NON-REFOULEMENT OBLIGATIONS
UNDER ARTICLE 1F(A) OF THE REFUGEE
CONVENTION

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I. ABSTRACT

This article explores the intersection between international criminal law and international refugee law, namely, by examining the requisite threshold necessary to establish culpability under Article 1F(a) of the Convention Relating to the Status of Refugees (Refugee Convention) for an asylum claimant who has committed “a crime against peace, a war crime, or a crime against humanity”. The definition of “a crime against peace, a war crime, or a crime against humanity” as defined under the Rome Statute of the International Criminal Court (Rome Statute) as well as jurisprudence from international courts and tribunals will be discussed. Given the wide-ranging implications of excluding an asylum claimant from refugee status, it is important to bring clarity to the law on what constitutes “serious reasons for considering” culpability threshold so that those deserving of international protection are not excluded from refugee status, which may then heighten the possibility of them being sent back to persecution, death or torture, or otherwise where their life or freedom would be threatened, thus violating the principle of non-refoulement.

II. INTRODUCTION

Asylum claimants are Convention refugees as long as they can demonstrate a well-founded fear of persecution on the basis of race, religion, nationality, membership of a particular social group or political opinion, they are outside their country of origin, and state protection from their country of origin is not available to them, or they are otherwise not willing to avail themselves of
However, asylum claimants who meet this definition are nonetheless not recognized as refugees and thus are not accorded Convention protection where they are excluded under Article 1F of the Refugee Convention. The purpose of Article 1F is to prevent asylum claimants who have committed “a crime against peace, a war crime, or a crime against humanity”, or who otherwise have committed “a serious non-political crime outside the country of refuge”, or who otherwise have been “guilty of acts contrary to the purposes and principles of the United Nations”, from Convention protection and to prevent abuse of the asylum institution.

This article will specifically focus upon Article 1F(a) exclusion because it implicates the intersection between two branches of international law, namely: international criminal law and international refugee law. The danger inherent in Article 1F(a) interpretation that is too wide is that it inevitably encapsulates more asylum claimants than its original purpose in that asylum claimants excluded are likely to be incarcerated in detention and have their liberties and freedoms stripped away. The situation of an interpretation that is too wide is that it leads to an extraordinary number of excluded asylum applications, even where, on a closer examination, the applications may have been legitimate. A provision that over-captures asylum claimants is troublesome because asylum claimants who are legitimately

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3 Refugee Convention, supra note 1, at art. 1F.


6 See id.
fleeing from a “well-founded fear of persecution” will be excluded from Convention protection, including protection against *refoulement*.\(^7\) An interpretation that is too wide also increases the likelihood of inconsistency both in terms of the interpretation and the application of the provision in specific circumstances. For instance, experts have argued that “serious reasons for considering” of Article 1F(a) is too wide and ambiguous, which results in variation in State interpretation of the same provision as well as in the application of that interpretation.\(^8\)

Another consequence of being excluded under Article 1F(a), is that Convention protection, including *non-refoulement*, no longer applies to individuals who are found to have committed “a crime against peace, a war crime, or a crime against humanity.”\(^9\) The potentially severe consequence for an asylum claimant who otherwise has a legitimate application is that he or she may be sent back to face persecution without any protection.\(^10\) This dire consequence entails a careful examination of the requisite threshold necessary to exclude individuals from Convention protection and calls for much-needed clarity in the law.

An understanding of one branch of international law relative to another branch may inform an understanding of the other. For instance, international refugee law incorporates concepts from the international criminal law under Article 1F(a) of the Refugee Convention to prevent those undeserving of international

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8 For instance, the UNHCR and the United Kingdom interpret the “serious reasons for considering” standard as coming close to the evidentiary threshold required for domestic criminal conviction, while the Netherlands and France both interpreted the same provisional standard as a low one which can be met easily. Canada, on the other hand, interprets the provisional standard somewhere in between by equating the “serious reasons for considering” standard with the “reasonable grounds to believe” standard in Holvoet, *supra* note 5, at 1047–48.


protection from being granted refugee status.11 To adequately understand the scope and application of Article 1F(a), therefore, requires an examination of the underlying relevant international criminal law principles. This paper explores the intersection between international criminal law and international refugee law by reviewing three questions. First, what is the requisite threshold for an asylum claimant to be excluded from Convention protection under Article 1F(a)? Second, is a low threshold for Article 1F(a) exclusion demonstrative of language that is too wide? Finally, does a wide scope effectively prevent asylum claimants from being recognized as refugees, potentially leading to their refoulement back to persecution, death or torture, or otherwise where their life or freedom would be threatened?

