize. It is critical that exclusion decision makers continue to apply the underlying principle regarding unsettled norms such that claimants are not denied access to protection in the absence of clarified doctrine from international criminal law.

*D. Determine whether a mechanical application of existing international criminal law would lead to an exclusion that is contrary to the object and purpose of the Refugee Convention.*

As has been explained above, one of the core principles that must inform a just application of Article 1(F)(a) is that structural and remedial differences between exclusion and international criminal law must be accounted for. Article 1(F)(a) is not intended to limit refugee protection to only a small sphere of the most meritorious or morally virtuous claimants and is an exception to the Refugee Convention's core commitment to protection. As a result, it must be applied cautiously and narrowly. Further, the underlying rationale for denying protection under Article 1(F)(a) must inform the overall assessment: where it becomes evident that the claimant is not undeserving of protection as a refugee, and thus that granting access to the Refugee Convention will not bring the asylum system into disrepute, exclusion should not occur.

Current approaches to exclusion do not emphasize—or even consider—the underlying purposes of Article 1(F)(a) in a meaningful way. Further, exclusion decision makers who are compelled by the facts of a particular case but conscious of the need to rely on international criminal law, are challenged when they try to directly apply the blunt instruments that system provides.<sup>212</sup> Indeed, in international criminal law itself, discretionary mechanisms such as prosecutorial discretion,<sup>213</sup> summary judgment,<sup>214</sup> or dismissal<sup>215</sup> ensure that blatant injustices do not occur as a

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211 Prosecutor v. Erdemovic, Case No. IT-96-22-Tbis, Sentencing Judgment (Int'l Crim. Trib. for the Former Yugoslavia Mar. 5, 1998).

212 For an example of a judge discussing this challenge, see Justice James O'Reilly, *Presentation at Refugee Research Network: Application of Criminal Law in the Immigration and Refugee Context*, YOUTUBE (Mar. 22, 2012), <http://www.youtube.com/watch?v=7MZ0HCiEkVQ>.

213 Prosecutorial discretion is defined as: "A prosecutor's power to choose from the options available in a criminal case, such as filing charges, prosecuting or not, and recommending a sentence to the court." BLACK'S LAW DICTIONARY 1342 (9th ed. 2009).

214 Summary judgment is defined as: "A judgment granted on a claim or defense about which there is no genuine issue of material fact and upon which the movant is entitled to prevail as a

result of a mechanical application of strict legal principles.<sup>216</sup> No equivalent mechanisms have been incorporated into the exclusion process<sup>217</sup>, meaning that decision makers may be compelled to either deny protection to claimants whose admission as refugees would not bring the system into disrepute or distort basic principles of criminal law in an attempt to render a just result. Neither of these outcomes is desirable. Instead, the exclusion framework must include a mechanism that accounts for the structural and remedial differences between the two systems.

It is important to emphasize that such a mechanism must not introduce a discretionary process for increasing the scope of liability beyond that which is clearly established by international criminal law. Indeed, for reasons already articulated above, it would be contrary to a purposive reading of Article 1(F)(a) for the outer boundary of the “net” of personal responsibility applicable to exclusion cases to exceed that established by settled norms of international criminal law. Thus, the mechanism called for in this section must not be used to expand the scope of liability or to legitimize the arbitrary “cherry picking” of certain international criminal law principles for use under Article 1(F)(a), while ignoring others. Instead, it must be carefully designed to identify and address those situations in which direct application of international criminal law would impose individual liability on at least some individuals who would not bring the asylum system into disrepute. Two alternative approaches are proposed and discussed below.

Option 1: Test for whether the claimant brings the asylum system into disrepute.

The first possible approach is for the decision maker to engage literally in a fourth step of analysis which requires her to consider directly whether granting refugee status to the particular claimant would bring the asylum system into disrepute. Judicial decision makers across jurisdictions are familiar with the standard of “bringing a system into disrepute” which appears, amongst other places, in the law of evidence,<sup>218</sup> abuse of process,<sup>219</sup>

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matter of law . . . [t]his procedural device allows the speedy disposition of a controversy without the need for a trial . . . [a]lso termed ‘summary disposition.’” *Id.* at 1573.

215 Dismissal is defined as: “Termination of an action or claim without further hearing, esp. before the trial of the issues involved.” *Id.* at 537.

216 Commentators vary in their view of prosecutorial discretion, with some expressing particular concern that the result will be a targeting of certain conflicts to the exclusion of others during which equally egregious crimes were committed. For a range of opinions on prosecutorial discretion in international criminal law see, for example, Matthew R. Brubacher, *Prosecutorial Discretion within the International Criminal Court* 2 J. INT’L CRIM. JUST. 71 (2004); Luc Cote, *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, 3 J. INT’L CRIM. JUST. 162 (2005); Alison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT’L L. 510 (2003); William A. Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, 6 J. INT’L CRIM. JUST. 731 (2008).

