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Of course, but maybe: the absolute prohibition of *refoulement* and threats to national security and public safety

Legal and practical effects of undesirable but unreturnable refugees

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Those who are responsible for the persecution which creates refugees
should not enjoy the benefits of a Convention designed to protect those refugees.

- *Canadian Supreme Court,* Pushpanathan v. Canada

States face immense difficulties in modern times in protecting their communities from terrorist violence. That must not, however, call into question the absolute nature of Article 3.

- *The European Court of Human Rights*, Saadi v. Italy

Like, of course children who have nut allergies need to be protected, of course. We have to segregate their food from nuts, have their medication available at all times, and anybody who manufactures or serves food needs to be aware of deadly nut allergies, of course, but maybe… Maybe if touching a nut kills you, you're supposed to die. Of course not. Of course not. Of course not.

- *Louis C K,* Of Course, But Maybe*, from "*Oh My God*", HBO 2013*

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The following 60-something pages are actually a very long answer to a question asked by my friend, and at the time fellow Amnesty intern, Ellen. Where would this thesis be if you hadn't one late afternoon, frustrated and puzzled, hollered across the room: "but what happens to refugees who are considered security threats but can't be sent back because they risk being tortured!?"

I couldn't answer, but I'm so glad you asked. I hope you enjoy my extensive answer. Since it was in fact your brain, not mine, that conjured up my research question, I think it's only fair that I dedicate these pages to you, dear Ellen. Thank you! I quite literally could not have done this without you.

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ABSTRACT

States are routinely confronted with conflicting duties of maintaining full respect for human rights, on the one hand, and protecting national security and public safety, on the other. This is not least noticeable when States' sovereignty and the right to control who enters and leaves their territories clash with the obligation to afford protection to refugees fleeing persecution. Some refugees are bound to be dangerous criminals, presenting a serious threat to national security and public safety in the host State. Refugee law prescribe that allegedly serious criminals must be excluded from refugee protection. However, the principle of *non-refoulement*, as developed and interpreted under international and regional human rights law, prohibits removal of persons if there is risk for torture or ill-treatment in the country of origin. This thesis explores the fact that a person can be considered fundamentally undeserving of protection under refugee law, while protected against removal under human rights law. Persons like this have fittingly been coined *undesirable but unreturnable*.

The relationship between the relevant provisions on *refoulement* and exclusion from refugee protection is examined and analyzed, followed by a recount of the effects that this clash of legal regimes and legitimate interests has on the individuals concerned, on the States, and on the integrity of refugee law. Possible solutions to adverse effects are identified and discussed, including the question of whether the principle of *non-refoulement*, as understood today, is viable in light of the challenges presented to national security and public safety.

ABBREVIATIONS

CAT	Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment
CIA	Central Intelligence Agency (of the USA)
CJEU	The Court of Justice of the European Union
ECHR	The European Convention on Human Rights and Fundamental Freedoms
ECtHR	The European Court of Human Rights
EU	The European Union
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
IDP	Internally Displaced People
IS	The Islamic State
NGO	Non-Governmental Organization
UN	The United Nations
UNGA	The United Nation's General Assembly
UNSC	The United Nation Security Council
UNHCR	The United Nations High Commissioner for Refugee Rights
TFEU	The Treaty of the Functioning of the European Union

1. Introduction

Refugee law prescribe that people who suffer from serious human rights violations in their home country should be entitled to international protection. To complicate the matter, the same one person might be both a victim of grave human rights abuses, and a perpetrator of grave human rights abuses. We can picture a Syrian IS fighter guilty of outrageous crimes during the war in Syria. Intuitively, we'd like to put this person in the "abuser of human rights" box only. Let's imagine that this fighter faces prosecution in Syria, which will indisputably result in torture and ill-treatment by the Syrian authorities. The IS fighter flees to Europe, seeking asylum. Is the fighter a refugee? That doesn't seem quite right. Offering protection to such a person comes off as unfair, unjust, and offensive. Can the fighter be sent back to torture in Syria? Of course not. We don't actively facilitate torture, even if conducted beyond our borders. Right? Even if this fighter is thought to be exceptionally dangerous? In Syria, prosecution and punishment is waiting. Can the fighter be sent back? When we know that there is a very high probability that the fighter will be tortured? No one should be subjected to torture or ill-treatment, of course not, but maybe…maybe if you have slaughtered children and vow to destroy the society you seek protection in you don't deserve protection from torture? Of course not! Of course not. Of course not.

1.1 Background

States are routinely confronted with conflicting duties of maintaining full respect for human rights, on the one hand, and protecting national security and public safety, on the other. Even in times of emergencies, human rights law set certain boundaries that constraint State responses. This is not least noticeable when States' sovereignty and the right to control who enters and leaves their territories clash with the obligation to afford protection to refugees fleeing persecution. As a result of armed conflicts, criminality and unrest, destitute and climate change, more people than ever are displaced and seek international refuge.[1] Some of these people are dangerous criminals, presenting a serious threat to national security and public safety in the host State. Perpetrators of the most serious crimes might seek refuge to escape justice in their country of origin, and so long as they risk being subjected to torture or ill-treatment, the principle of *non-refoulement*

[1] UNHCR, 2021, *Refugee Data Finder*, accessed March 17 2022, https://www.unhcr.org/refugee-statistics/

prohibits removal to that country. However, refugee law prescribe that allegedly serious criminals must be excluded from refugee status. The situation where a person can be deemed undeserving of protection but be non-removable raises questions regarding the legal status of such a person as well as how to practically handle such people, and whether the international system of rules governing dangerous refugees is coherent.

The Refugee Convention's article 33(2) exempt certain serious criminals from the protection against *refoulement*.[2] The human rights-based principle of *non-refoulement*, on the other hand, is absolute and prohibits deportation if there are reasonable grounds to believe that the deportee would face a serious risk of torture or other inhuman or degrading treatment or punishment, no matter how merited the deportation may be. International human rights law is crystal clear: the principle of *non-refoulement* leaves no room for exceptions. The rule is non-derogable and applies just as much to terrorists and war criminals. The worst conceivable villain is protected from *refoulement,* "however heinous the crime", to quote ECtHR in its seminal *Soering*-case.[3]

Not only is the prohibition of *refoulement* absolute under human rights law, but the understanding of what constitutes torture and ill-treatment has expanded, particularly through the jurisprudence of the ECtHR. The principle is both rigid in its absoluteness and wide in scope. Consequently, States increasingly find themselves hosting refugees who are "undesirable but unreturnable".[4]

1.2 Purpose and research question

It appears as if international human rights law requires States to protect individuals that Refugee law considers fundamentally undeserving of protection. The purpose of this thesis is to examine the effects of this clash. The first questions asked is: what happens to refugees who are excluded from refugee protection but cannot be removed due to overriding human rights obligations? If some negative consequences are discovered, a second question is asked: are there any possible solutions to these consequences? The second question will involve an assessment of whether the principle of *non-refoulement,* as developed and interpreted under human rights law, is desirable in light of present-day challenges to national security and public safety.

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[2] UN General Assembly, *Geneva Convention relating to the Status of Refugees*, July 28, 1951, United Nations, Treaty Series, vol. 189, p. 137.
[3] *Soering v. the United Kingdom*, app. no. 14038/88, ECtHR, para 88.
[4] Cantor, D. J., van Wijk, J., Singer, S., & Bolhuis, M. P., *Undesirable and Unreturnable Migrants: Policy challenges around excluded asylum seekers and other migrants suspected of serious criminality who cannot be removed. Conference report and policy brief*, 2016, University of London, p. 2.

1.3 Outline

To answer these questions, I will first explore the content and development of the principle of *non-refoulement*, in refugee law and human rights law respectively. I will then proceed to consider the grounds for exclusion from refugee status because of criminal or dangerous activity. Having done this, I hope to have gained an understanding of the relationship between exclusion, expulsion and *non-refoulement*. I then explore the effects of this relationship on the refugees affected, on the States affected, and on the legal coherence. Lastly, I examine and discuss possible solutions to the identified effects and revisit the overarching question of the conflict of interest between national security and public safety and the principle of *non-refoulement*, to make concluding remarks on the principle's legitimacy today.

1.4 Method and material

The method used is the one commonly referred to as legal doctrine or legal dogmatics. The method is described by Smits as one that "aims to give a systematic exposition of the principles, rules and concepts governing a particular legal field or institution and analyses the relationship between these principles, rules and concepts with a view to solving unclarities and gaps in the existing law."[5] I will thus aim to give a systematic exposition of the principles, rules and concepts governing undesirable but unreturnable refugees, analyze the relationship between them with a view to solving gaps and unclarities. To establish the content of the relevant rules I will examine the traditional sources in public international law. These sources are, as authoritatively and exhaustively listed[6] in article 38 of the Statute of International Court of Justice: international conventions, international customary law, general principles of law, and as subsidiary means for determining the law, judicial decisions, and doctrine.[7] Because there is no authoritative source dictating the solution to the specific problem of undesirable but unreturnable refugees as such, arguments and opinions are found in or derived from the reasonings of international monitoring bodies, regional courts, national courts, and to a great extent in the relevant literature. Statements by the UNHCR has been particularly instrumental in understanding the relevant provisions of the Refugee Convention.

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[5] Jan M. Smits, "What is legal doctrine? On the aims and methods of legal-dogmatic research", in Rob van Gestel, Hans-W. Micklitz & Edward L. Rubin (eds.), *Rethinking Legal Scholarship: A Transatlantic Dialogue*, New York, Cambridge University Press, 2017, p. 210.
[6] Shaw, M. N., *International law*, eighth edition., Cambridge, 2017, p. 52.
[7] United Nations, *Statute of the International Court of Justice*, 18 April 1946, art. 38.

The purpose of this thesis is not so much to interpret and analyze in any depth the specific requisites in each referenced provision. There are simply too many vague, ambiguous, and contested concepts contained in the relevant rules. Questions such as "what does 'serious grounds for regarding' mean?" or "what constitutes a 'danger to society'?" will thus largely be left out – unfortunately, as they are both interesting and important. The focus here, though, is on the effects of the clash between refugee and human rights law in this respect, on possible solutions, and on a *de lege ferenda* perspective on the principle of *non-refoulement*.