This paper begins by examining whether the threshold established by Article 1F(a) is too low and the interpretation too wide, leading to the exclusion of otherwise legitimate asylum claimants. It will also consider the opposite: interpretation of Article 1F(a) that is too narrow will create a “safe haven” for perpetrators. It will be shown that a balancing act must be struck by international courts and tribunals to ensure that interpretation of Article 1F(a) is not too wide or too narrow, leaving too much room for interpretation for individual decision-makers.12

III. SPECIFIC ACTS UNDER ARTICLE 1F(A)

Specific acts under Article 1F(a) warrant a separate discussion given each definition has a specific meaning under international law. The specific acts under Article 1F(a) are “a crime against peace, a war crime, and a crime against

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11 Refugee Convention, supra note 1, at art. 1F(a).

humanity.” The following very briefly summarizes the definition of each crime.

A. Crimes Against Peace

The term “crime against peace” is not defined in the Refugee Convention. However, the United Nations High Commissioner for Refugees (UNHCR) guidance notes and commentaries provide a “soft law” approach which may assist in its interpretation. Citing the Nuremberg Charter, the UNHCR defines a “crime against peace” as involving the “planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing”. “War crime” is defined under the Rome Statute, but the definition under Article 8 is non-exhaustive. A “war crime” is “a serious violation of the laws and customs applicable in armed conflict (also known as international humanitarian law) which gives rise to individual criminal responsibility under international law.” “Crimes against humanity” were listed in the Nuremberg Charter, which

13 Refugee Convention, supra note 1, at art. 1F(a).
14 See generally Refugee Convention, supra note 1.
15 JOHN CURRIE ET AL., INTERNATIONAL LAW: DOCTRINE, PRACTICE, AND THEORY 151–52 (Irwin Law ed., 2nd ed. 2014) (“the manuals and guidance notes prepared by expert bodies as diverse as the UN Refugee Agency (UNHCR) and the International Civil Aviation Organization (ICAO) may be considered influential soft law instruments”).
16 See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis § II art. 6 (a), Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter Nuremberg Charter].
17 Refugee Status Criteria, supra note 12, at ¶ 150; Nuremberg Charter, supra note 16.
19 UNHCR Guideline, supra note 4, at ¶ 31.
inspired their inclusion in Article 1F(a) of the Refugee Convention. More recently, “crimes against humanity” are delineated in Article 7 of the Rome Statute. The Rome Statute defines “crimes against humanity” as prohibited acts (such as murder, extermination, rape, and torture) carried out as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

B. Definitional Complexity

The definition of crimes above has shown the complexity of defining extraordinary crimes. In the context of Article 1F(a), this complexity is indicative of the difficulty for international courts and tribunals to interpret and apply the threshold to extraordinary crimes, where the definition of the crimes themselves may not be straightforward. In fact, the evolutionary development of crimes in international criminal law proceeds at a geometric pace. Further, those who commit the above specific acts, those who are responsible as “leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes” and who are responsible for “all acts performed by any persons in execution of such plan” are also liable and will be excluded from Convention protection under Article 1F(a).

Moreover, the UNHCR has, in its commentary, stated that “the individual need not physically have committed the criminal


23 Rome Statute, supra note 18, at art. 7.

24 Id. at art. 7 (1) (a), (b), (f), (g).

25 Id. at art. 7 (1).


28 Refugee Convention, supra note 1, at art. 1F(a).
act in question. Instigating, aiding and abetting and participating in a joint criminal enterprise can suffice”.29

The next section explores the standard and burden of proof for proving Article 1F(a) exclusions as well as the elements of the crime.