217 I note again that a possible exception is the UNHCR’s proportionality assessment, which does allow additional factors to be considered. For a commentary on this process, including concerns about the practice of weighing the severity of persecution faced as part of the assessment under Article 1F(a), see Jennifer Bond, *supra* note 28.

218 In Canada, this standard is used to determine whether to admit evidence taken in breach of procedural protections in the *Canadian Charter of Rights and Freedoms*. See *R. v. Grant*, [2009] S.C.R. 353, 393, 2009 SCC 32 (Can.). Further, according to the *Canadian Youth Criminal Justice Act*, an inquiry into bringing a principle into disrepute must be used to

intellectual property,<sup>220</sup> and the rescinding of honors.<sup>221</sup> Although the term itself is frequently undefined and left to the judgment of the decision maker on a case-by-case basis,<sup>222</sup> recent comments by the Supreme Court of Canada provide some helpful guidance on its meaning. The Court was considering whether admitting evidence that was obtained in violation of an accused's rights under the *Canadian Charter of Rights and Freedoms* would "bring the administration of justice into disrepute" when it explained:

The phrase "bring the administration of justice into disrepute" must be understood in the long-term sense of maintaining the integrity of, and public confidence in, the justice system. Exclusion of evidence resulting in an acquittal may provoke immediate criticism. But [the inquiry] does not focus on immediate reaction to the individual case. Rather, it looks to whether the overall repute of the justice system, viewed in the long term, will be adversely affected by admission of the evidence. The inquiry is objective. It asks whether a reasonable person, informed of all relevant circumstances and the values underlying the *Charter*, would conclude that the admission of the evidence would bring the administration of justice into disrepute.<sup>223</sup>

Similarly, the exclusion decision maker is asked at step 4 of the inquiry to consider whether a reasonable person, informed of all relevant

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determine whether to admit oral or written statements made by a young person to a peace officer or person in authority that would otherwise be inadmissible due to technical irregularities. Youth Criminal Justice Act, S.C. 2002, c. 1, s. 146(6) (Can.), available at <http://canlii.ca/t/52054>. The self-incrimination clause of the Fifth Amendment to the *United States Constitution* does not protect a witness against the disclosure of facts that might "disgrace him or bring him into disrepute." In this context, "disrepute" means any negative effect on a witness, short of the actual infliction of criminal penalties. *Brown v. Walker*, 161 U.S. 591, 598 (1896). Furthermore, the standard is used with regard to hearsay. One of the relevant questions that courts will ask to determine if a particular statement is a statement against interest is: whether the statement is likely to put the declarant into disrepute. See *Barker v. Morris*, 761 F.2d 1396, 1401-02 (1985).

219 See, e.g., *R. v. Curragh Inc.*, [1997] 1 S.C.R. 537 (Can.); *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 312, 375 (Can.); *R. v. Conway*, [1989] 1 S.C.R. 1659, 1667 (Can.); *R. v. Latif*, [1996] 1 W.L.R. 104 (Eng.); *R. v. Maxwell*, [2010] UKSC 48, [13]-[14]; *Ridgeway v R* (1995) 184 CLR 19 (Austl.), available at <http://www.austlii.edu.au/au/cases/cth/HCA/1995/66.html>; *Rogers v The Queen* (1994) 181 CLR 251 (Austl.), available at <http://www.austlii.edu.au/au/cases/cth/HCA/1994/42.html>.

220 A section of the US Code dealing with trademark states that there can be no trademark on goods that are distinguishable from other goods and yet consist of "matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into . . . disrepute." U.S.C. § 1052 (2006).

221 The United Kingdom's Honours Forfeiture Committee considers cases where there are questions as to whether an individual awarded a British honour should be allowed to continue to hold that honour. The Committee makes a recommendation to the monarch, who has the authority to rescind an honour. The standard used to determine whether to recommend that an honour be rescinded is whether the individual "is judged to have brought the honours system into disrepute." HOUSE OF COMMONS PUBLIC ADMINISTRATION SELECT COMMITTEE, THE HONOURS SYSTEM 29 (2012), available at <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmpubadm/19/19.pdf>; *Having Honours Taken Away*, GOV.UK, <https://www.gov.uk/honours/having-honours-taken-away> (last visited June 7, 2013).

222 The phrase "bring the system into disrepute" is often used rhetorically, without further definition, leaving it to individual decision makers to decide the precise parameters of the standard.

