

Commentary

Ending Exclusion from Refugee Protection and Advancing International Justice

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Abstract: In any utopic vision of the international refugee protection regime at least these two conditions ought to prevail: (1) all those who are genuinely in need of refugee protection will be granted international protection; (2) all those who are responsible for criminality, especially, serious international crimes, shall be held criminally liable. This presumes that the so-called “exclusion clauses” of the 1951 Refugee Convention, Article 1F, and those found in the regional refugee rights instruments (1969 OAU Convention, 1984 Cartagena Declaration, 2011 EU Qualifications Directive) are not required. No one would be excluded from refugee protection who meets the definition of refugee as found in these international refugee rights instruments. By the same token, anyone who is responsible for serious criminality, especially, serious international crimes, (as defined by the 1998 Rome Statute of the International Criminal Court) shall be held criminally liable. This serves the ideal of bringing an end to impunity for serious international criminality and ensuring everyone is held accountable for their contribution for the persecution of others. Accordingly, the first part of this article presents the thesis that serious criminality should be part of the inclusionary portions of the definition of who is a refugee and not its exclusionary portions, Article 1F of the 1951 Refugee Convention. Indeed, Article 1F, it is argued, is antiquated and no longer conforms to contemporary international norms and principles and can result in injustices to refugee applicants. Given the inherent complexity and difficulties with Article 1F and the fact it is no longer required, it can be repealed and Article 1A(2), the definition of who is a refugee, can be amended to not include anyone who is responsible for the commission of serious criminality. Moreover, when there is sufficiently reliable and trustworthy evidence that a refugee applicant is responsible for serious criminality then they can be prosecuted and by doing so both ending impunity for serious international crimes and advancing international justice can be achieved. The second part of the article is a commentary on the first part and raises a word of caution. The thesis of this part is that before adopting any radical solution with respect to the exclusion clause, it would be useful to provide a broader context to the issues raised. The commentary raises some questions regarding the underlying assumptions in the first part, specifically, in its examination of the human rights and international criminal justice framework. These questions are on three levels, namely conceptual, legal, and practical. The commentary concludes with some overarching observations in respect to the criticisms raised and the proposal submitted.

Keywords: refugee protection; exclusion; Article 1F; international refugee law; international criminal law; international justice



Citation: Simeon, James C., and Joseph Rikhof. 2022. Ending Exclusion from Refugee Protection and Advancing International Justice. *Laws* 11: 61. <https://doi.org/10.3390/laws11040061>

Academic Editor: Patricia Eastael

Received: 26 June 2022

Accepted: 28 July 2022

Published: 8 August 2022

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1. Ending Exclusion from Refugee Protection and Advancing International Justice

1.1. Introduction

Any utopic vision of the international refugee protection regime ought to include at least two core elements: one, all those who are genuinely in need of refugee protection would receive international protection; and two, all those who are responsible for criminality, especially, serious international crimes, would be held accountable for their crimes. Of course, if we lived in a utopian world there would be no refugees and no need for an international refugee protection regime. However, since we live in a world where the numbers of forcibly displaced persons are at historically high levels and, seemingly, ever-escalating (UNHCR 2021a, 2022a, 2022b), then it is patently obvious that we live in a world that is far from utopian. Indeed, with the war in Ukraine, which commenced on 24 February 2022, the UNHCR reports that there are now more than 100 million, 1 in 78 people, in the world who are forcibly displaced (UNHCR 2022c, 2022d, 2022e). This number has more than doubled over the last decade (UNHCR 2022c, 2022d, 2022e).

It is interesting to note that in 2015–2016, the mass influx of asylum seekers in Europe and elsewhere, spurred the search for new approaches and reforms to the current international refugee protection regime (As an example, see Betts and Collier 2017; Centre for Governance Innovation, and the World Refugee Council 2019; Aleinikoff and Zamore 2019; Corcoran 2017; Bradley 2019). Indeed, the *New York Declaration for Refugees and Migrants* (UNGA, A/RES/71/1, 3 October 2016) and the subsequent *Global Compact on Refugees* and the *Global Compact for Safe, Orderly and Regular Migration* (UNGA 2018a, 2018b) sought to bring the international community together in an effort to address the unprecedented number of new forcibly displaced persons who were seeking asylum from the unbearable conditions of living within protracted armed conflict and other variants of extreme organized political violence and oppression (Simeon 2021, 2022a; Simeon and Singer 2017). In addition, the critics and reformers sought to address some of the more critical issues and concerns confronting the current international refugee protection regime such as States' efforts at limiting access to asylum and equitable burden sharing principally between the States in the Global North and South.¹

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

The thesis presented here is that serious criminality ought to be part of the inclusionary portion of the *1951 Convention* that defines who ought to be a Convention refugee and not be part of its exclusionary portions. International justice can be best promoted and advanced when those who are responsible for serious criminality are brought to justice. This includes, of course, asylum seekers who have committed serious international crimes. Given the nature of serious international crimes or the *atrocities crimes*—war crimes, crimes against humanity, ethnic cleansing, and genocide (United Nations, and Office on Genocide Prevention and the Responsibility to Protect 2022)—that by definition or, more often than not, take place in situations of extreme political organized violence, that is, war or armed

¹ James C. Hathaway is the leading critic in this regard, see <https://michigan.law.umich.edu/faculty-and-scholarship/our-faculty/james-c-hathaway> (accessed on 21 April 2022).

conflict, could well include potentially all those belligerents who are trying to flee situations of protracted armed conflict.