IV. THE CONTENT OF ARTICLE 1F(A)

This section will provide a brief overview of the standard and burden of proof required to establish that an asylum claimant falls under the exception of Article 1F(a). The elements of crime including knowledge and intent will be discussed.

A. UNHCR Guidance Note

The UNHCR guidance note is a good starting point to examine the standard of proof of Article 1F(a). UNHCR guidance notes, although non-binding, are an authoritative source for States interpreting and applying the Article 1F(a) threshold.30 The UNHCR guidance note indicates that the standard of proof of Article 1F is to be less than “proof of guilt beyond reasonable doubt”, although it must be a “high standard of proof”, having regard to “the serious consequences of exclusion and the need to preserve and adhere to the object and purpose of Articles 1F”, while construing the provision within its “plain meaning”.31 What is frustrating is that there is no further guidance upon what constitutes a “high standard of proof” which is to fall somewhere

29 UNHCR Guideline, supra note 4, at ¶ 18.
31 U.N. High Comm’r for Refugees, UNHCR Statement on Article 1F of the 1951 Convention, § 2.2.2 (July 16, 2009) [hereinafter UNHCR Statement]. The object and purpose of exclusion has been stated, from the travaux préparatoires, as “the decision to exclude such persons, even if they are genuinely at risk of persecution... is rooted in both a commitment to the promotion of an international mortality and pragmatic recognition that states are unlikely to agree to be bound by a regime which requires them to protect undesirable refugees.” JAMES C. HATHAWAY & MICHELLE FOSTER, THE LAW OF REFUGEE STATUS 214 (Cambridge Univ. Press ed., 2nd ed. 2014).
between the domestic criminal law standard of “beyond a reasonable doubt” and the civil standard of “balance of probabilities.”

The burden of proof to exclude the asylum claimant rests on the State or the UNHCR, and the applicant is given the “benefit of the doubt.” The only exception to the burden of proof being upon the State or the UNHCR exists where the individual asylum claimant is indicted by an international criminal tribunal or where the presumption of responsibility applies to that individual. In this instance, the individual will have the reverse onus to prove a rebuttable presumption of excludability.

B. Analysis of the Elements to Crimes Against Humanity

Each crime against humanity has a specific set of elements that the prosecutor must demonstrate in order to prosecute the perpetrator for committing a crime against humanity successfully. For the crime against humanity of persecution found under Article 7(1)(h) of the Rome Statute, six elements of the crime must be separately proven by the prosecutor for a successful conviction. These six elements are: 1) the perpetrator

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32 See UNHCR Statement, supra note 31; Rome Statute, supra note 18, at art. 61(5).
33 UNHCR Guideline, supra note 4, at ¶ 34.
34 Id. “Benefit of the doubt” means, the asylum claimant need not establish every part of his or her case in order to establish a “well-founded fear of persecution” on the five Convention grounds. Refugee Convention, supra note 1, at art. 1C; UNHCR Guideline, supra note 4, at ¶ 34; Refugee Status Criteria, supra note 12, at ¶¶ 203, 204. In adjudicating the application, the asylum officer should consider: “the reasonableness of facts alleged, consistency of the overall story, corroborative evidence adduced, consistency with common knowledge or generally-known facts, and the known situation in the country of origin at the time of the application.” U.N. High Comm’n for Refugees, An Overview of Protection Issues in Western Europe: Legislative Positions Taken by UNHCR, 88, European Series vol. 1 no. 3 (1995) [hereinafter UNHCR Overview].
35 UNHCR Guideline, supra note 4, at ¶ 19. The presumption of responsibility applies against the individual asylum claimant where the individual “remained a member of a government clearly engaged in activities that fall within the scope of Article 1F”, or where the membership is voluntary but “the purposes, activities and methods of some groups are of a particular violent nature.” Id.
36 Id. at ¶ 34.
37 Id.
38 Rome Statute, supra note 18, at art. 7 (1) (h).
severely deprived, contrary to international law, one or more persons of fundamental rights, 2) the perpetrator targeted such person(s) by reason of the identity of a group of collectivity or targeted the group or collectivity as such, 3) such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in Article 7(3) of the Rome Statute, or other grounds that are universally recognized as impermissible under international law, 4) the conduct was committed in connection with any act referred to in Article 7(1) of the Rome Statute or any crime within the jurisdiction of the International Criminal Court, 5) the conduct was committed as part of a widespread or systemic attack directed against a civilian population, and 6) perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systemic attack directed against a civilian population.39