1.5 Scope

This thesis focuses on excluded refugees only, not those excluded from other forms of protection, such as the EU subsidiary protection. This is because the Refugee Convention only covers refugee status. The exclusion from subsidiary protection is highly relevant too, but necessarily falls outside the scope of this thesis.

Attention will only be paid to exclusion for reasons of criminal or otherwise undesirable conduct, as laid down in article 1F of the Refugee Convention, and not exclusion because protection can be afforded elsewhere, nor will cessation be covered. This is because the other exclusion- or cessation grounds don't involve the same conflict of interest between security and protection. Likewise, only bar to removal on account of overriding human rights obligations is covered, not practical impediments to removal such as temporarily closed borders because of a pandemic, insufficient identity documents or lack of cooperation from the country of origin.

The thesis focuses on refugees who are unremovable but undesirable because they are suspected of serious crimes or considered to constitute threats to national security and public safety. Other categories of people can also find themselves ineligible for refugee status but still be unremovable due to a State's human rights obligations. Or so to speak, be stuck between the Refugee Convention and Human Rights law. For instance, very sick people have been found ineligible for refugee status but unremovable because removal would amount to ill-treatment.[8] However, these people are not – I assume – quite as unwanted, since they don't also pose a threat to national security. As Lustgarten & Leigh puts it: "Once something is categorized as an issue of national security, it immediately assumes an overwhelming importance" and other "important

[8] See for example CJEU Case C-542/13 *M'Bodj* ECLI:EU:C:2014:2452.

interests are thrust aside."[9] The consequences of a State being unable to remove a security threat would, I gather, be greater than the inability to remove a very sick but not at all dangerous person.

Although the thesis will focus on excluded refugees in general, this group will often be exemplified by alleged terrorists. Terrorism is frequently purported as one of the greatest threats to national security and public safety, and countermeasures to combat terrorism has motivated a plethora of questionable methods, such as derogations from human rights and tighter border controls. UN monitoring organs have repeatedly called on States to respect human rights while fighting terrorism. Because of terrorism's contemporaneity, its large-scale impact, and intrinsic negative consequences, not least the loss of life and enjoyment of human rights, it is arguably the weightiest interest that refugee protection can be, or should be, balanced against. If the disadvantage of an absolute and far-reaching prohibition on *refoulement* comes to a head when compared to threats to national security, it does so *a fortiori* in the light of terrorism. To borrow the words of Vedsted-Hansen, "the legal developments pertaining to the non-refoulement principle under article 3 of the European Convention on Human Rights provide ample illustration of the dilemmatic relationship between refugee protection and anti- or counter-terrorism measures."[10] Therefore, when examples are warranted, the thesis will often turn to terrorism.

There is an unmistakable European focus throughout the thesis. There are two reasons for this: first, the concept of undesirable but unreturnable refugees have gained most attention in Europe, and second, the principle of *non-refoulement* is considered most evolved under the ECtHR.[11] While regrettably regional, the findings should be applicable to a wider geographical context too.

The relationship between the provisions discussed throughout the thesis is complex, and at times surely confusing. They are often materially close while sometimes serving different purposes and causing distinct effects. Hopefully, the annexed table of the recurring provisions and their functions can help facilitate the reading.

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[9] Lustgarten, L. & Leigh, I., *In From the Cold: National Security and Parliamentary democracy* (1994) p. 34.
[10] Vedsted-Hansen, J., "The European Convention on Human Rights, counter-terrorism, and refugee protection", *Refugee Survey Quarterly*, 2011, Vol. 29, No. 4, p. 45.
[11] De Weck, F, *Non-refoulement under the European Convention on Human Rights and the UN Convention against Torture: the assessment of individual complaints by the European Court of Human Rights under Article 3 ECHR and the United Nations Committee against Torture under article 3 CAT*, Brill Nijhoff, Leiden, 2017 p. 4.

2. The concept of *non-refoulement* in international law

As a rule, sovereign States have the right to control the entry, residence, and expulsion of aliens.[12] This right is well established in international law. Sovereign States are on the other hand free to voluntarily conclude treaties, through which they agree to take on certain responsibilities. States are then legally bound, according to the principle of *pacta sunt servanda*, to respect and implement these responsibilities in good faith.[13] Examples of such voluntarily accepted responsibilities can be found in the Refugee Convention and in international and regional human rights treaties.

The principle of *non-refoulement* is commonly referred to as the cornerstone of refugee law, or as the "most fundamental of all obligations owed to refugees".[14] The verb *refouler* is French and roughly translates as to repel or to drive back.[15] In the context of immigration regulation, *refoulement* can be used to distinguish a lawful removal of an alien, perhaps by force, from removal that is prohibited.[16] In essence, the principle of *non-refoulement* forbids the removal of a refugee to a country or territory where he or she faces a real risk of persecution or torture or other serious ill-treatment.[17] *Non-refoulement* does not equal a right to asylum, or even a right to admission. In practice, however, a State will need to admit an asylum seeker at least temporary to assess whether he or she does in fact risk persecution if removed.[18]

To establish the necessary legal background and foundation, this chapter provides a brief account of the concept of *non-refoulement* in international law and its development under different instruments, as well as a recount of current State practice and *opinio juris*. It concludes with remarks on the relationship between the different instruments.

2.1 The Refugee Convention

The Refugee Convention was adopted in 1951 under the United Nations and modified in 1967 by a Protocol that removed the Convention's original temporal limitations,

[12] *Paposhvili v. Belgium*, app. no. 41738/10, ECtHR, para. 172.
[13] Vienna Convention on the Law of Treaties, May 23 1969, art. 26.
[14] Mathew, P, *Non-Refoulement*, in Costello, C., Foster, M., & McAdam, J., (red.), *The Oxford handbook of international refugee law*, Oxford University Press USA, 2021, p. 899.
[15] Goodwin-Gill, G S., & McAdam, J., *The refugee in international law*, Fourth edition, Oxford University Press, Oxford, 2021, p. 241.
[16] *Ibid.*
[17] *Ibid.*
[18] *Ibid*, p. 254.

making it applicable to post World War II-refugees as well.[19] Most notably the Convention lays down the definition of who a refugee is, and who is not. It also stipulates rights that follow from a refugee status and bans *refoulement*.

The drafters of the Refugee Convention motivated the inclusion of a prohibition on *refoulement* the following way: "the turning back of a refugee to the frontiers of a country where his life or freedom would be threatened on account of his race, religion, nationality or political opinion *would be tantamount to delivering him into the hands of his persecutors*."[20] This is the basic rationale behind the principle of *non-refoulement*. Article 33(1) of the Refugee Convention thus provide that:

> No Contracting State shall expel or return ("refouler") a refugee in any matter whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

Reservations to the article are not permitted.[21] According to the language of art. 33(1), the right not to be *refouled* can be claimed by "refugees", but UNHCR has explained that since the determination of refugee status is declaratory in nature, the provision applies to asylum seekers who haven't yet been formally recognized as refugees as well.[22] Still, the beneficiaries of the principle of *non-refoulement* in the context of the Refugee Convention are refugees who have met or would meet the definition in article 1A. The phrase "on account of" means that an individual risk relating to a convention ground is required, and accordingly article 33(1) does not cover people who, for instance, flee generalized violence in armed conflict. UNHCR has made clear that the phrase "where his life or freedom would be threatened" is equivalent to the "well-founded fear of persecution" in the refugee definition in article 1A(2).[23] There is thus no requirement of added or aggravated risk to life or freedom in the context of *refoulement*, compared to what is required in the context of refugee definition.

Unlike most other instruments that proscribes *refoulement*, the Refugee Convention allows for certain delimited exceptions to the prohibition.

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[19] Burson B., & Cantor, D. J., "Introduction: interpreting the Refugee Definition via Human Rights standards", in Burson, B, & Cantor, D J (red.), *Human rights and the refugee definition: comparative legal practice and theory*, Martinus Nijhoff Publishers, Leiden, 2016, p. 2.
[20] UN *Report of the Ad Hoc Committee on Statelessness and Related Problems*, Lake Success, New York, 16 January to 16 February 1950, E/1618, page 61. Emphasis added.
[21] Refugee Convention, art. 42(1); art. 7 in the 1967 Protocol.
[22] UNHCR *Note on Non-Refoulement*, EC/SCP/2, 1997, para. 15.
[23] *Ibid*, para. 4.

2.1.1 The exception in article 33(2)

During the drafting process, many states considered it necessary to include exceptions to the prohibition on *refoulement*. The main reason appears to have been concerns for national security. The UK representative remarked that it "must be left to states to decide whether the danger entailed to refugees by expulsion outweighs the menace to public security that would arise if they were permitted to stay."[24] This reference to proportionality gained support from several states, and like the UK representative pointed out, if no exceptions were allowed, states might be less keen to accept the principle, not least since no reservations were allowed.[25] The French representative warned against "undesirable elements" who might abuse an absolute right not to be *refouled*. States would "think twice before granting an unconditional right", it was argued.[26] The same representative also suggested that an unconditional obligation towards "undesirable elements" would create a problem of "moral and psychological" character, and stressed that the possible reactions of public opinion had to be considered.[27] Already in 1951 did States reference a changing global environment that called for realism; the Canadian representative claimed that since the Ad Hoc Committee had drafted the *non-refoulemen*t – three years prior – the "international situation had deteriorated", and because of that it had to be recognized that an unconditional prohibition on *refoulement* would be unacceptable to many governments.[28] As a result of these considerations, article 33(2) provides that the benefit of protection from *refoulement*

> may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

According to Hathaway & Foster, the purpose article 33(2) is to allow the expulsion of even recognized refugees on the basis of concerns for national security or danger to the host state's communities.[29] The right to balance the harm that the refugee risks against

[24] UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Summary Record of the Sixteenth Meeting*, 23 November 1951, A/CONF.2/SR.16.
[25] *Ibid.*
[26] *Ibid.*
[27] *Ibid.*
[28] *Ibid.*
[29] Hathaway, J. C. & Foster, M, *The law of refugee status*, 2. ed., Cambridge, 2014, p. 566.

threats to national security, the protection against abuse by "undesirable elements", the mindfulness of public opinion, and the consideration of changing times that bring about new challenges – these main caveats that States raised against an absolute prohibition on *refoulement* during the drafting process are undoubtedly as relevant today. However, the at the time virtually self-evident vent that article 33(2) created has largely been shut by other international instruments.