If international justice requires the provision of international protection to all those fleeing persecution in all its forms, it equally demands the prosecution and conviction of those who are liable for the commission of serious international crimes that cause the forcibly displaced who are seeking refuge within or outside their State's borders.

1.2. *The Status Quo in Refugee Status Determination*

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

One of these provisions, Article 1F, the so-called "Exclusion Clauses", has been the subject of much criticism and contention in terms of both its application and interpretation in determining whether a refugee applicant ought to be excluded from Convention refugee status. Some have even argued that Article 1F of the *1951 Convention* is not in keeping with modern international human rights law and that rather than enhancing the integrity and legitimacy of the international refugee protection system, it actually undermines it and that it can create injustices by excluding persons from Convention refugee status who should not be excluded. Article 1F, it is then argued, ought to be set aside because international law has progressed and developed significantly since 1951 and that rather than excluding persons from refugee protection they should be prosecuted for their involvement in serious international crimes and not merely excluded from refugee protection.

Situations of non-international armed conflict or civil war are the most prevalent in the world today. More than two-thirds of the world's refugees come from only five countries that have been wracked by the protracted armed conflict that can last for decades and result in seemingly "endless wars." (UNHCR 2021b, 2022a; Simeon 2016). War and protracted armed conflict, with all its death and destruction and accompanying economic, social, and public health disruptions and turbulence, inevitably produces mass forced displacement.

The significance of prosecuting those who are responsible for the commission of serious international crimes for international justice and the promotion of international peace and security should not be lost in the turmoil and brazen disregard and trampling of millions of people's most fundamental human rights and respect for their human dignity, that also includes the right to peace itself (Perry et al. 2019). This is most evident today with the war in Ukraine where some 14 million people have been forcibly displaced, there has been massive destruction of infrastructure and property, thousands of casualties on both sides of the armed conflict, and the documented widespread commission of the atrocity crimes (Associated Press 2022).

The advancement of international justice requires that those who have been victimized by engineered forced displacement in the form of extreme organized political violence (Greenhill 2008, 2010, 2016, 2022) be treated in a "right and fair way" and all those who are responsible for their predicament be held to account and brought to justice through criminal prosecution. Ending impunity for serious international crimes that 'shock the moral conscience' of any decent human being should be the prime objective when it comes to advancing international justice and international protection.

Achieving a balance between the outcomes for the victims, the forcibly displaced, is the provision of international protection, whether to those who are internally displaced persons (IDPs) or those who are externally displaced persons or refugees, and the perpetrators who committed the serious international crimes, that often precipitate the forced displacement,

through their prosecution and conviction at the international and/or national levels. For international justice to be served, one cannot proceed without the other.

1.3. The Purpose of the Exclusion Clauses

The “Exclusion Clauses”, Article 1F of the *1951 Convention relating to the Status of Refugees*, are intended to ensure, according to the UNHCR, the “integrity of the asylum concept” and that the perpetrators of heinous acts and serious common crimes are not granted refugee protection (UNHCR 1997). In short, the “Exclusion Clauses” “help to preserve the integrity of the asylum concept.” (UNHCR 1997) Further, in the UNHCR’s 2003 *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, it is argued “that certain acts are so grave as to render their perpetrators undeserving of international protection as refugees” (UNHCR 2003). Furthermore, the UNHCR also points out that the “obligations under international law may require that the person concerned may be criminally prosecuted or extradited” (UNHCR 2003, p. 4, paragraph 8). This latter point is particularly relevant to the arguments presented here. Who among those excluded, particularly, under Article 1F(a), ought to be prosecuted by States?

Of course, it would be anomalous in the extreme for those who are responsible for serious international crimes to be given refugee status or refugee protection. Those who are responsible for creating refugees should not have the benefit of a convention intended for the protection of refugees. However, does it then follow that all those who have committed serious international crimes should be excluded formally from refugee protection altogether? Would it not be sufficient merely to find that such persons do not meet the legal definition of who is a Convention refugee or a person in need of refugee protection? In other words, should this not be incorporated directly within the legal definition of who is a refugee; that is, within the inclusionary provisions of the *1951 Convention*?

It has been argued that those persons who are excluded from refugee protection can still be refugees but are simply not entitled to the benefits of refugee status that are found in the Refugee Convention. Not everyone agrees with this view, but it seems logical to think of it in these terms. From this perspective, exclusion means that you cannot receive the benefits of refugee protection even though you meet the definition. In fact, this is what UNHCR’s mandate Refugee Status Determination (RSD) process does. Those who are excluded cannot receive the benefits UNHCR provides to refugees. However, since the UNHCR is not a State, of course, it cannot prosecute individuals for the commission of serious international crimes. However, it is worth noting, their Guidelines state that States may be obligated to prosecute those who are excluded (UNHCR 2003, p. 4, paragraph 8; Nyinah 2000).

1.4. The Critique of the “Exclusion Clauses”

Critics have taken issue with the UNHCR’s approach to the “Exclusion Clauses.” Ben Saul, for instance, has argued that “Human rights are *rights*, not privileges, and cannot be suspended for bad behaviour” (Saul 2008, p. 13). Furthermore, Satvinder Singh Juss has been highly critical of the use of terms such as “undeserving” and “unworthy” in refugee law (Juss 2012).