C. Assessment of the Relevant Mitigating Factors and Establishing Mens Rea

The decision-maker must assess any relevant mitigating factors40 and establish the mens rea41 necessary to prove individual responsibility for the act(s) in question.42 In order to establish the mens rea, the decision-maker must find that such crime was committed with intent and knowledge.43 Further, the


40 Such as in the case of minors where they have not reached the age of criminal responsibility and/or do not possess the mental capacity to be held responsible for the crime in question. UNHCR Guideline, supra note 4, at ¶ 28. It has been held that the defense of duress can be a mitigating factor in sentencing. Prosecutor v. Erdemovic, Case No. IT-96-22-A, Judgement of Appeals Chamber, ¶ 12 (b) (Int’l Crim. Trib. For the Former Yugoslavia Oct. 7, 1997).

41 Rome Statute, supra note 18, at art. 30 (2) (Showing that “a person has intent where: in relation to conduct, that person means to engage in the conduct; in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events”; “knowledge” is defined as: “awareness that a circumstance exists or a consequence will occur in the ordinary course of events.”).

42 Rome Statute, supra note 18, at art. 30 (1).

43 Id.
intent is proven where the perpetrator “means to engage in the conduct,”44 while knowledge is proven where the perpetrator had the “awareness that a circumstance exists or a consequence will occur in the ordinary course of events.”45 To establish awareness of a consequence, one must show that the perpetrator “means to cause that consequence or is aware that it will occur in the ordinary course of events.”46

An examination of knowledge and intent illustrate the difficulty for the State or the UNHCR to prove the knowledge and intent in question when trying to establish culpability for the act. Not only must knowledge and intent to engage in the conduct be proven as to each element of the crime, but the perpetrator must also be shown to be aware of his or her conduct and that such conduct would lead to a consequence in the ordinary course of events.47 A finding of exclusion under Article 1F(a), therefore, does not come lightly, and should not be, given the severity of being excluded from Convention protection and the possibility of being sent back to persecution without non-refoulement protection.

V. ANALYSIS OF ARTICLE 1F(A) THRESHOLD

This part of the article will address two gaps that exist where the wording of the article is interpreted too widely or too narrowly, and the implications of each for the asylum claimant and his or her right against refoulement. The first gap explored in this section is where the wording of Article 1F(a) is interpreted too widely, resulting in asylum claimants with legitimate claims from being recognized as refugees. The second gap occurs where the wording of Article 1F(a) is interpreted too narrowly, creating a “safe haven” for perpetrators to circumvent the asylum system.

44 Id. at art. 30 (2) (a).
45 Id. at art. 30 (3).
46 Id. at art. 30 (2) (b).
47 See id. at art 30.
A. The Interpretation that is Too Wide

An interpretation of the evidentiary threshold of Article 1F(a) that is too wide may inevitably lead to *refoulement* of the asylum claimant back to persecution. First, if interpreted in a manner that is too wide, asylum claimants with legitimate claims may have an increased likelihood of being excluded under Article 1F(a) for reasons of being suspected of committing acts of “a crime against peace, a war crime, or a crime against humanity.”48 Second, if interpreted too widely, the original intention of Article 1F(a) of preventing asylum claimants from being accorded Convention protection where they do not deserve protection may be undermined.49 Third, the unintentional consequence of excluding asylum claimants who have legitimate claims for refugee status is that they may be sent back to their country of origin to face persecution, which could mean death, or torture, or other cruel, inhuman or degrading treatment or punishment (*refoulement*).50

The case of child soldiers provides a good example for analysis and demonstrates the need to interpret Article 1F(a) with some flexibility in extraordinary circumstances. In the case of child soldier asylum claimants who were perpetrators of mass atrocities, nonetheless, fall under the special category of unaccompanied minors (if they are unaccompanied).51 The

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49 Id. (This view is supported by academics such as Jennifer Bond, where she stated that “A broad interpretation of Article 1F(a) is not supported by either a purposive reading... and the Refugee Convention more generally”).