2.2 *Non-refoulement* in human rights law

In international human rights law, the principle of *non-refoulement* is considered an implied, inherent part of the absolute prohibition on torture and ill-treatment. *Non-refoulement* provisions are for example found explicitly in article 3 CAT,[30] and implicitly in article 7 ICCPR.[31] Regionally it is also found in, for instance, article 3 ECHR,[32] which provide that 'no one shall be subjected to torture or to inhuman or degrading treatment or punishment'. Because these measures are prohibited in absolute terms, so is the correlative prohibition on *non-refoulement*.[33] The right to not be *refouled* is not tied to a persecution ground under human rights law, and therefore the personal scope is wider.

Since there is no individual complaints mechanism in relation to the Refugee Convention, individuals facing deportation who wish to complain internationally must choose the human rights provisions and turn to, primarily, the Torture Committee or the ECtHR.[34] It is not surprising then, that it is these two bodies that are responsible for the bulk of the jurisprudence regarding the principle of *non-refoulement*, and consequently are most experienced in assessing *non-refoulement* related cases.[35] Being only implicit in the treaty texts, in a human rights context the concept is best understood through the adjudication of these complaints mechanisms. Because the Torture Committee's decisions are not binding on the State parties, in contrast to the judgements of the ECtHR, most attention will be directed at the latter, which is also regarded as the chief vanguard of interpretating the principle of *non-refoulement* under human rights law.[36]

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[30] *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, December 10, 1984, United Nations, Treaty Series, vol. 1465, p. 85.
[31] *International Covenant on Civil and Political Rights*, December 16, 1966, United Nations, Treaty Series, vol. 999, p. 171..
[32] *European Convention for the Protection of Human Rights and Fundamental Freedoms*, *as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5.
[33] UN Human Rights Committee (HRC), *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, para. 9 and 3.
[34] De Weck, 2017, p. 8.
[35] *Ibid*, p. 4.
[36] Goodwin-Gill & McAdams, 2021, p. 364.

2.2.1 Non-refoulement in human rights jurisprudence

The first time the ECtHR confirmed that the absolute prohibition on torture or inhuman or degrading treatment or punishment in article 3 contained a corresponding prohibition on *refoulement*, and therefore applied in expulsion cases, was in its seminal 1989 case *Soering v United Kingdom*. The ECtHR proclaimed that:

> "it would hardly be compatible with the underlying values of the Convention, (…) were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed."[37]

The case concerned a German citizen who had killed his girlfriend in the United States and then fled to the UK. The court concluded that were the UK to expel him to the US, where a death sentence and a prolonged period on "death row" awaited, article 3 would be breached. The time on "death row", the Court stated, would amount to torture or inhuman or degrading treatment or punishment, and actively contributing to such treatment – including by forcibly deporting someone – is prohibited by article 3 in absolute terms, "however heinous the crime".[38] This German citizen was indeed a fugitive of justice, the type of person who the drafters of the Refugee Convention's exclusion clauses, as will be shown in chapter 3, were unwilling to afford protection to.

The ECtHR has reaffirmed its position on *non-refoulement* numerous times since *Soering*. Another significant case is *Chahal v United Kingdom*, where the Court emphasized again the absolute nature of the prohibition provided by article 3 in expulsion cases, even in the event of terrorism and threats to national security. The UK Government argued that the deportation in question was necessary and proportionate given the threat Mr. Chahal – a Sikh separatist – presented to national security of the UK.[39] While acknowledging the "immense difficulties faced by States in modern times in protecting their communities from terrorist violence", the Court did not accept the Governments argument.[40] If there are substantial grounds for believing that an expelled individual would face a real risk of torture or ill-treatment contrary to article 3 in the receiving state, then state parties to the ECHR are obligated by virtue of that article to protect

[37] *Soering v. the United Kingdom*, para. 88.
[38] *Ibid,* para. 88.
[39] *Chahal v. The United Kingdom*, app. no. 22414/93, ECtHR, para. 136.
[40] *Chahal v. the United Kingdom*, para. 79.

him or her from such treatment.[41] Since the prohibition of torture or ill-treatment is just as absolute in expulsion cases, "the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration."[42] The court also concluded that the protection afforded by Article 3 is thus wider than that provided by article 33(2) of the Refugee Convention.[43] The same conclusion – that the conduct of the expellee or the danger he or she poses is immaterial – was reached by the Torture Committee in, for instance, *Paez v Sweden*.[44]

The most notable way in which human rights provisions have broadened the principle of *non-refoulement* would thus be through the widened personal scope and the elimination of exceptions. Under human rights law, the principle applies not just to Convention refugees but to everyone on the State's territory. In the context of the ECHR, this follows from article 1.[45] The prohibition is also absolute, "however heinous the crime". The balancing operation of weighing a refugee's dangerous conduct against the risk he or she would face if returned, as the States thought so imperative at time of the Refugee Convention's drafting, is thus obliviated.

In *Soering*, the Court asserted that the prohibition on inhuman or degrading treatment or punishment is just as absolute and applies just as much to expulsion of aliens as the prohibition on torture.[46] It makes no differences whether a treatment is considered inhuman or if it amounts to torture – this is usually not even specified, the Court simply state that article 3 has been breached.[47] The scope of the concept of inhuman or degrading treatment or punishment, here and elsewhere often shortened to ill-treatment for practical reasons, is therefore relevant for the understanding of the scope of *non-refoulement*. Utilizing its "superior enforcement mechanisms", to borrow Costello's phrasing,[48] the ECtHR has widened the understanding of the type of treatment that constitutes torture or other ill-treatment in the European context.

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[41] *Ibid,* para. 80.
[42] *Ibid.*
[43] *Ibid.*
[44] *Gorki Ernesto Tapia Paez v. Sweden*, CAT/C/18/D/39/1996, 28 April 1997, para. 14.5
[45] "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in section 1 of this Convention."
[46] *Soering v. The United Kingdom*, para. 90.
[47] De Weck, 2017, p. 217.
[48] Costello, C, "The Search for the Outer Edges of *Non-Refoulement* in Europe: Exceptionality and Flagrant Breaches", in Burson, B, & Cantor, D J (red.), *Human rights and the refugee definition: comparative legal practice and theory*, Martinus Nijhoff Publishers, Leiden, 2016, p. 180.

2.2.2 Interpretation of ill-treatment under ECHR

It is well-established that the ECHR is a "living instrument which must be interpreted in the light of present-day conditions".[49] Regarding torture and ill-treatment, the Court stated in *Selmouni v France* that "certain acts which were classified in the past as 'inhuman and degrading treatment' as opposed to 'torture' could be classified differently in future."[50] The Court recognized that the "increasingly high standard being required in the area of the protection of human rights and fundamental liberties" affect the assessment of when such rights and liberties have been breached.[51] The bar for human rights is continuously raised, resulting in the correct notion that what constitutes ill-treatment today might amount to torture tomorrow and, correspondingly, treatment that is not considered inhuman or degrading today might qualify as such tomorrow. We continuously except more of our governments' conduct, and the tolerance for human rights violations is likewise lowered.

Having noted the evolutive nature of human rights generally, what kind of treatment constitutes inhuman or degrading treatment today, according to the ECtHR? The Court has stated that article 3 does not relate to all possible instances of ill-treatment; a "minimum level of severity" must be reached, and such an assessment is relative and depends on all the circumstances of the case, such as "duration of the treatment, its physical and mental effects and, in some cases, the sex, age, and state of health of the victim."[52] While it is beyond the scope of this thesis to account for the exact nature of ill-treatment under article 3 ECHR, it will highlight three cases which have expanded the understanding of the type if treatment that is contrary to article 3. The cases concern, respectively, risks of serious illness, generalized violence, and material deprivation.

In *Paposhvili v Belgium*, the Court famously reiterated that article 3 can preclude removal of aliens suffering from a serious illness that risk being exacerbated by the expulsion.[53] The threshold, though, is incredibly high. The Court stated that the consequence of removal must be that the individual face "a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state

[49] *Tyrer v. the United Kingdom*, app. no. 5856/72, ECtHR, para. 31.
[50] *Selmouni v. France*, app. no. 25803/94, ECtHR, para. 101.
[51] *Ibid*, para. 101.
[52] *Paposhvili v. Belgium*, para. 174.
[53] *Paposhvili v. Belgium*, para. 175.

of health resulting in intense suffering or to a significant reduction in life expectancy."[54]

In *Sufi & Elmi v The United Kingdom*, the Court reiterated that "in the most extreme cases" a situation of general violence could be of sufficient intensity so as to create a risk of treatment contrary to article 3 for everyone present.[55] After careful considerations of all the facts in the case, which regarded removal to Mogadishu, Somalia, the Court concluded that the violence in Mogadishu was of such a level of intensity "that anyone in the city, except possibly those who are exceptionally well-connected to 'powerful actors', would be at real risk of treatment prohibited by article 3."[56] It also concluded that the conditions in the country's refugee and IDP[57] camps were so dire that staying in such a camp amounted to treatment contrary to article 3.[58]

Related to dire conditions, in *M.S.S v Belgium and Greece* the applicant alleged that the state of extreme poverty in which he had lived after being removed from Belgium to Greece amounted to ill-treatment.[59] The Court concluded that the fact that the applicant had lived in the most extreme material poverty, "unable to cater for his most basic needs: food, hygiene and a place to live", combined with the "prolonged uncertainty in which he has remained and the total lack of any prospects of his situation improving", reached the level of severity required to trigger article 3.[60]