223 *R. v. Grant*, [2009] S.C.R. 353.

circumstances and the values and purposes underlying the asylum system, would conclude that admitting the claimant would bring the system into disrepute. As the Supreme Court of Canada emphasized in the context of the exclusion of evidence, the inquiry should not focus on whether public criticism would result from a particular case, but rather on whether the overall repute of the asylum system, viewed in the long term, would be harmed by admitting the particular claimant.

This direct inquiry would provide decision makers with a robust tool for dealing with injustices that could result on either a case-by-case or systemic basis. The decision maker would be able to deal with situations involving child-soldiers, *de minimis* contributions, the broad application of extended forms of liability, cases involving coercion, and all other situations where a direct application of international criminal law is likely to yield an unjust result by considering in each instance the critical question of whether admitting the person as a refugee would harm the integrity of the asylum system. This is a simple and direct approach that can easily accommodate new areas of concern, avoids the need for decision makers to distort international criminal law doctrine to avoid exclusion, and ensures that the underlying purpose of Article 1(F)(a) is not eroded.

Option 2: Test for self-evident non-exclusions and the need to nuance international criminal law doctrine.

The second proposed approach is to combine a preliminary test for self-evident non-exclusions with recognition of the need to nuance certain aspects of international criminal law. In this variant, the decision maker considers the essential inquiry underlying Article 1(F)(a) early in the process—after determining that an international crime has been committed but before conducting a full analysis of the actus reus and mens rea requirements. Where it is self-evident that denying access to the *Refugee Convention* is not necessary to preserve the integrity of the asylum system, the exclusion analysis need not go further. Early detection of self-evident cases not only prevents distortion of legal principles, it also yields increases in administrative efficiency by truncating the process where the result is easily determined.

It is important to emphasize that the analysis at this first stage should not be overly rigorous. This preliminary step is meant to identify those cases where the purpose of Article 1(F)(a) would *obviously* not be served by denying refugee status, and detailed consideration of criminal standards should not occur here. More comprehensive analysis of the degree to which the claimant's contributions render him or her individually responsible for an international crime occurs in the remainder of the framework, and the actus reus and mens rea requirements should be completed where the response to the underlying inquiry is not self-evident at this early stage. Equally important is the fact that claimants who do not meet the threshold for self-evident non-exclusion may nonetheless be found non-excludable at a later stage in the analysis. This preliminary step will not be determinative for most claims and should not prejudice the more detailed analysis that follows.

Exclusion decision makers will be able to identify self-evident non-exclusions on a case-by-case basis. Examples may include child soldiers and *de minimis* contributions. Once it is self-evident that granting refugee status

will not bring the system of asylum into disrepute, no further exclusion analysis should be performed. Otherwise, the decision maker should move through the remainder of the framework.

The preliminary test for self-evident cases of non-exclusions should be combined with a mechanism for recognizing and accommodating situations where direct application of particular doctrine from international criminal law may result in systemic injustice. This paper has identified several situations of concern in existing law: at the outer margins of extended forms of liability and when the claimant's criminal involvement may have been the result of a superior order or coercion. In each circumstance, the particular nuance that is required to make the doctrine compatible with the object and purpose of Article 1(F)(a) has also been identified.

As both international criminal law and jurisprudence under Article 1(F)(a) continue to develop, additional areas requiring nuancing may be identified. In all cases, the decision maker must seek to identify circumstances in which direct application of a norm developed in the context of international criminal law would result in systemic denial of refugee protection to individuals who do not bring the system into disrepute. Given the importance of avoiding *ad hoc* approaches to exclusion and ensuring consistency between the two systems, a nuancing of existing international criminal law should occur rarely and must be made at the doctrinal level rather than on a case-by-case basis. Exclusion decision makers should be particularly alive to the possible need for nuancing where established principles of international criminal law are being applied in a context that differs considerably from that in which they were developed. This will be the case, for example, where the exclusion decision maker is applying doctrine developed in the context of high level, principal actors to a secondary actor whose contribution to the ultimate harm was extremely remote, or, alternatively, where the outcome hinges on the applicability of a defense that has been recognized to have a significant mitigating effect in sentencing. Other indications that nuancing may be necessary include situations where the international criminal doctrine in question has already been the subject of significant controversy (since potential injustices may become exacerbated when already-controversial norms are imported into the exclusion context), or situations where doctrine has been developed to address specific concerns in the criminal law context that are not relevant in the exclusion context—such as to ensure liability as a principal rather than secondary offender or to ensure the prosecution of a “big fish” offender who is obviously individually responsible for a serious offense but where evidence of direct involvement is lacking. In all cases, doctrinal nuancing should reflect careful consideration of the structural and remedial differences between the two systems and be clearly explained and legitimized with reference to the underlying purposes of Article 1(F)(a).