51 Daniel J. Steinbock, *The Admission of Unaccompanied Children into the United States*, 7 Yale L. & Pol’y Rev. 137, 188 (1989) (Discussing instances where children do not gain asylum under the enumerated grounds but still deserve sanctuary in the United States in light of international norms, and citing the example of child soldiers because international protocols condemn recruitment of children under the age of 15). Some scholars have argued whether child soldiers are perpetrators at all or if they should be regarded instead as victims since a vast majority of them may be forcibly abducted and
European Union, for example, has special measures to protect unaccompanied minors. Where the exclusion provision is read too widely, these child soldiers will fall under Article 1F(a) and will be precluded from Convention protection unless the defence of lack of *mens rea* could be shown. In the case of child soldiers older than 15 years of age, Article 7 of the *Statute of the Special Court for Sierra Leone* has implied that *mens rea* may exist. In fact, the United Kingdom Border Agency has echoed similar concerns and warned that “the application of the exclusion clauses . . . will be rare and must always be exercised with great caution, [in view of] the particular circumstances and vulnerabilities of children.” Further, the United Kingdom Border Agency is of the opinion that as a minor, for instance “while being compelled to serve with armed forces or an armed group, the individual is more likely to have been a victim of offences against international law than a perpetrator.” David Crane, the former Chief Prosecutor of the Special Court for Sierra Leone, has also specifically addressed the situation of child soldiers and his decision not to prosecute them for crimes they committed between the ages of 15 and 18.

The problem with an Article 1F(a) interpretation that is too wide is that it encapsulates child soldiers who took part in mass atrocities but who are nonetheless vulnerable due to their young age and the fact that there is no internationally accepted conscripted at a young age (before age of culpability may be established) See Matthew Happold, *Child Soldiers: Victims or Perpetrators*, 29 U. L. VERNE L. REV. 56, 85 (2008).

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54 *Statute of the Special Court for Sierra Leone*, art. 7, January 16, 2002, 2178 U.N.T.S. 138 (Giving the Special Court for Sierra Leone jurisdiction over any person who is over 15 years of age at the time of the alleged commission of the crime).

55 HOME OFFICE, EXCLUSION (ARTICLE 1F) AND ARTICLE 33(2) OF THE REFUGEE CONVENTION, 2016, ver. 6.0 at 7 (UK).

56 *Id*.

minimum age of criminal responsibility.\textsuperscript{58} States cannot and should not absolve themselves of responsibility for mass atrocities by “washing their hands” through the process of excluding child soldiers from refugee status.\textsuperscript{59} Further, the UNHCR has argued that non-refoulement obligations should apply to child soldiers excluded under Article 1F(a) because “the fact that a child has been a combatant may enhance the likelihood and aggravate the degree of persecution he or she may face upon return.”\textsuperscript{60}

B. The Interpretation that is Too Narrow

An interpretation of Article 1F(a) that is too narrow may allow perpetrators to abuse the system by getting away with their wrongdoings. For example, a perpetrator who has committed “a crime against peace, a war crime, or a crime against humanity” should, as the Convention provision originally intended, be denied Convention protection and refugee status.\textsuperscript{61} However, where the provision is read too narrowly, only a very specific class of perpetrators meeting the strict reading of the provision are excluded under Article 1F(a).\textsuperscript{62} A problem with this is, not only is the burden of proof placed upon the State or the UNHCR to establish the need to exclude the perpetrator,\textsuperscript{63} a high evidentiary standard (or narrow reading of the provision) requires specific evidence that needs to pinpoint the perpetrator to each element


\textsuperscript{59} Gilbert, supra note 12, at 473.