In academia, the discussion of what could qualify as ill-treatment under article 3 is even wider. For instance, being affected by climate change,[61] and being denied access to safe abortions,[62] has been discussed to fall within the scope of article 3. This demonstrates the elasticity of the article, inherent to all vague and broad provisions. It should nonetheless be remembered that even if the notion of inhuman or degrading treatment has widened compared to the perhaps intuitive understand of ill-treatment as something very similar to torture, the threshold in the referenced cases is virtually insurmountable. All three cases were, of course, rich with situation-specific circumstances that were meticulously assessed by the Court. It would not be correct to claim that *non-refoulement* now overall protects against removal to generalized violence,

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[54] *Ibid,* para. 183.
[55] *Sufi & Elmi v. the United Kingdom*, app. no. 8319/07, ECtHR, para. 241.
[56] *Ibid*, para. 250.
[57] Internally Displaced People.
[58] *Sufi & Elmi v. the United Kingdom*, para. 291.
[59] *M.S.S v. Belgium & Greece*, app. no. 30696/09, ECtHR, para. 235.
[60] *Ibid*, paras. 254 and 263.
[61] https://research.birmingham.ac.uk/en/projects/esrc-iaa-rethinking-state-behaviour-on-climate-change-as-ill-trea accessed March 17 2022
[62] Zureick, A., "(En)gendering suffering: denial of abortion as a form of cruel, inhuman, or degrading treatment", *Fordham International Law Journal*, 2015, vol. 38:99.

aggravated health problems and material deprivation. In almost all cases, it will not, but in *extreme* circumstances though, it might. As Stoyanova points out, the incredibly high thresholds set out by the ECtHR in the so called health cases, which should be true for cases regarding material deprivation as well, is a testament to how poorly protected socio-economic rights are under international human rights law.[63] On the other hand, the cases undoubtedly represent a further restrain on States' right to exercise control over their migration flows by making health and socio-economic consequences for returnees factors that must be considered. In summary, the widened understanding of ill-treatment has expanded the scope of *non-refoulement*, and accordingly affected States' ability to lawfully remove unwanted refugees, even further away from the principle as imagined by the original signatories to the Refugee Convention.

2.3 The relationship between refugee law and human rights law

Human rights law and refugee law overlap both in substance, purpose, and reality. "On the one hand, human rights violations can lead to refugee flows and, on the other, refugees have human rights."[64] It is perhaps not surprising then that the relationship between the human rights treaties' and the Refugee Convention's provisions on *non-refoulement* isn't normally regarded as one of conflict, but rather as one of mutual assistance; States' *non-refoulement* obligations under human rights law is complementary to the protection afforded by article 33(1) of the Refugee Convention.[65] The UNHCR Executive Committee has stated that international treaty obligations which prohibit *refoulement* are important protection tools to address the protection needs of people who are of concern to the UNHCR, but who are not Convention refugees according to the definition in article 1(A).[66] This is unsurprising as both human rights treaties and the Refugee Convention have a humanitarian purpose and share the objective of protecting people from harm. As Costello puts it: "the vitality and evolutionary interpretation of human rights law can be used to invigorate refugee law" and that "human right's superior enforcement mechanisms provide refugee law with both added clout and

[63] Stoyanova, V, "How exeptional must 'very exceptional' be? Non-refoulement, socio-economic deprivation, and Paposhvili v Belgium", *International Journal of Refugee Law*, 2017, vol 29, no 4, p. 615.
[64] Burson & Cantor, 2016, p. 3.
[65] UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, p. 7, para. 15.
[66] UNGA, *Note on International Protection (submitted by the High Commissioner)*, 2 August 1989, A/AC.96/728, para. 19.

greater dynamism."[67] Indeed, the substantive overlap is clear, since what's at risk in cases of *refoulement* is the returnee's full enjoyment of human rights, such as the right to life, liberty and security of person, and freedom from torture.[68] Chetail claims that the interaction between human rights law and refugee law is so dense that it is "virtually impossible to separate one from the other".[69] While not unchallenged, he suggests that refugee law has effectively been absorbed by human rights law which has now become the primary source of refugee protection.[70] Since the relationship isn't really one of conflict, the question of which of the horizontal treaty obligations prevails or how to solve issue of the concurring obligations is rarely raised.[71] However, for the purpose of this thesis, the relationship between the two divergent notions of *non-refoulement* warrants attention, because upon closer examination, the relationship is rather complex.

2.3.1 General notes on the hierarchy between conflicting horizontal treaty obligations

As shown above, the Refugee Convention permits exceptions to the prohibition on *refoulement* through art. 33(2), while human rights treaties do not. For States that are parties to both the Refugee Convention and one or several of the human rights treaties, which of the two conflicting rules prevail?

Treaties generally trumps customary law, on account of them being the most recent, specific, and authentic representation of the will and consent of the States in question. [72] This is an expression of the principle *lex specialis derogat legi priori*; a special law repeals a general law.[73] When States have conflicting obligations arising from the same source of law, in this case treaties, the principle of *lex posterior derogat priori* applies; a later law repeals an earlier law.[74] All human rights treaties mentioned above came into force after the Refugee Convention. Therefore, it might be argued that their provisions on *non-refoulement* should take primacy on account of being *lex posterior*. However, in regards to refugee claims, the Refugee Convention is *lex specialis* – it deals specifically with refugee

[67] Costello, 2016, p.180.
[68] UNHCR, *Note on the principle of non-refoulement*, November 1997.
[69] Chetail, V., "Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law", in Rubio-Marin, R., *Human Rights and Immigration*, 2014, Oxford University Press, p. 68.
[70] *Ibid*, p. 69f.
[71] *Ibid*, p. 22.
[72] Orakhelashvili, A., & Akehurst, M. B., *Akehurst's modern introduction to international law*, 8th rev. ed., Routledge, Milton Park, 2019, p. 52.
[73] *Ibid.*
[74] *Ibid.*

protection – and would trump general human rights treaties on that account.[75] That said, Yi/Li maintains that once other instruments provide better protection, these instruments supersede the Refugee convention.[76] Indeed, article 5 of the Refugee Convention provide that "nothing in this convention shall be deemed to impair any rights and benefits granted by a Contracting state to refugees apart from this Convention". This is confirmed by the UNHCR, which has stated that the provision of article 33(2) in the Refugee Convention does not affect State's *non-refoulement* obligations under international human rights law.[77]

It may be argued that when States acceded to the human rights treaties (except for the CAT), they did so unaware of the implicit *non-refoulement* obligations that would come to hamper their right to expel unwanted refugees, a right afforded to them in the more specific Refugee Convention. As Schabas points out, "although satisfying from the standpoint of human rights advocacy, the fact that norms are at their broadest when they are only implied from vague and general texts, and rather more narrow when they are formulated in precise treaty provisions, seems contrary to general principles of interpretation."[78] States have at times objected to the widened scope of art. 3 ECHR, citing a pressing need to remove security threats.[79] Overall though, as will be demonstrated below, State support for the principle of *non-refoulement* is robust.

2.3.2 The relationship between article 33(2) of the Refugee Convention and the human rights provisions on non-refoulement

Lauterpacht & Bethlehem argue that, considering the trend in the development of the law concerning *non-refoulement* to not permit any exceptions, it would be odd to fetter article 33 to the conceptions of the drafters of the Refugee Convention, and thus "leave the principle significantly out of step with more recent development of the law. This would amount to a retrogressive approach to the construction of a principle that, given its humanitarian character, would ordinarily warrant precisely the opposite approach."[80] That said, they still find that there "remains an evident appreciation amongst States,

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[75] Yi L., "Exclusion from protection as a refugee: an approach to harmonizing interpretation in international law", Leiden: Brill, 2017, p. 38.
[76] *Ibid*, p. 38.
[77] UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol,* p. 4, para 11.
[78] Schabas, W. A., "Non-Refoulement", in *Expert Workshop on Human Rights and International Co-operation in Counter-terrorism, final report*, February 2007, ODIHR.GAL/14/07, p. 27.
[79] See for instance the UK intervening in *Saadi v. Italy*, app. no. 37201/06, ECtHR, paras. 119-122 More attention will be paid to this in chapter 5.
[80] Lauterpacht & Bethlehem, *The scope and content of the principle of non-refoulement: Opinion*, June 2003, Cambridge University Press, p. 132 para. 157.

within UNHCR, and among commentators, that there may be some circumstances of overriding importance that would, within the framework of the Convention, legitimately allow the removal or rejection of individual refugees or asylum seekers."[81] They thus conclude that the exceptions to *non-refoulement* pursuant to article 33(2) of the Refugee Convention are still effective.[82] The authors do stress though that the application of the exception in article 33(2) now comes with limitations – it does not apply if there is a danger of torture or cruel, inhuman, or degrading treatment.[83] It is not immediately apparent what is left of the exception if this limit applies.

The language of article 33(1) of the Refugee Convention differs from the human rights provisions on *non-refoulemen*t, such as article 3 of the ECHR. The Refugee Convention's prohibition on *refoulement* preclude removal to places where a person's "life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." As mentioned, according to UNHCR this notion is equivalent to persecution as understood in article 1(A). Article 3 ECHR preclude removal to serious risk of torture or inhuman or degrading treatment or punishment. While different in text, is there any meaningful difference in scope? In what circumstances can someone risk his or her life or freedom on account of race, religion, nationality etc., without that treatment also amounting to at least inhuman or degrading treatment? Bruin & Wouters interpret this as meaning that danger of torture and ill-treatment, since absolutely prohibited in human rights law, does disqualify the exception to *refoulement* in article 33(2), but if there is a "risk of other forms of persecution a balancing act is possible."[84] If the danger to life and freedom is less severe, then concerns for national security or public safety may outweigh the refugee's claim to protection from *refoulement*. While acceptable in theory, this distinction does not seem entirely convincing in practice. As Goodwin-Gill & McAdam note, "a person who fears 'persecution' necessarily also fears at least inhuman or degrading treatment or punishment, if not torture."[85] Costello, on the other hand, disagrees, arguing that the protection against persecution under the Refugee Convention is wider than the protection offered under article 3 ECHR; persecution covers sexual and religious minority rights, for instance, rights that the ECtHR require to be "flagrantly breached"