Still others have gone so far as to say that the “Exclusion Clauses” have outlived their purposes and ought to be removed. Justin Mohammed has argued that the “Exclusion Clauses” can perpetuate injustices rather than uphold the integrity of the international refugee protection regime (Mohammed 2011).

In essence, Mohammed argues that both international human rights law and the international criminal law systems of today are not what they were in 1951 when the *Convention relating to the Status of Refugees* was negotiated under the auspices of the United Nations. There are many more international human rights instruments in place today, along with a full slate of international human rights, the *International Bill of Rights* that

was established in 1966 (UNHCHR 1996), and international human rights and criminal courts such as the European Court of Human Rights, Inter-American Court of Human Rights, the African Court of Justice and Human Rights, the International Criminal Court, and numerous UN special and ad hoc criminal courts such as the International Criminal Tribunal of the Former Yugoslavia and the International Criminal Tribunal for Rwanda that were not yet in existence nor were they even contemplated some 70 years ago.² The rich international law jurisprudence that exists today was certainly not present in 1951.

Mohammed argues that there was no judicial mechanism that had jurisdiction over serious international crimes in the early 1950s. Moreover, universal jurisdiction, that allows States to prosecute individuals for serious international crimes, was yet to be applied to any degree. Universal jurisdiction became an important principle in international law in 1949.³

What is implied here is that the “Exclusion Clauses” of the 1951 *Convention* are antiquated and that if the Refugee Convention were negotiated today, they would not be required. Indeed, whenever the “Exclusion Clauses” are applied today, they can potentially conflict with other conventions such as the 1989 *Convention on the Rights of the Child*, as in the case of child soldiers, or the 1984 *Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment and Punishment*, when it involves those who are criminally liable for acts of torture. What is required is the proper application and interpretation of international treaties as outlined by the 1969 *Vienna Convention on the Laws of Treaties*. State parties to these international instruments must always take into consideration the most recent relevant treaties and how they might modify the interpretation of the 1951 *Convention*. Clearly, this complicates the legal application and interpretation process of a refugee law decision-maker immensely and, consequently, increases the potential for errors to be made. Indeed, it has been found that the judicial review grant rate for cases involving the exclusion clauses is higher for these cases than on average (Simeon 2015).

It is also relevant to point out that Article 33(2) of the 1951 *Refugee Convention* allows for persons who are determined to be in need of refugee protection but are subsequently found to be a danger to national security and/or a threat to their host community, to be refouled, contrary to contemporary international norms and laws with the possible result of great injustices. This, undoubtedly, contradicts the customary international law principle of non-refoulement. Nonetheless, the Supreme Court of Canada upheld the constitutionality of doing so under exceptional circumstances and under appropriate procedures in its landmark judgment in *Suresh*.⁴

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

My explicit contribution here is to underscore the necessity of amending Article 1A(2) to prohibit anyone liable for serious criminality not to be determined to be a Convention refugee and, further, if there is sufficiently trustworthy and valid evidence to obtain a conviction then the person ought to be prosecuted, convicted, and sentenced.

² UN Documentation: International Law, “Courts and Tribunals”, Dag Hammarskjöld Library, <https://research.un.org/en/docs/law/courts> (accessed on 22 April 2022) and The United States Department of Justice, International Courts, <https://www.justice.gov/jmd/ls/international-courts> (accessed on 22 April 2022).

³ “Universal Jurisdiction”, Trial International, <https://trialinternational.org/topics-post/universal-jurisdiction/> (accessed on 22 April 2022).

⁴ *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1937/index.do> (accessed on 22 April 2022). Please note that I rely primarily on Canadian jurisprudence in this article, but not exclusively.

It is important to note that under Article 1F the standard of proof for the exclusion clauses is “serious reasons for considering.”⁵ This is a lower standard of proof than a balance of probabilities, the civil standard of proof. Critics of the exclusion clauses have argued that such standards of proof for excluding refugee applicants on alleged criminality are unfair, particularly, given that criminal law guarantees are absent in the administrative law applications of immigration and refugee law and practice (Bond 2012). Those who have critiqued the exclusion clauses on these grounds would presumably support a process of refugee law adjudication that allows the criminal courts to determine a person’s guilt or innocence with respect to serious criminality.

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

Furthermore, perhaps, of equal importance, the repeal of Article 1F with an amended Article 1A(2), which would preclude anyone who is liable for serious criminality, would simplify the refugee status determination process immensely while aligning it closer to its true humanitarian orientation and principles.⁶

1.5. The Challenges of Prosecuting the Perpetrators of Serious Criminality

The prosecution and conviction of those responsible for serious criminality is difficult by design. The intention is as much to protect the innocent from a miscarriage of justice as it is to ensure that the person who is actually responsible for the crime, to a very high degree of certainty, is held accountable for their criminal liability and that the guilty person pays their debts to society, at large, as well as to the person or to those persons who have been so victimized.