#### Evaluation of the two proposed options.

Each of the options proposed under step four is imbued with a variety of strengths and weaknesses. For example, the term “brings the system into disrepute” may be overly vague and impossible to apply without more specifically articulated content. It may also be doctrinally incoherent to suggest that the framework should contain a single-mechanism which

directly tests whether the admission of a particular claimant would bring the system into disrepute, when in fact this is the ultimate inquiry and thus must result from consideration of the cumulative work done by all of the steps in the framework.

On the other hand, this first option has the benefit of addressing the structural and remedial differences between international criminal law and Article 1(F)(a) in a single, clear step that relies on a concept that is familiar to judicial decision makers around the world. In addition, the fact that this step only applies when there has already been a finding of individual responsibility under steps 1-3 of the framework ensures that it works in tandem with other portions of the analysis: the first three steps establish the maximum boundary on the net cast by individual responsibility, while the fourth allows the decision maker to identify and “pick-out” of the net those individuals who on a purposive reading of Article 1(F)(a) should not be there. This variant provides the exclusion decision maker with the explicit discretion to identify cases where the purpose and object of Article 1(F)(a) will not be well served through a denial of access to the Refugee Convention, and provides relief in a direct manner that will be easy to explain and easy to apply.

The second option avoids some of the challenges associated with the first. The initial screen for cases of self-evident non-exclusion functions as a gate-keeping mechanism that is in some ways directly analogous to prosecutorial discretion. Applying this screen early in the process allows decision makers to easily and immediately deal with cases that are obvious on the facts, resulting in significant administrative efficiencies. Further, principled nuancing requires that a failure to directly apply international criminal law be rationalized with reference to specific doctrinal concerns. This makes the process far less discretionary on a case-by-case basis and may yield more consistent results across similar claimants. The potentially ambiguous term “brings the system into disrepute” is also avoided. It may, however, be difficult for decision makers to identify situations where a principled nuancing is needed, and requiring critical assessment of the intersection between exclusion and international criminal law such that potential systemic concerns can be identified may not be realistic in the context of the regular refugee status determination process. Concerns may also exist with the first step of this variant, on the basis that it does not provide adequate direction to the decision maker, and requires a decision about non-exclusion before international criminal law principles are fully considered and applied.

There are many other aspects of these models that are worthy of consideration and debate, including the relationship between these frameworks and the language of Article 1(F)(a) (it is my view that both of the proposals above can be textually grounded through a purposive reading of the “serious reasons for considering” standard, or the term “committed”, or both), and comments here are presented merely as starting points for a discussion about how a framework under Article 1(F)(a) might best be able to recognize and accommodate key structural and remedial differences between exclusion and international criminal law. I am hopeful that the analysis in this paper has demonstrated the need for such a principle to underlie a just and purposive application of Article 1(F)(a).

## CONCLUSION

The Refugee Convention is one of the most important and influential modern human rights instruments. Each year, millions of the world's most vulnerable people claim the basic protections the Convention guarantees and, despite many flaws, today's asylum system is extensive. Article 1(F)(a) plays an important role in protecting the integrity of this system by ensuring that individuals who are fundamentally unworthy of protection are not admitted as refugees. It is critical, however, that this provision be applied in a narrow and purposive manner such that it does not erode the Convention's core commitments by denying status to those who do not pose a threat to the integrity of the asylum system.

Unfortunately, current exclusion practices are flawed. Frameworks are inconsistent among jurisdictions and do not draw on principles of international criminal law, despite language clearly mandating that they do so. Further, key differences between exclusion law and international criminal law are neither identified nor accommodated, meaning that similarities and differences between the two systems are arbitrary rather than principled, and the object and purpose of Article 1(F)(a) are not protected. The result is that individuals who would not bring the asylum system into disrepute are routinely being denied access to the Refugee Convention. The consequences of these failures are significant and represent a tragic deviation from international commitments to afford protection to individuals facing serious persecution. Reform is desperately needed.

This paper proposes four core principles that must underlie a revised paradigm for application of Article 1(F)(a), and encourages the development of a pragmatic tool that respects the language and purpose of the provision such that the delicate balance contained within the Convention is upheld. International criminal law figures prominently in this approach, and its focus on a proper application of *actus reus* and *mens rea* requirements will help exclusion decision makers navigate complicated international law norms and avoid arbitrary application. In addition, renewed emphasis on the importance of defenses, implementation of the core principle that refugee protection should not be denied on the basis of unsettled norms, and introduction of a step to explicitly recognize the structural and remedial differences between the systems all function to ensure that Article 1(F)(a) will only apply to individuals who are truly undeserving of international protection.

An exclusion framework based on the principles proposed in this paper will allow the object and purpose of Article 1(F)(a) to be fulfilled in a principled and pragmatic way, and will address the major deficiencies in current approaches. Immediate development and adoption is encouraged.