[81] Lauterpacht & Bethlehem, 2003, p. 133 para. 158.
[82] *Ibid.*
[83] *Ibid*, p. 133 para. 159.
[84] Bruin, R., & Wouters, K., "Terrorism and the Non-derogability of Non-refoulement", *International Journal off Refugee Law* vol. 15 no. 1, Oxford University Press, 2003, p. 20f.
[85] Goodwin-Gill & McAdam, 2021, p. 273.

if a duty not to *refoule* is to be triggered.[86] It's not entirely ruled out then that there could exist particular circumstances where a dangerous refugee risk persecution severe enough to trigger article 33(1) but not serious enough to be at least degrading, and thus an expulsion would be in line with article 33(2) and lawful under the Refugee Convention if the refugee is dangerous. The relationship could be illustrated like this:

Instrument / Risk of	**The Refugee Convention art. 33**	**ECHR art. 3**	**CAT art. 3**
Persecution	Removal conditioned on security analysis	Removal permitted	Removal permitted
Ill-treatment	Removal absolutely prohibited	Removal absolutely prohibited	Removal permitted
Torture	Removal absolutely prohibited	Removal absolutely prohibited	Removal absolutely prohibited

The possible instances where persecution does not overlap completely with torture and ill-treatment is left for others to explore in more detail. To conclude, it seems that through the evolvement of human rights, article 33(2) today operates in a very narrow space. The rule subsists, but must be applied with the caveat that a return cannot involve risks of torture or ill-treatment. If a refugee risk persecution that does not amount to ill-treatment, the Refugee Convention offers more protection than ECHR and CAT, as it protects against removal to persecution unless the individual presents a serious threat to national security or public safety. In cases of risk for more severe forms of ill-treatment, the drafter's vision of a balancing act between security and protection in case of truly unwanted refugees is on the other hand largely abolished.

2.4 Customary law – State practice and *opinio juris*

There is robust international agreement that the principle of *non-refoulement* has attained the status of customary law.[87] As such, it is binding on all States. The scope of the principle under customary law is more contested, but Lauterpach & Bethlehem conclude that the customary law principle of *non-refoulement* precludes any act of *refoulement*, including non-admission at the frontiers and chain-*refoulement*, that would expose a refugee or asylum seeker to (i) a risk of persecution, (ii) a real risk of torture, cruel, inhuman or degrading treatment or punishment, or (iii) a threat to life, physical

[86] Battjes, H., "The *Soering* Threshold: Why only fundamental values prohibit *refoulement* in ECHR case law", *European Journal of Migration and Law* 11, 2009, p. 206.
[87] Goodwin-Gill & McAdam, 2021, p. 300.

integrity, or liberty.[88] As for exceptions, they must be applied with caution and be subject to procedural safeguards, and are only permitted if there are overriding concerns for national security and public safety. However, if the risk of persecution in case of removal amounts to torture or cruel, inhuman, or degrading treatment or punishment, no exceptions may be made, and the prohibition is absolute.[89] The scope of the prohibition of *refoulement* is thus largely dictated by the human rights version; seemingly no interpreter suggest that the Refugee Convention or customary law offer less protection. The principle is not at all fettered to the conceptions of the drafters, but rather the drafter's vision is abandoned, save for instances where the persecution risked does not amount to ill-treatment. The customary law principle of *non-refoulement*, binding on all states, could perhaps be considered as semi-absolute.

Looking at State practice, the status of *non-refoulement* might appear significantly less consolidated. Gammeltoft-Hansen & Hathaway have described States as having "what might charitably be called a schizophrenic attitude towards international refugee law".[90] UNHCR has frequently urged States to fully respect the prohibition of *refoulement* and expressed deep concern of the fact that expulsion and non-admission at the frontiers contrary to the principle undermine the refugee protection regime.[91] Examples of when the principle is breached, apart from deportation orders against refugees who would risk torture or ill-treatment in the country of origin, include return to unsafe third countries (chain-*refoulement*), walls or electrified fences to prevent entry, interceptions at sea, non-admission of stowaway asylum-seekers, and so-called pushbacks.[92] Currently in Europe, for instance, pushbacks against migrants and/or refugees trying to enter the EU via Belarus has been observed and heavily criticized by human rights and humanitarian NGOs.[93] Because of the frequent and flagrant breaches of the principle, Hathaway dichotomize that *non-refoulement* has in fact *not* reached the level of customary international law.[94] This notion does not seem to attract too much support.[95] While

[88] Lauterpacht & Bethlehem, 2003, p. 149f.
[89] Lauterpacht & Bethlehem, 2003, p. 150.
[90] Gammeltoft-Hansen, T., & Hathaway, J. C. (2015). "Non-Refoulement in World of Cooperative Deterrence", *Columbia Journal of Transnational Law*, 53(2), p. 282.
[91] Executive Committee of the High Commissioner's Programme, *General Conclusion on International Protection No. 102* (LVI), 7 October 2005, para. (J).
[92] UNHCR, 1997, *Note on the Principle of non-refoulement*.
[93] For example, see Amnesty International, https://www.amnesty.eu/news/belarus-eu-new-evidence-of-brutal-violence-from-belarusian-forces-against-asylum-seekers-and-migrants-facing-pushbacks-from-the-eu/ accessed March 7 2021.
[94] Hathaway, James C., *The rights of refugees under international law*, Cambridge University Press, Cambridge, 2005, p. 363.
[95] Gilbert & Bentajou, "Exclusion", in Costello, C., Foster, M., & McAdam, J., (red.), *The Oxford handbook of international refugee law*, Oxford University Press USA, 2021, p. 722.

consistent patterns of state practice can indeed modify obligations under customary law and create new rules, it is important to note that attempts by States to avoid responsibilities stemming from the principle by adopting measures like the ones mentioned, does not absolve them of their legal obligation to not *refoule*. Inadequate implementation of human rights obligations is prevalent. There is a *jus cogens* prohibition on torture despite the use of torture being incredibly widespread. There is little to suggest that negative State practice in relation to *refoulement* is so widespread that it has modified the customary rule.

Lastly, *opinio juris* is clear as far as the principles existence and importance goes. States have time and again stated their commitment to the principle, and practically no State has attempted to justify *refoulement*.[96] The provision has repeatedly been hailed as the cornerstone of refugee law and refugee protection.[97] However, the *opinio juris* regarding the absoluteness of the principle is less unison. For instance, the UNGA Declaration on Territorial Asylum from 1967 states in article 3.2 that "exception may be made to the foregoing principle only for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons."[98] As will be returned to, the Canadian Supreme Court has argued against an absolute prohibition of *refoulement*, even when there is risk of torture.[99] The United Kingdom, intervening on behalf of Italy in the ECtHR case *Saadi v Italy*, argued against both the absoluteness and the widened scope of article 3 ECHR in relation to expulsion.[100] There is strong support for the notion that no one should be removed to torture or ill-treatment is, but at the same time it is an entrenched view in international refugee law that not everyone deserves the protection afforded by the Refugee Convention. This ambivalent attitude will be explored in the next chapter, where the grounds for exclusion from refugee protection are covered, as well as the relationship between exclusion and *non-refoulement*.

[96] Goodwin-Gill & McAdams, 2021, p. 261.
[97] UNHCR, 1997, *Note on the Principle of non-refoulement*
[98] UN General Assembly, *Declaration on Territorial Asylum*, 14 December 1967, A/RES/2312(XXII)
[99] *Suresh v. Canada (Minister of Citizenship and Immigration)*, Supreme Court of Canada, 2002, 1 SCR 3, SCC 1, para. 78.
[100] *Saadi v Italy*, paras. 118-122.

3. Persons undeserving of protection: the exclusion clauses in article 1F of the Refugee Convention

Those who are responsible for the persecution which creates refugees should not enjoy the benefits of a Convention designed to protect those refugees.[101]

While the principle of *non-refoulement* prevents removal in certain circumstances, it has no say over who is granted refugee status. Article 1(2) of the Refugee Convention state that a refugee is someone who is outside his or her country of nationality because of a well-founded fear of persecution on account of his or her race, religion, nationality, membership of a particular social group or political opinion, and is unable or owing to such fear unwilling to avail him- or herself of the protection of that country.[102] Such a person should typically be granted international protection. In UNHCR's words, however, some acts are so grave that they render their perpetrators underserving of refugee protection.[103] Persons seriously suspected of such acts must be excluded from the benefits that follow from a recognized refugee status, even if they face a real risk of persecution.[104] In other words, exclusion means that someone who would otherwise qualify as a refugee is barred from protection. In a sense, they are *de facto* refugees, but not *de jure*.[105] The principles for exclusion are arguably less well recognized compared to the principles for inclusion, and thus, according to Singh Juss, determining who does *not* qualify for refugee status is today a more difficult question than deciding who does.[106]

This chapter explores subject of undesirable refugees, and how the rules governing their exclusion from refugee protection relate to the principle of *non-refoulement*. First a short background will be sketched to illustrate the justification for exclusion, and then each ground for exclusion will be briefly explained. After this, the exclusion clauses will be discussed in relation to *non-refoulement*, as expressed in the Refugee Convention and human rights law respectively.

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[101] *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, Supreme Court of Canada, [1998] 1 SCR 982, para. 63.
[102] Art. 1(2).
[103] UNHCR, *Guidelines on international protection No. 5*, HCR/GIP/03/05, para. 2.
[104] Hathaway & Foster, 2014, p. 525.
[105] Callixte, K., "Refugees, serious non-political crimes and prosecution: Deficiencies in the criminal justice system occasioned by observance of principle of non-refoulement in the context of refugee and human rights protection", *South African Journal of Criminal Justice* 30, no. 2, 2017, p. 224.
[106] Singh Juss, S., "Terrorism and the Exclusion of Refugee Status in the UK", *Journal of Conflict & Security Law*, 2012a, vol. 17, no. 3, p. 497.