Mohammed makes the observation that in the intervening years since the 1951 *Convention* came into force the experience of States in the prosecution of those who were charged with serious international crimes has proved to be costly, time consuming, and often, ineffective with few people actually being convicted. These are clearly some of the downsides of pursuing the prosecution of individuals suspected of serious international crimes. However, it is also important to be mindful of the fact that overcoming the novelty of doing so and given the necessity of developing the appropriate investigative and prosecutorial methods and procedures necessary for gathering credible and trustworthy evidence for the commission of serious international crimes, takes time and effort to develop before its effectiveness can come into its own and have its desired impact in terms of the number of successful prosecutions and convictions. Sadly, many countries’ efforts in this regard, including Canada’s, have been wanting (Amnesty International 2020).

Mohammed further posits that “universal jurisdiction” allows States to prosecute refugee claimants if they are allegedly liable for the commission of serious international crimes. Nevertheless, he also points out that it is important to note that given the high cost of investigating and prosecuting such cases, along with the high standard of proof needed to obtain a criminal conviction, States prefer to use immigration measures to remove refugee claimants suspected of criminality rather than to prosecute them for their serious international crimes. While this may be a cost-effective and a politically more satisfying method, at least for some politicians, for dealing with those refugee claimants suspected

⁵ Article 1F, 1951 *Convention relating to the Status of Refugees*, Geneva, 28 July 1951. In force 22 April 1954, 1989, UNTS 137.

⁶ As to what would constitute “serious criminality”, it would be anything that has been accepted as a serious crime by the international community and the standard of proof would be the same as that for any other evidence in a claim for refugee protection, a balance of probabilities.

of criminality it does not deal with the serious international crimes that were committed.⁷ Nonetheless, the fight against impunity and the necessity of achieving international justice rightly demands it.

In this regard, it is relevant and important to note that Geoff Gilbert has indicated that a number of jurisdictions in Europe have prosecuted individuals through the use of universal jurisdiction in the domestic courts in The Netherlands, Germany, and Belgium.⁸ Recently, domestic courts in Germany convicted two former Syrian Intelligence Officers for crimes against humanity (Human Rights Watch 2022; Chowdhury and Tambay 2022).

1.6. Advancing International Justice

The establishment of the International Criminal Court (ICC) in 1998 was a highly significant step forward in the fight to end impunity through international criminal justice. The ICC aims to prosecute those who are responsible for the world's most serious international crimes: genocide; war crimes, crimes against humanity; and the crime of aggression.⁹

No one can have impunity for the commission of these most heinous and serious international crimes. Moreover, the ICC has a broader role to uphold international justice and contributing to the achievement and maintenance of long-term peace and security. Indeed, the ICC states on its website that, "Justice is a key prerequisite for lasting peace."¹⁰

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

States have an obligation to either extradite or to prosecute, the *aut dedere aut judicare* principle in International Criminal Law, those who have committed serious international crimes. Indeed, there is a positive duty on States to investigate, prosecute, and punish all those who have committed serious international crimes.¹¹

The international courts that deal with the most serious international crimes play a key role in supporting peace and security through holding those who commit *atrocities crimes* accountable for the harm that they have inflicted on their victims—people—but also the harm that they have inflicted on the international community as a whole (Simeon 2022b).

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

⁷ van Sliedregt (2021). See the YouTube presentation at <https://www.youtube.com/watch?v=vqNBjTRbAjA> (accessed on 22 April 2022); Philippe (2006).

⁸ Gilbert (2003, pp. 429–32). For an update on this chapter see, Gilbert (2014).

⁹ The Rome Statute of the International Criminal Court, Done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, vol. 2187, No. 38544, Depositary: Secretary-General of the United Nations, <http://treaties.un.org> (accessed on 22 April 2022). Article 5, Crimes within the Jurisdiction of the Court, and Articles 6 to 8 *bis*. ICC, About the Court, <https://www.icc-cpi.int/about> (accessed on 22 April 2022).

¹⁰ ICC, About the Court, <https://www.icc-cpi.int/about> (accessed on 22 April 2022). See also the Preamble of the Rome Statute of the International Criminal Court, "Recognizing that such grave crimes threaten the peace, security and well-being of the world", Rome Statute of the International Criminal Court, 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, vol. 2187, No. 38544, Depositary: Secretary-General of the United Nations, <http://treaties.un.org> (accessed on 22 April 2022).

¹¹ See among other international instruments, The Preamble of the Rome Statute of the International Criminal Court, 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, vol. 2187, No. 38544, Depositary: Secretary-General of the United Nations, <http://treaties.un.org>, wherein it states, "Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes", and "Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions" (accessed on 22 April 2022).

crimes. It is anticipated that the number of those who will be prosecuted for their alleged serious international crimes will likely not be high. However, these prosecutions must proceed. This implies that there needs to be a commitment on the part of States to prosecute all those who are responsible for the commission of serious international crimes when they are apprehended within their territorial borders, subject, of course, to all those whom there may be an outstanding international criminal indictment by the ICC or any other international criminal tribunal.¹²

1.7. Serious Criminality as a Bar to Refugee Protection

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

Those who are responsible for the commission of serious international crimes simply cannot be Convention refugees or persons in need of protection, by definition. Hence, this provision ought to be included within Article 1A(2), the inclusionary provisions of the Refugee Convention, and not remain as a separate Exclusion Clause.¹³ This would be a more effective means of dealing with those who apply for asylum but are responsible for the commission of serious international crimes. Furthermore, such persons should be prosecuted and, if they are not convicted, then they can proceed with their application for refugee protection.