\textsuperscript{61} Refugee Convention, supra note 1, at 156 (Article 1F specifically excludes from the refugee definition persons who have committed a crime against peace, a war crime, or a crime against humanity).

\textsuperscript{62} Bond, supra note 48, at 29.

\textsuperscript{63} See 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. 92, 112 (2000). The State, which should be governed by the guidelines laid out in the UNHCR Refugee Status Criteria Handbook, is the decision maker for excluding refugees. Refugee Status Criteria, supra note 12, at ¶ 194.
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of the crime.\textsuperscript{64} Given the complexities and extraordinary nature of international criminal acts, the burden and pressure placed upon the State or the UNHCR to establish the requisite threshold to exclude these suspects are insurmountable and a difficult one.\textsuperscript{65} Where the interpretation of the provision is too narrow and allows the perpetrator to escape exclusion, the perpetrator is, in essence, able to circumvent the system, which may amount to an abuse of process (of the asylum institution) or otherwise brings the asylum system into disrepute.\textsuperscript{66}

The doctrine of abuse of process under the international criminal law is rooted in fairness.\textsuperscript{67} The case of \textit{Lubanga}\textsuperscript{68} and \textit{Mbarushimana}\textsuperscript{69} illustrate the importance of fairness in trial proceedings in that the former case dismissed a defence application requesting leave to stay proceedings against the accused on the grounds that the fairness of the proceedings was prejudiced by the Prosecutor’s reliance on intermediaries during the trial, while the latter case examined the issue of procedural fairness in trial.\textsuperscript{70} The concept of “fairness” was defined by the

\begin{itemize}
\item \textsuperscript{64} U.N. High Comm’r for Refugees, \textit{The Exclusion Clauses: Guidelines on their Application}, ¶¶ 8, 9 (Dec. 2, 1996), at http://www.refworld.org/docid/3ae6b31d9f.html.
\item \textsuperscript{66} Bringing the asylum system into disrepute means, “whether a reasonable person, informed of all relevant circumstances and the values and purposes underlying the asylum system, would conclude that admitting the claimant would bring the system into disrepute.” Bond, \textit{supra} note 48, at 74. The test is “on whether the overall repute of the asylum system, viewed in the long term, would be harmed by admitting the particular claimant.” \textit{Id.} This definition is analogous to the Supreme Court of Canada’s definition of bring the “administration of justice into disrepute” in \textit{R. v. Grant}, 2009 SCC 32, 357 (Can.).
\item \textsuperscript{67} Int’l Bar Ass’n, \textit{Fairness at the International Criminal Court: An International Bar Association’s Human Rights Institute Report}, at 9 (Aug. 2011).
\item \textsuperscript{68} Prosecutor v. Lubanga, ICC-01/04-01/06, Pre-Trial Chamber I (Jan. 29, 2007).
\item \textsuperscript{69} Prosecutor v. Mbarushimana, ICC-01/04-01/10, Pre-Trial Chamber I (Dec. 16, 2011).
\item \textsuperscript{70} Int’l Bar Ass’n, \textit{supra} note 67. \textit{See also} Prosecutor v. Lubanga, ICC-01/04-01/06, Pre-Trial Chamber I (Jan. 29, 2007) (denying Defense motions to stay proceedings based on intermediary problems with the chain of custody); Prosecutor v. Mbarushimana, ICC-01/04-01/10, Pre-Trial Chamber I, ¶¶ 59–61 (Dec. 16, 2011) (dismissing any procedural shortcomings in the investigative procedures that would exclude evidence from trial).
\end{itemize}
International Criminal Court Pre-Trial Chamber I as “the act of balancing, or finding equilibrium, between the procedural rights of all the participants,”\(^71\) including the rights of the accused and the rights of the victim(s).\(^72\) The centrality of fairness within the International Criminal Court is evidence which points to the importance of preventing abuse of process.\(^73\) While it is important to ensure fairness to the accused in trial proceedings involving allegations of a crime against peace, a war crime, and a crime against humanity,\(^74\) it is also important to note that fairness must be balanced against the interests of both the accused and the victim(s).\(^75\) It is an abuse of process where Article 1F(a) interpretation is so narrow that it enables the perpetrator to “abuse the process” of the asylum institution by evading liability or otherwise bring the asylum institution into disrepute.\(^76\) An allegation of lack of “fairness” accorded to the accused cannot be made without consideration for the “fairness” that should also be accorded to victims of mass atrocities such as the pain and re-traumatization they suffered throughout the trial process.