3.1 The background and purpose of the exclusion clauses

The purpose of the exclusion clauses, found in article 1F of the Refugee Convention, is to deny international protection to persons guilty of "heinous acts" and serious common crimes, while also making sure that the asylum regime is not abused by criminals who seek to escape justice.[107] Hathaway & Foster stresses that the purpose of the exclusion clauses is not to protect states from refugees who presents a danger to national security and public safety – that's what expulsion and denial of protection against *refoulement* through article 33(2) is for – but to protect the integrity of refugee law itself.[108] This is supported by the location of article 1F as part of article 1 and the definition of who a "refugee" is. Perpetrators of serious crimes should per definition not be considered refugees, or at least per definition be considered unworthy of protection. The idea of refugee protection as being something a person can be deemed underserving of is noticeable in the *travaux préparatiores*. The French representative thought it "impossible" to not include in the Convention the possibility to differentiate between refugees and "ordinary common- law criminals", in fact such an inclusion would be a crucial factor in France's decision to accede to the Convention or not.[109] Hathaway & Foster's reading of the *travaux préparatoires* is that the most fundamental reason for including exclusion clauses was to make the Convention acceptable to as many States as possible.[110] Like we saw with the exception to *non-refoulement* in article 33(2), States were not willing to accept unlimited obligations towards refugees. Interestingly, the same logic is not found in the human rights notion of protection against *refoulement*. Why is refugee protection something that one can be undeserving of but not protection against *refoulement*? This line of thought will be elaborated on in chapter 6.

The next sections give a short introduction to the three exclusion clauses in article 1F, for the purpose of exploring what kind of conduct the original signatories thought rendered asylum seekers undeserving of refugee protection.

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[107] UNHCR, *Guideline on international protection No. 5*, para. 2.
[108] Hathaway & Foster, 2014, p. 529.
[109] UN *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the 24th Meeting*, UN Doc. A/CONF.2/SR.24, 27 Nov. 1951, statement of Mr. ROCHEFORT (France).
[110] Hathaway James, C. & Foster, M., The law of refugee status, p. 525.

3.2 Grounds for exclusion in Article 1F

The grounds for exclusion based on alleged criminal conduct are listed exhaustively in article 1F.[111] Common to all subparagraphs of article 1F is that the burden of proof is on the host State.[112] The conduct or the acts covered by the clauses does not have to be formally verified, for instance by previous prosecution, "serious reasons for considering" that a refugee falls under one or more of the provisions is sufficient.[113] Because the article state that the provisions of the Convention "*shall* not apply to…", it is mandatory to deny refugee protection to a person if an exclusion clause is applicable. This is logical given that the exclusion clauses forms part of the refugee definition. States are, however, free to grant excluded refugees a different status other than refugee status.[114] The effect of exclusion is that no provision in the Convention can be claimed.[115] Given this serious consequence, the UNHCR urge States to apply and interpret the exclusion clauses restrictively.[116] UNHCR is of the view that the principle of "inclusion before exclusion" normally applies, meaning that the need for protection is first examined and if substantiated, grounds for exclusion can be considered, but many States will in practice assess the applicability of article 1F first.[117] Systematically, the Refugee Convention does indeed appear to suggest that it should first be assessed whether an asylum seeker meet the criteria set out in article 1(2), and secondly whether something in the individuals' conduct render them undeserving of the protection that they would otherwise be granted. It seems contrary to the rationale behind article 1F to exclude persons who, had their protection needs been evaluated properly, might not have qualified for protection in the first place. Perhaps given the nature of the conduct that trigger exclusion, it is not surprising that States often chose to examine an asylum seeker's article 1F compatibility first.

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111 UNHCR, *Guidelines on international protection No. 5*, para. 3.
112 Gilbert & Bentajou, 2021, p. 719.
113 UNHCR *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, para. 149.
114 UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, para. 21.
115 *Ibid.*
116 UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee*, para. 149.
117 Gilbert, G., "Current issues in the application of the exclusion clauses", in *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, eds. Feller, E., Türk, V., & Nicholson, F., Cambridge University Press, 2003, p. 464.

3.2.1 1F(a) – international crimes

Article 1F(a) provides that refugee status must not be granted to someone whom there are serious reasons for considering having committed "a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes". Simentic argue that article 1F(a) is the least controversial one, mainly because interpretation is contingent on international humanitarian and criminal law. Several international instruments offer guidance on how to interpret the scope of war crimes, crimes against humanity and crimes against the peace, e.g., the Genocide Convention,[118] the Geneva Conventions and protocols,[119] the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda[120], and the Statute of the International Criminal Court[121]. Expulsion under 1F(a) must be based on the standards of international instruments and not on domestic norms.[122] This leaves less room for national discretion and expansive application.

The crimes in article 1F(a) can be prosecuted both internationally and nationally under universal jurisdiction. However, exclusion under 1F(a) greatly outnumber prosecution of the same category of crimes, because prosecution is far more resource-intensive, complex and subject to higher standards of proof compared to the administrative decision to exclude someone from refugee protection.[123] The lower evidentiary standard should not be used to exclude minor offenders whose contributions to these egregious crimes are remote.[124] Bond stress that the objective of 1F(a) is neither prevention of nor punishment for international crimes – this is the role of criminal law – but to preserve the integrity of refugee law.[125] It could indeed been considered offensive to let the perpetrators of grave international crimes benefit from the same regime that is supposed to protect their victims. Recognizing war criminals and the likes as refugees would thus damage the integrity, or credibility, of refugee law.

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[118] *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277.
[119] *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, 12 August 1949, 75 UNTS 31.
[120] *Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002)*, 25 May 1993; *Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006)*, 8 November 1994.
[121] *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6
[122] Hathaway & Foster, 2014, p. 568.
[123] Bond, J., "Principled exclusions: a revised approach to Article 1F(a) of the Refugee Convention", *Michigan Journal of International Law*, 2013, Vol. 35:15, p. 18.
[124] Hathaway & Foster, 2014, p. 571.
[125] Bond, 2013, p. 18.

3.2.2 1F(b) – serious non-political crimes

Article 1F(b) provide that refugee status must not be granted to those who has "committed a serious non-political crime outside the country of refuge prior to his admission to that country". This article is far more controversial than the former. The concept of a "serious non-political crime" is open-ended, and many diverging interpretations are possible, leading to a significant amount of State discretion.[126] UNHCR lists murder, rape, and armed robbery as crimes that would undoubtedly qualify as serious offences, "whereas petty theft would obviously not."[127] UNHCR further recognize that terrorist acts should be considered non-political crimes since they are, normally, carried out in a way that is disproportionate to any political goal.[128] It's true of course that a "political goal which breaches fundamental human rights cannot form a justification."[129]

It should be uncontroversial to claim that a significant number of States today seek to rid themselves of refugees who commit serious but common crimes *after* admission. However, this is not the purpose of article 1F(b). This important limitation to the article will be clarified further below.

3.2.2.1 The temporal and geographical limitation

The perhaps most crucial point to make about article 1F(b) is that it explicitly refers to serious non-political crimes committed *outside* the host country, *prior* to admission. Accordingly, an act of – for instance – terrorism that is conducted *after* admission does not trigger article 1F(b). Such conduct should normally be dealt with through the criminal law enforcement in the host State.[130] The impact of this temporal and geographical limitation is significant because it affects States' ability to "revoke" an already granted refugee status because of later criminality. This subject will be returned to later. Hathaway & Foster stresses that the point of article 1F(b) is not to afford States a general right to remove criminal or dangerous refugees.[131] That, again, is the role of

[126] Bolhuis, M P., & van Wijk, J., "Alleged Terrorists and Other Perpetrators of Serious Non-Political Crimes: The Application of Article 1F(b) of the Refugee Convention in the Netherlands", *Journal of Refugee Studies*, 2016, Vol. 29, No. 1, p. 32f.
[127] UNHCR, *Guidelines on international protection No. 5,* para. 14.
[128] UNHCR, *Statement on Article 1F of the 1951 Convention Issued in the Context of the Preliminary Ruling References to the Court of Justice of the European Communities from the German Federal Administrative Court Regarding the Interpretation of Articles 12(2)(b) and (c) of the Qualification Directive*, 2009.
[129] UNHCR, *Background note on the Application of the Exclusion Clauses*, 2003, para. 43.
[130] *Ibid*, para. 44.
[131] Hathaway & Foster, 2014, p. 532.

article 33(2).[132] As mentioned, Hathaway & Foster claim that the State's concern for its own and its communities' safety and security is irrelevant to the question of exclusion. The purpose of article 1F(b) is instead primarily to deny protection to fugitives of justice.[133] Put that way, it's only logical that the provision exclusively targets previous crimes. The rationale is yet again that it would be offensive if the international protection regime was abused by criminals trying to dodge a legitimate and proportionate sentence, for a crime over which the country of refuge would not have jurisdiction and therefore could not prosecute, unlike with universal crimes. If international refugee law could be abused this way, it would challenge the public confidence in its ethical value.[134] As will be elaborated on further down, however, it's questionable if this is how most states interpret and apply article 1F(b).

3.2.3 1F(c) – acts contrary to the purposes and principles of the UN

Article 1F(c) provide that refugee status must not be granted to someone whom there are serious reasons for believing has been "guilty of acts contrary to the purposes and principles of the United Nations". The purposes and principles of the UN are expressed in the preamble and the provisions of the UN Charter,[135] and directed at and binding on states, not individuals.[136] This would suggest that a certain level of power or authority is required for a person to be excluded on this ground, but today the EU, along with multiple other countries, does not require a person excludable under article 1F(c) to be in a position of governmental authority.[137] In *MH (Syria)*, for example, the UK Court of Appeal did not rule out that a nurse who had provided medical assistance to terrorists could be subject to exclusion based on article 1F(c).[138] The UNHCR has remarked that such a wide personal scope is contrary to the drafter's vision, which specified that the clause was not aimed at "the man in the street".[139]

The acts covered by the article has expanded significantly, and perhaps most so in relation to terrorism.[140] The UN Security Council has declared in its resolution 1373 that

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[132] UNHCR, *Background note on the Application of the Exclusion Clauses*, 2003, para. 44.
[133] Hathaway, James C., & Harvey, C. J., "Framing Refugee Protection in the New World Disorder", 2001, *Cornell International Law Journal*, vol, 34, no. 2, p. 319.
[134] Hathaway & Harvey, 2001, p. 319.
[135] Charter of the United Nations, 24 October 1945, 1 UNTS XVI.
[136] Hathaway & Foster, 2014, p. 587.
[137] *Ibid*, p. 588.
[138] *MS (Syria) v Secretary of State for the Home Department*, (2009) EWCA Civ 226, para. 30.
[139] UNHCR, *Background note on the Application of the Exclusion Clauses*, 2003, para. 48
[140] Hathaway & Foster, 2014, p. 591.