Significantly, whenever there is sufficiently reliable and trustworthy evidence to prosecute those who are responsible for serious international crimes then it is clear that there is a positive obligation on the part of States to do so. Hence, international justice would not only be served through the prosecution of those who are responsible for serious criminality but they would also be held accountable for their crimes through their criminal prosecution and possible conviction. This would help to ensure that there is no impunity for serious international criminality. At the same time, those who are found guilty of such crimes would be paying their debts to not only their victims but the international community as a whole (Song 2012; International Criminal Court 2019; Robertson 2005).

1.8. Final Reflections

A utopic vision of international refugee protection would ensure that all those in need of refugee protection would receive it, and all those who are responsible for the commission of serious criminality, and most assuredly serious international crimes or the *atrocities crimes*, would be prosecuted for the harm they have inflicted on persons as well as their society and the international community as a whole. The present configuration of exclusion from refugee protection through Article 1F is dated and can result in injustices and the denial of Convention refugee status for those who ought to receive international protection. The exclusion clauses are intended to exclude all those who are responsible for serious international crimes in order to maintain the legitimacy and the integrity of the international refugee protection regime while ensuring that those who are responsible

¹² For instance, the International Criminal Court has publicly indicted 49 people. See “List of people indicted by the International Criminal Court”, *Wikipedia*, https://en.wikipedia.org/wiki/List_of_people_indicted_in_the_International_Criminal_Court (accessed on 18 July 2022).

¹³ Article 1A(2) could be amended, as an example, to include the following phrase, “and who is not liable for any serious criminality.” This phrase could be inserted in the definition in Article 1A(2) as follows:

Article 1A(2), As a result of events occurring before 1 January 1951 and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality, **and who is not liable for any serious criminality**, and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

for such serious crimes are brought to justice.¹⁴ However, there are more simple, straightforward, and effective ways to accomplish both of these utopic aspirations and, that is, to include a provision within Article 1A(2) of the *1951 Convention* that precludes anyone from Convention refugee status and refugee protection who is liable for serious criminality. Hence, only those refugee applicants who are not responsible for serious criminality would meet the legal definition of who is a refugee. Not including those responsible for serious criminality in the definition of who can be a refugee is a lot simpler than excluding someone on the grounds that there are “serious reasons for considering” that they have committed a serious international crime, a serious non-political crime outside the country of refuge prior to their admission to that country as a refugee, or are guilty of acts contrary to the purposes and principles of the UN.

The argument advanced by Justin Mohammed is that with the progression of international human rights and international criminal law Article 1F is no longer required. Moreover, it can create injustices if not applied properly in light of subsequent treaties that have changed the meaning of essential terms. However, repealing Article 1F creates a legal vacuum that needs to be filled by also amending Article 1A(2) to ensure that no one can be a Convention refugee if they are liable for serious criminality. Attendant to this is the need to prosecute all those who are responsible for serious international crimes, where there is sufficient credible and reliable evidence to prosecute and to obtain a guilty verdict. International justice demands this if we wish to end impunity for serious international crimes.

Those persons who do not meet this legal definition of who is a refugee would, rather than being excluded from Convention refugee status per se, would be found not to be a Convention refugee. Furthermore, in those instances where there is sufficient evidence to charge and to prosecute the person for their serious international crimes then States are obligated to do so. This would not only advance international justice but contribute to ending impunity for those who are responsible for their criminal liability. Disposing of Article 1F, and the adversarial hearing process that is required in exclusion cases, would make the refugee status determination hearing process that much more straightforward and simpler for the refugee law decision-makers. This should make for a quicker hearing and a less error-prone refugee status determination process and, presumably, shorter final reasons for judgment, at least for these types of asylum applications. One would expect, naturally, that States would be more inclined to this type of refugee status determination system when deciding claims for refugee protection. This proposal, accordingly, should have broad support amongst its current States Parties. Adoption of this proposal would also need the support of the UNHCR. If State Parties would support this proposal, it would be reasonable to expect that the UNHCR would support it as well.

The arguments presented here that Article 1F of the *1951 Convention* is antiquated and that it no longer aligns with contemporary international law norms and principles and could potentially result in injustices are at least thought provoking, if not compelling. Equally important are the arguments that those failed refugee claimants who are responsible for serious international crimes do not meet the new refugee definition proposed here and where the criminality is serious ought to be prosecuted, where the evidence warrants it, in an effort to end impunity and to advance international justice that, ultimately, will contribute, no matter how small, to helping to maintain global peace and security. Furthermore, an international refugee protection regime of this nature should, ultimately, contribute

¹⁴ Gilbert (2003, p. 428). Gilbert notes as follows:

The first recognizes that refugee status has to be protected from abuse by prohibiting its grant to undeserving cases. Due to serious transgressions committed prior to entry, the applicant is not deserving of protection as a refugee—there is an intrinsic link ‘between ideas of humanity, equity and the concept of refuge’. The second aim of the drafters was to ensure that those who had committed grave crimes in the Second World War or other serious non-political crimes, or who were guilty of acts contrary to the purposes and principles of the United Nations, did not escape prosecution.

to ending the seemingly never-ending and escalating world refugee crises. Moreover, it would, at the same time, promote international justice by first helping to ensure that only those refugees who are not criminally liable are determined to be Convention refugees, while those who are responsible for serious international crimes, where the evidence warrants it, are prosecuted for their serious criminality, that very often produces the forced displacement and those who are seeking asylum in the first instance.