In an asylum system where the interpretation of Article 1F(a) is so narrow that it allows perpetrators of mass atrocities to have their exclusions overturned on the basis of lack of “fairness”, the likelihood of including illegitimate asylum applications is increased so that rejections may also increase accordingly, potentially resulting in subsequent refoulement of legitimate asylum claimants back to persecution, death or torture, or otherwise where their life or freedom may be threatened.

\(^71\) Int’l Bar Ass’n, supra note 67, at 19; Situation in the Democratic Republic of the Congo, Decision on the Prosecution’s Application for Leave to Appeal the Chamber’s Decision of 17 January 2006 on the Application for Participation in the Proceedings of VPRS 1, VPRS2, VPRS3, VPRS 4, VRPS 5, and VRPS 6, ICC-01/04-135-tEN, Pre-Trial Chamber I, ¶ 38 (Mar. 31, 2006) [hereinafter, DRC Situation].

\(^72\) DRC Situation, supra note 71.

\(^73\) Int’l Bar Ass’n, supra note 67, at 9.

\(^74\) See Rome Statute, supra note 18, at art. 67 (describing the rights of an accused).

\(^75\) DRC Situation, supra note 71, at ¶ 38.

\(^76\) See Bond, supra note 48, at 74; R. v. Grant, 2009 SCC 32, 357 (Can.).
VI. CONCLUDING REMARKS: THE WAY FORWARD?

An examination of the above reveals the inadequacies of international jurisprudence in addressing the ambiguous Article 1F(a) threshold. There are several ways in which international courts and tribunals may ensure this balance while not reading Article 1F(a) too broadly, too narrowly, or leaving too much room for interpretation by domestic courts. One way is that international courts and tribunals should specify the requisite threshold for “serious reasons for considering” by narrowing the scope of what constitutes “serious reasons for considering,” instead of allowing domestic courts to arbitrarily put the threshold on a spectrum, leading to confusion and variation in domestic implementation of the threshold. For example, by defining what constitutes “serious reasons for considering” at the international courts and tribunals level, domestic courts will be guided towards a more refined and concrete approach in their domestic implementation of the provision. The result will be less room for a reading that is too broad or too narrow, which creates confusion.

The law surrounding the evidentiary threshold necessary to be excluded under Article 1F(a) needs to be clarified. The great need to ensure clarity in the law enables the twin goals of the Refugee Convention to punish the perpetrator and protect asylum claimants with legitimate claims are achieved. It has been shown that current international jurisprudence is inadequate in addressing the need to clarify the state of the law, which leaves gaps open including allowing Article 1F(a) to be interpreted too broadly or too narrowly, which leaves too much room for interpretation, to the detriment of asylum claimants who are at a greater risk of being sent back to persecution, death or torture or otherwise where their life or freedom would be threatened. The lessons from the international criminal law may be utilized in the international refugee law context, by ensuring that the interests

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77 See Bond, supra, note 48, at 33, 77, 78 (describing how the current exclusion practices are flawed and inconsistent between the States, and how application of settled international criminal law will create more uniformity among the States in executing article 1F(a) determinations).

78 Mathias Holvoet, supra note 5, at 1055–56.
of States and the larger community to punish the perpetrator is met with safeguarding the interests of the asylum claimant to be accorded Convention protection, through a larger, supervisory role played by international courts and tribunals. While clarity in the law cannot be achieved overnight, over time, a stronger presence of international courts and tribunals in adjudicating the evidentiary threshold of Article 1F(a) through a case-by-case basis, may guide domestic courts in achieving the much-needed balancing act in years to come.