"acts, methods and practices of terrorism *are* contrary to the purposes and principles of the United Nations."[141] Even before this, States have been under growing pressure to exclude terrorists from international protection, a pressure that has stemmed not only from the UNSC but from the UNGA, regional organizations, other States and the UNHCR.[142] The lack of an internationally recognized definition of terrorism leaves it to State to designate who is a terrorist or supporter of terrorism, and general provisions combined with vast State discretion risk denying protection to people in a very broad manner.[143] It is again worth noting that exclusion is not a surrogate for criminal punishment but with a lower standard of proof. Singer requests a specialized approach to terrorism and refugee exclusion, that "recognizes the unique and exception nature of the provision and its context in an international treaty of a humanitarian character, rather than as a means of criminal prosecution and punishment."[144] It's not at all inconceivable that acts of terrorism could trigger article 1F(c), but a careful application and assessment that takes the exceptional nature of the clause and the protective nature of the Convention into consideration as well is necessary.[145] Hathaway & Foster maintain that article 1(c) has become "something of a ravenous omnivore".[146] Using article 1F(c) as catch-all provision is contrary to UNHCR recommendations, which demand that "given the vagueness of this provision, the lack of coherent State practice and the dangers of abuse, article 1F(c) must be read narrowly."[147] The article is only triggered in "extreme circumstance", and a high threshold must be met in terms of the acts "international impact" and "implications for international peace and security".[148] Again, the alleged acts must be so grave that the granting of protection would threaten the integrity of refugee law. Protecting the host state from unwanted or dangerous individuals is, as Hathaway & Foster underscores repeatedly, never the role of article 1F, but the role of article 33(2).[149]

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[141] UNSC Res. 1373, UN Doc. S/RES/1373 (sept. 28, 2001), art. 5. Emphasis added.
[142] Saul, B., "*Exclusion of Suspected Terrorists from Asylum: Trends in International and European Refugee Law*" discussion paper, University of Oxford, 2004, p. 1.
[143] Saul, 2004, p. 1.
[144] Singer, S., "Terrorism and Article 1F(c) of the Refugee Convention. Exclusion from Refugee Status un the United Kingdom", *Journal of International Criminal Justice*, 2014, 12, p. 1075.
[145] Singer, 2014, p. 1091.
[146] Hathaway & Foster, 2014, p. 594.
[147] UNHCR, *Background note on the Application of the Exclusion Clauses*, 2003, para. 46.
[148] *Ibid*, para. 47.
[149] Hathaway & Foster, 2014, p. 597.

3.3 Article 1F in relation to cancellation and revocation of refugee status

There are several relevant concepts that are similar and thus easily confused. A brief recount of these will be given, as it might ease the understanding of coming discussions.

Exclusion, as detailed above, is the operation of denying refugee status to a person who would qualify for protection were it not for his or her own – previous – conduct. It applies to people deemed underserving of protection. The exclusion regime, in the context of the Refugee Convention, serves to uphold the credibility of and respect for international refugee law. Admittance of dangerous criminals would weaken the support for the refugee law as an institution. The legal basis for exclusion is found in article 1F of the Refugee Convention.

Cancellation, not mentioned in the Refugee Convention but practiced nationally and later endorsed by the UNHCR, comes into question when subsequent information sheds new light on an already granted refugee status. It's a correcting measure. If it is afterwards revealed that one of the exclusion clauses did in fact apply at the time when the refugee status was granted, then the status should be cancelled.[150] Years after a granted status, testimonies might surface suggesting that a refugee was in fact a war criminal prior to admission. This would trigger cancellation based on article 1F(a); a mistaken grant of refugee status is corrected. It is not related to a refugee's conduct *post*-recognition and should not be confused with expulsion and denial of protection from *refoulement* under article 33(2). Cancellation applies to someone who because of past conduct should never have been recognized as a refugee, whereas expulsion based on article 33(2) provides for removal of correctly recognized refugees who later prove to be dangerous.[151]

Revocation is another concept that is not found in the Refugee Convention but practiced by states and endorsed by the UNHCR. Where cancellation refer only to past, undetected conduct that is later revealed, revocation deals with the withdrawal of an at the time correctly granted refugee status due to criminal conduct *after* admission. What must really be emphasized here is that according to the UNHCR, revocation is only possible when a later crime can be subsumed under either article 1F(a) or 1F(c).[152] This is so because (1) the ending of a granted refugee status is linked to the exclusion clauses, and (2) for the common, serious non-political crimes under 1F(b), there are explicit

[150] UNHCR, *Background note on the Application of the Exclusion Clauses*, 2003, para. 13.
[151] *Ibid*, para. 13.
[152] *Ibid*, para. 17.

temporal and geographical limitations. Article 1F(b) is only triggered by crimes committed *outside* the host country, *prior* to admission. Accordingly, if a refugee commits a crime in the host country that amounts to, for instance, a war crime or an act contrary to the purposes and principles of the UN, the status can be revoked, because article 1F(a) and 1F(c) is phrased in a continuous way.[153] If a refugee commits an "ordinary" armed robbery or murder in the host state, there is no exclusion clause that apply. 1F(b) applies to prior crimes, outside the host country. Hence, ordinary albeit serious crimes committed after recognition does not permit revocation of refugee status.

As the UNHCR pointed out in its comment on the EU's Qualification Directive,[154] "for crimes other than those falling within the scope of article 1F(a) or 1F(c), criminal prosecution would be foreseen, rather than revocation of refugee status."[155] The criminal activity of recognized refugees, unless the conduct is so serious as to fall within articles 1F(a) or 1F(c), should be dealt with through a state's ordinary criminal justice system. Which, notably, might very well result in an expulsion decision. Expulsion, but not revocation of refugee status. As Hathaway & Foster points out repeatedly, getting rid of recognized refugees who pose a threat to national security or public safety is done through expulsion and the denial of the right not to be *refouled*, based on article 33(2), not by denying or revoking refugee status.[156] This relationship between exclusion and expulsion, article 1F and article 33(2), is perhaps confusing, but important. The relationship will be explored further in the next section.

3.4 The relationship between Articles 1F and 33(2)

The exclusion clauses in article 1F and the exception to *non-refoulement* in article 33(2) are similar in language and substance but serve different purposes. The purpose of article 1F is, in short, to sort out persons fundamentally undeserving of refugee protection, to preserve the integrity of international refugee law. To use the words of the Canadian Supreme Court: "the general purpose of article 1F is not the protection of the society of refuge from dangerous refugees (…) rather, it is to exclude *ab initio* those who are not *bona fide* refugees."[157] Article 1 askes "who is a refugee?" and article 1F forms part of the answer by stating who *isn't* a refugee.

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[153] UNHCR *Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection granted* (OJ L 304/12 of 30.9.2004), p. 29

[154] *Ibid.*

[155] *Ibid.*

[156] Hathaway & Foster, 2014, p. 594.

[157] *Pushpanathan v. Canada*, para. 58

The purpose of article 33(2) is different. It doesn't affect the refugee status at all, but instead acts as a vent, allowing States to protect themselves against already admitted refugees who, through their later conduct, turn out to be an unwanted presence in the host State.[158] By affording an exception to the prohibition of *refoulement*, this vent enables expulsion of refugees even if there are threats to their life and freedom. What's relevant for article 33(2) is the likeliness of a future threat from the refugee, meaning that the assessment has to be forward-looking.[159] Article 33(2) expulsion is a last resort, granting states the right to balance safety and security concerns against protection only if faced with "extremely serious" threats to the country because of refugees who pose a "major actual or future threat".[160]

It may be counter-intuitive that these distinct purposes mean that concerns for national security and public safety is immaterial to the question of exclusion. The UNHCR confirm that "a decision to *exclude* an applicant based on a finding that s/he constitutes a risk to the security of the host country would be contrary to the object and purpose of article 1F and the conceptual framework of the 1951 Convention".[161] States do confuse these two provisions.[162] As Gilbert & Bentajou remark, in much of the domestic case law the two concepts are fused, because they are incorrectly understood to serve a similar purpose of lawfully removing unwanted refugees.[163] The "clear division of labor" between exclusion and expulsion[164] makes sense in the context of the Refugee Convention and its "conceptual framework", but such an isolated reading is not possible today. As demonstrated, article 33(2) as imagined by the drafters is largely out of work, shut down by stricter, overriding human rights obligations. It is perhaps as a result of this development that States confuse the right to expel refugees under article 33(2) with the duty to deny refugee status under article 1F, and exclude national security threats in a manner that is inconsistent with the conceptual framework of the Refugee Convention.

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158 UNHCR, *Background note on the Application of the Exclusion Clauses*, 2003, para. 10.
159 Lauterpacht & Bethlehem, 2003, p. 139, para. 147.
160 UNHCR, *Background note on the Application of the Exclusion Clauses*, 2003, para. 10.
161 UNHCR, *Statement on Article 1F of the 1951 Convention Issued in the Context of the Preliminary Ruling References to the Court of Justice of the European Communities from the German Federal Administrative Court Regarding the Interpretation of Articles 12(2)(b) and (c) of the Qualification Directive*, at 12 (2009). Emphasis added.
162 Mahon, J., "Humanitarianism within statist boundaries: a systemic interpretation of art. 1F Refugee Convention in light of terrorist concerns, *UCL Journal of Law and Jurisprudence*, 2019, Vol. 8, No. 2, p. 30.
163 Gilbert & Bentajou, 2021, p. 712.
164 Hathaway & Foster, 2004, p. 538f.