2. Ending Exclusion from Refugee Protection and Advancing International Justice: A Commentary

2.1. Introduction

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

2.2. Conceptual Issues

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

The most recent iteration of the purpose of the exclusion clause, as a whole, was given by this court in 2014 in the *Febles* case¹⁵ where it said:

“The *Refugee Convention* is not itself an abstract principle, but an agreement among sovereign states in certain specified terms, negotiated by them in consideration of the entirety of their interests. In *R. (European Roma Rights Centre) v. Immigration Officer at Prague Airport*, [2004] UKHL 55, [2005] 2 A.C. 1, the U.K. House of Lords stated that the *Refugee Convention* “represent[s] a compromise between competing interests, in this case between the need to ensure humane treatment of the victims of oppression on the one hand and the wish of sovereign states to maintain control over those seeking entry to their territory on the other” (para. 15).”¹⁶

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

“As the Federal Court of Appeal recognized in *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433, at p. 445: ‘When the tables are turned on persecutors, who suddenly become the persecuted, they cannot claim refugee status. International criminals, on all sides of the conflicts, are rightly unable to claim refugee status.’ In other words, those who create refugees are not refugees themselves: . . . On the one hand then, if we approach art. 1F(a) too

¹⁵ *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68.

¹⁶ *Idem*, paras 27–29.

narrowly, we risk creating safe havens for perpetrators of international crimes—the very scenario the exclusion clause was designed to prevent. On the other hand, a strict reading of art. 1F(a) arguably best promotes the humanitarian aim of the *Refugee Convention* . . . ”¹⁷

With respect to 1F(c), the same court has said:

“What is crucial, in my opinion, is the manner in which the logic of the exclusion in Article 1F generally, and Article 1F(c) in particular, is related to the purpose of the Convention as a whole. The rationale is that those who are responsible for the persecution which creates refugees should not enjoy the benefits of a Convention designed to protect those refugees.”¹⁸

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

“Excluding people who have committed serious crimes may support a number of subsidiary rationales—it may prevent people fleeing from justice; it may prevent dangerous and particularly undeserving people from entering the host country. However, Article 1F(b) cannot be confined to any of these subsidiary purposes. Excluding people who have committed crimes in other countries prior to seeking refugee protection may serve other state interests. It may help preserve the integrity and legitimacy of the refugee protection system, and, hence, the necessary public support for its viability. It may deter states from exporting criminals by pardoning them or imposing disproportionately lenient sentences while supporting their departure elsewhere as refugees. Finally, it may allow states to reduce the danger to their society from all serious criminality cases taken together, given the difficult task and potential for error when attempting to determine whether criminals from abroad (on whom they have more limited sources of information than on domestic criminals) are no longer dangerous. Whatever rationales for Article 1F(b) may or may not exist, its purpose is clear in excluding persons from protection who previously committed serious crimes abroad.”¹⁹

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

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

- To denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
- To deter the offender and other persons from committing offences;
- To separate offenders from society, where necessary;
- To assist in rehabilitating offenders;
- To provide reparations for harm done to victims or to the community;
- To promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.”²⁰

Internationally, some of these goals are reflected more recently in the preamble of the *Rome Statute*, which indicates that one of its goals is “to put an end to impunity for the

¹⁷ *Ezokola v. Canada (Citizenship and Immigration)*, 2013 SCC 40, paras 34–36.

¹⁸ *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982, para 63.

¹⁹ *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68, para 36.

²⁰ Section 718; for further details and jurisprudence regarding sentencing in Canada, see Kent Roach, *Criminal Law, Seventh Edition* (Irwin Law, 2018) at 522–535.

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

2.3. Legal Issues

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

The first issue is the fact that the insertion of the exclusion clause into the *Refugee Convention* was seen as an insular event, which is not the case. Apart from the circumstance that there is a direct connection between the 1948 *Universal Declaration of Human Rights* (UDHR) and the 1951 *Refugee Convention*,²² the concerns with respect to persons with a criminal background who are seeking asylum go back as far as the very first time that the issue of asylum was raised in international law, from important philosophers such as Grotius, Pufendorff and Vattel²³ to the first international treaties dealing with refugees between the first and second World Wars, as well as shortly after the Second World War.²⁴

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

“An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.”²⁵

²¹ Preambular paragraph 5.

²² Article 14 of the UDHR says:

1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.
2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

This is the only provision in the UDHR which has any limitation of the rights contained in it; as well, the wording of article 14(2) was the starting point of the deliberations for the drafting of the *Refugee Convention* in 1950. For a background of the negotiations of the UDHR, see Rikhof (2012, pp. 45–50); for a discussion of the debates regarding the exclusion clause in the *Refugee Convention*, see idem at 51–61.

²³ Idem at 33–34.

²⁴ Idem at 35–45.

²⁵ Article 13.

Similarly, in two conventions dealing with statelessness, an area related to refugee law,²⁶ the first one repeats the exclusion clause from the *Refugee Convention* so that States have no obligation to resolve the statelessness status of persons in their country²⁷ while the second has the same effect for persons who have been convicted of an offence against national security or have been sentenced to imprisonment for a term of five years or more on a criminal charge.²⁸

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

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

While the second says:

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

Thirdly, refugee law at the supra-national level (in the European Union) and national level have taken into account the developments of international human rights law in the area of *refoulement* by extending the prohibition from removing refugees from their countries from a fear that their life or freedom would be threatened²⁹ and also to torture³⁰ or cruel, inhuman or degrading treatment or punishment.³¹

2.4. Practical Issues

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

Legally, the obligations to prosecute or extradite are all based on international treaties and only apply to a limited number of exclusion crimes, namely war crimes, torture, certain terrorist offenses as well as drug and people trafficking. Even the reference to war crimes must be qualified as this obligation only applies to war crimes committed in international armed conflicts. As most 1F(a) crimes are the result of war crimes in non-international armed conflicts or crimes against humanity, it means that for this exclusion ground the obligation is very limited.³²

²⁶ The first sentence of article 1(A)(2) of the Refugee Convention says: “As a result of events occurring before 1 January 1951 and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or **who, not having a nationality** and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

²⁷ Article 2(iii) of the 1954 *Convention Relating to the Status of Stateless Persons*.

²⁸ Article 2(2)(c) of the 1961 *Convention on the Reduction of Statelessness*.

²⁹ Article 33(1).

³⁰ Derived from article 3 of the 1984 *Torture Convention*.

³¹ Indirectly derived from article 7 of the ICCPR; see also Rikhof, *supra* note 22 at 17–21.

³² See Rikhof, *supra* note 22 at 461–462.

With respect to the specific obligation to prosecute and the implicit assumption that all exclusion cases should be subject to the obligation if an excluded person cannot be extradited, the reality is that this is not possible and will likely never be possible due to the much larger number of cases produced based on an exclusion in contrast to the ability of the international community to prosecute persons in general. Most of the attention has been given to 1F(a) excluded persons and when examining this aspect, the discrepancy between exclusion and prosecution is vast. At the international level in the last 25 years, the ICC has only finished seven trials with two more ongoing³³ and it is unlikely that this pace can be increased given the limitations in budget placed on the ICC. The two international criminal tribunals, the ICTY and ICTR have a better track record, namely 109 trials at the ICTY³⁴ and 76 at the ICTR³⁵ but these tribunals have ceased to operate except for handling the limited number of cases, which were already in litigation at the time that they closed, in 2017 and 2015, respectively, which are processed by the United Nations International Residual Mechanism for Criminal Tribunals.³⁶

However, the situation at the international level is even worse with respect to 1F(b) and 1F(c) cases. There is no international institution dealing with 1F(b) criminality while for 1F(c), for which the vast majority involved cases of terrorism and for which at the international level there has only been one international tribunal, which has only convicted five persons (in absentia for one incident in Lebanon), namely the Special Tribunal for Lebanon.³⁷

At the national level, cases involving international crimes or terrorism committed outside the territory of the country initiating such investigations and prosecutions number less than one hundred in the last 25 years.³⁸ These involve situations akin to 1F(a) and 1F(c) crimes for which the national legislation in countries, which are the most active in such extra-territorial jurisdiction efforts, only allows in those limited circumstances; as such it is impossible to prosecute 1F(b) cases, which were committed outside the country where such persons reside and which is a prerequisite for 1F(b) exclusion. Taken together the number of prosecutions at the international and national level for 1F crimes (less than 300) and comparing the number of exclusion cases in the same time period and countries (for national prosecutions), which are over 1000,³⁹ it must be clear that there exists a vast discrepancy between the number of persons excluded who can also be prosecuted; this situation has become much more serious since 2017 when the ICTY closed.

The obligation to extradite also has a number of obstacles, which makes it even more difficult to deal with excluded persons in a meaningful manner. First of all, extradition is only possible between countries, which have an extradition arrangement between them and those arrangement are limited in number and usually not with countries, which have produced excludable persons.⁴⁰ Secondly, an extradition can only occur at the request from the country where the crime has been committed and an attempt to influence a country to issue such a request by a country where a person is present will raise the spectre of disguised extradition and can result in a finding of abuse of process. Apart from these

³³ See ICC, Situations and Cases (Home (icc-cpi.int) (accessed on 22 April 2022)).

³⁴ See Key Figures of the Cases | International Criminal Tribunal for the former Yugoslavia (icty.org) (accessed on 22 April 2022).

³⁵ See The ICTR in Brief | United Nations International Criminal Tribunal for Rwanda (irmct.org) (accessed on 22 April 2022).

³⁶ See About | UNITED NATIONS | International Residual Mechanism for Criminal Tribunals (irmct.org) (accessed on 22 April 2022).

³⁷ See The Cases | Special Tribunal for Lebanon (stl-tsl.org) (accessed on 22 April 2022) The ICTR had a reference to the war crime of acts of terrorism in non-international armed conflicts (article 4(d) while the ICTY jurisprudence developed the war crime of causing terror (see Rob Currie and Joseph Rikhof, *International and Transnational Criminal Law, Third Edition*, (2020 Irwin Law) at 169, footnote 336) but neither is similar to the definition used in 1F(c) instruments and jurisprudence.

³⁸ See Einarsen and Rikhof (2018, pp. 425–98); for the problems involving prosecutions based on extra-territorial jurisdiction, see Rikhof, *supra* note 22 at 460–469.

³⁹ See Rikhof, *supra* note 6 at 210–263.

⁴⁰ For instance, Canada has extradition treaties with 31 countries, see the schedule to the *Extradition Act*.

procedural difficulties, there is also the exact same substantive issue, which has caused problems when attempts were made to deport a person with a criminal background, namely, a violation of human rights upon arrival in the country which issued the extradition request. Given the fact that in the context of extradition a criminal trial is often contemplated, not only do human rights associated with torture, or cruel, inhumane or degrading treatment or punishment come into play but in addition also the right to a fair trial.⁴¹

Lastly, with respect to refugee law, the suggestion that the types of criminality to be considered by refugee decision makers during the inclusion phase, namely “anything that has been accepted as a serious crime by the international community and the standard of proof would be the same as that for any other evidence in a claim for refugee protection, a balance of probabilities”⁴² raises some practical issues as well. It is not clear what is meant by the international community. If this is meant to convey a reference to multilateral treaties or jurisprudence by international bodies in the area of criminality, this raises the specter of international criminal law (where crimes, such as aggression, genocide, war crimes and crimes against humanity) are regulated or transnational criminal law (where crimes such as forms of terrorism, organized crime, corruption, drug trafficking and crimes against peacekeepers or cybercrime) are regulated. If that is the case, this characterization falls then squarely within the realm of the existing exclusion clauses 1F(a) and 1F(c)⁴³ while for some of the transnational crimes 1F(b) would be engaged as well. If the international community is meant the jurisprudence related to exclusion in the refugee context by the CJEU or by national courts then all three exclusion grounds would be included. If the latter is not meant to be part of the notion of the international community then there would be a considerable undesirable gap in the proposed notion of criminality as very serious 1F(b) crimes, such as murder, rape, assault and serious economic crimes would not be part of that definition. As a result of this uncertainty, it is not clear in how far the difficulties for refugee decision makers to assess criminality as part of inclusion are mitigated except for a slightly lower standard of proof.

2.5. Conclusions

The proposal of bringing the use of exclusion closer to achieving criminal justice is worthy of consideration. However, in order to do so a number of issues need to be examined. First of all, any such proposal needs to adhere to the underlying purposes of exclusion and refugee law and ensure that they are not mixed in order to make changes in either area of law, which is not part of its essential core. Secondly, it is important to take note of the practicalities of any alternatives considered in this context; especially the fact that the obligation to prosecute or extradite has a number of legal and practical difficulties, which will be difficult to overcome in the present political and international and national climates. This, in turn, leads to the related question of which is the best solution to deal with the large number of excluded persons who cannot be prosecuted or extradited and whether the proposal adequately addresses that phenomenon.⁴⁴ Lastly, any proposal needs to take into account the potentially high cost of changing an existing workable system versus the low number of exclusion cases in the present system (a dozen a year in Canada),⁴⁵ especially if

⁴¹ See Rikhof, *supra* note 22 at 469–470.

⁴² See *supra* note 22.

⁴³ For an overview of international crimes, see Currie and Rikhof, *supra* note 37 at 108–190 while for an overview of transnational crimes, see *idem* at 364–477; for an overview of the types of crimes considered for 1F(c), see Rikhof, *supra* note 22 at 350–369 as well as *Commissaire général aux réfugiés et aux apatrides v Mostafa Lounani*, Case C-573/14, 31 January 2017 by the Court of Justice of the European Union (CJEU).

⁴⁴ For possible partial solutions, see *idem* at 481–484 and Refugee Law Initiative, School of Advanced Study, University of London (UK) and Center for International Criminal Justice, VU University Amsterdam (Netherlands), *Undesirable and Unreturnable? Policy challenges around excluded asylum seekers and other migrants suspected of serious criminality who cannot be removed*, 2016 at 32 (online: [ubu.indd \(cicj.org\)](http://ubu.indd.cicj.org), accessed on 22 April 2022).

⁴⁵ For instance in Canada, only a dozen persons per year are subject to exclusion, see Joseph Rikhof, “Update on Exclusion and Inadmissibility Jurisprudence: New Developments since the Decisions of the Supreme Court of Canada in *Ezokola* and *Febles*”, CARFMS/ACERMF Working Paper No: 2017/2 (on-line: Update on Exclusion and Inadmissibility Jurisprudence: New Developments Since the Decisions of the Supreme

the notion of criminality in this proposal does not appear to be substantially different from what is presently being used in the exclusion.

Author Contributions: For *Ending Exclusion from Refugee Protection and Advancing International Justice*: conceptualization, J.C.S.; methodology, J.C.S.; formal analysis, J.C.S.; investigation, J.C.S.; resources, J.C.S.; data curation, J.C.S.; writing—original draft preparation, J.C.S.; writing—review and editing, J.C.S. For *Ending Exclusion from Refugee Protection and Advancing International Justice: A Commentary*: conceptualization, J.R.; methodology, J.R.; formal analysis, J.R.; investigation, J.R.; resources, J.R.; data curation, J.R.; writing—original draft preparation, J.R.; writing—review and editing, J.R. All authors have read and agreed to the published version of the manuscript.

Funding: This research received no external funding.

Conflicts of Interest: The authors declare no conflict of interest.

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