3.5 A clash between refugee law and human rights law

By the logic of the Refugee Convention, an excluded individual can be removed without any regard being paid to the issue of *refoulement*, since excluded persons do not benefit from article 33(1) in the first place. Admitted refugees who turn out to be security threats or serious criminals must meet the standards required by article 33(2) to be lawfully removed. However, the human rights provision of *non-refoulement* is absolute and applies to everyone, regardless of how "undesirable or dangerous" an asylum seeker or refugee is. The effect of this is, that should there be serious reasons to believe that an excluded or dangerous criminal refugee would be subjected to torture or ill-treatment in the receiving state, he or she may not be removed. *Non-refoulement* as expressed in, for instance, article 3 CAT and article 3 ECHR, acts in these cases as a strict doorman, precluding the enforcement of a decision to remove the undeserving or dangerous person. One instrument precludes protection and others demand it.

Perhaps we revisit our IS fighter once more. Subject to the exact nature of the conduct, s/he might be excludable under either 1F(a) (war crimes and crimes against humanity seem possible), 1F(b) (serious non-political crimes like murder or rape), or 1F(c) (his or her acts of terrorism could amount to acts contrary to the purpose and principles of the UN). If information surface later, a granted status can be cancelled. If s/he commits serious crimes or pose a serious threat to security post-admission, s/he can have his or her status revoked and/or be expelled. In any event – this dangerous IS fighter is unwanted in the host country. The strict doorman of *non-refoulement* is standing in the way of removal, though, because there are serious reasons for believing that an IS fighter will be subjected to torture or ill-treatment by the Syrian authorities if returned.[165] Thus, the IS fighter is undeserving of refugee status, but unable to remove. The host State is faced with the obligation to exclude the fighter from refugee protection *and* the obligation to protect the same person from *refoulment*.

What happens to individuals who are fundamentally undeserving of protection while also guaranteed protection, or, as this group has sometimes been referred to, who are undesirable but unreturnable? Chapter 4 will explore the effects of this clash between refugee law and human rights law, while chapter 5 will search for and discuss possible solutions to this intricate situation.

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[165] See for instance, Amnesty International, "*You're going to your death: violations against Syrian refugees returning to Syria*", 2021; Human Rights Watch, "*If the Dead Could Speak, mass deaths and torture in Syria's detention facilities*", 2015; HRC, "*Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*", 2021, A/HRC/46/55.

4. Effects of undesirable but unreturnable refugees

Possibly dangerous unwanted but unreturnable individuals travel around in Europe, while immigration authorities of the respective countries where they set foot toss these 'hot potatoes' around in the hope that they themselves do not have to deal with the matter.[166]

As mentioned in the introduction of this thesis, states are "increasingly confronted" with refugees who are undesirable – and therefore excluded – but unreturnable because of the absolute prohibition of *refoulement*.[167] This chapter explores which effects this has on the excluded individual, on the host State, and on international refugee law as such. The chapter draw heavily on the 2016 report "*'Undesirable but unreturnable'? Policy challenges around excluded asylum seekers and other migrants suspected of serious criminality but who cannot be removed*".[168] This report represent one of very few holistic, comparative approaches to the issue of unwanted but unreturnable asylum seekers. In 2001, an EU Commission working paper examined the "relationship between safeguarding internal security and complying with international obligations and instruments".[169] The working paper concludes that (a) there are no international legal instruments that regulate the status and rights of excluded but unreturnable persons, and (b) the policy options in Member States for dealing adequately with said group was limited.[170] This was considered "very unsatisfactorily", and the issue was seen therefore as being "urgently in need of further examination, and eventual resolution at European level."[171] Since then, the issue has not been further examined at any length, and there is yet no resolution at European level – according to the 2016 report, Member States appear reluctant to adopt a unified approach, preferring instead full discretion to deal with the matter.[172] Hence, the responses varies significantly between European states.

The following section will outline the main policy responses towards undesirable but unremovable asylum seekers as identified. The issue appears to have gained most attention in Europe, and it won't go unnoticed that European countries are therefore greatly overrepresented.

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[166] Bolhuis & van Wijk, 2016, p. 33.
[167] Cantor, van Wijk, Singer, & Bolhuis, 2016, p. 3.
[168] Cantor, van Wijk, Singer, & Bolhuis, 2016, see note 4.
[169] Commission of the European Communities, *The relationship between safeguarding internal security and complying with international protection obligations and instruments*, Commission working document, Brussels 05.12.2001, COM(2001) 743 final, accessed 17 March 2022. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52001DC0743&from=EN
[170] Commission of the European Communities, 2001, page 14.
[171] *Ibid.*
[172] Cantor, van Wijk, Singer, & Bolhuis, 2016, p. 5.

4.1 A note on the volume of the problem

The vast majority of asylum seekers who are denied refugee status are not excluded under article 1F, but simply rejected because they fail to substantiate a well-founded fear of persecution. One empirical finding suggests that about 1% of asylum claimants are excluded, which sounds small but can have a significant impact on host countries.[173] The largest group of undesirable but unreturnable refugees are those who have had their status revoked because of crimes committed in the host state, post admission.[174] This group is "relatively large and likely to grow in the near future."[175] Exclusion because of past crimes and revocation because of security concerns, while lower in volume, was also expected to grow in the near future.[176]

Data on the particular issue is of excluded and unreturnable refugees is scarce, but some figures exist. In 2016, Norway reportedly hosted 118 persons who were excluded under article 1F but could not be returned for legal reasons.[177] In the Netherlands, between 2008 and 2014 roughly 30% - 180 out of 360 – of excluded 1F-refugees could not be returned because of article 3 ECHR, which was considered "not insignificant".[178]

Undesirable but unreturnable refugees undeniably constitute a small sub-group of the already small group of excluded refugees. However, it is clear from the 2016 report that the volume is likely to increase in the future.[179] As the total number of refugees increase yearly, and as there is a growing tendency to apply the exclusion clauses,[180] this appears to be a reasonable estimate.

4.2 Current State responses

The following recount of current State responses is divided into two sections, one for Canada & Australia and one for European countries. The geographical division serves no other purpose than to ease the overview. This is clearly not a comprehensive representation, but an exemplifying compilation based on available information. Again, because this is a relatively understudied subject, relevant data is scarce.[181]

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[173] Cantor, van Wijk, Singer, & Bolhuis, 2016, p. 10.
[174] *Ibid*, p. 3.
[175] *Ibid.*
[176] *Ibid.*
[177] *Ibid*, p. 16.
[178] *Ibid*, p. 14.
[179] *Ibid*, p. 28.
[180] *Ibid*, p. 33.
[181] *Ibid*, p. 8.

4.2.1 Canada & Australia

When Bond describes how unwanted but unremovable persons are dealt with in Canada, she finds five possible outcomes: the individual can either be "eligible for permanent residence; granted temporary stay until impediment removed; granted temporary status while still under active removal order; placed in legal limbo; or subjected to suspect deportation."[182] She also concludes that the treatment in any given case is not the result of a deliberate policy choice by Canadian authorities. The lack of a coherent approach and the non-recognition of criminal unremovable persons as a defined group leads to arbitrariness in the decision-making and significant hardship for the individuals concerned.[183] She notes with concern that Canada has, in order to deal with "problematic cases", on occasion resorted to what she calls "suspect deportation", a concept not further explained but understood to mean unlawful deportation in breach of the prohibition of *refoulement*.[184] These suspect deportations have been both deliberate (but covert) as well as the result of concerns for *refoulement* not having been properly considered, most notably regarding removal to countries where there is a general risk of harm.[185] Lastly, when unreturnable refugees are afforded temporary residence permits, these result in only temporary work permits, which obstructs employment. There are also possibilities of lengthy administrative detention for the alleged criminals.[186] For those eventually released, a wide range of restrictions and monitoring may apply.[187]

Australia affords unreturnable refugees no residence permit whatsoever and does not grant access to employment.[188] Australia is notorious for its detention of refugees, and even asylum seekers who have been considered to have a well-founded fear of persecution and who were *not* excludable under article 1F have been held in indefinite detention, "often without access to legal remedies."[189] This has rightly been found by the UN Human Rights Committee to be contrary to international law.[190]

[182] Bond, J., "Unwanted but unremovable: Canada's Treatment of "Criminal" migrants who can't be removed, *Refugee Survey Quarterly*, 2017, Vol. 36, p. 168.
[183] *Ibid*, p. 168.
[184] *Ibid*, p. 183.
[185] *Ibid*, p. 183f.
[186] *Ibid*, p. 184.
[187] *Ibid.*
[188] Cantor, van Wijk, Singer, & Bolhuis, 2016, p. 6.
[189] *Ibid*, p. 19.
[190] HRC, *F.J. et al. v. Australia*, No. 2233/2013, 18 April 2016, para. 10.3.

4.2.2. Europe

In France, an excluded asylum seeker or dangerous refugee whose return is barred by *non-refoulement* loses the ground for residence and becomes ineligible for both permanent and temporary residence permit.[191] The person thus remains in the country without a residence permit. Such a person has no access to employment. Significant restrictions of movement will be imposed, ranging from a duty to report to the police regularly to home custody. While detention is not an option for those who are non-returnable due to a real risk of torture or ill-treatment, violation of the requirements of home custody, being a criminal offence, can result in imprisonment. Because communities disapprove of living in the same area as criminal refugees, unreturnable individuals subject to home custody are often "moved around the country".[192] Denmark responds in a very similar way, while also housing unwanted but unreturnable persons in designated asylum centers, as well as sometimes requiring daily reporting duty.[193] The possibility of return is reassessed every 6 months.[194] Belgium does also not afford any type of residence permits to unreturnable refugees. Accordingly, access to employment is barred, but there is no monitoring or restriction of movement for the unreturnable refugees.[195]

In the Netherlands, a country that is "at the forefront of applying article 1F",[196] a person who is excluded but unreturnable is still ordered to leave the country within 28 days, and non-compliance is a criminal offence.[197] This creates the bizarre situation where article 1F individuals who are unreturnable due to human rights concerns cannot legalize their stay and face detention for not leaving.[198] They are thus not afforded any residence permit or leave to remain in the country, and consequently cannot work or access public services, save for a minimal level such as primary emergency health care.[199]

The UK, Germany, Norway and Sweden represent a somewhat less harsh approach. All countries afford unreturnable refugees temporary residence permits and access to employment, while often conditioned on a risk assessment.[200] In all four countries,

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[191] Cantor, van Wijk, Singer, & Bolhuis, p. 6.
[192] *Ibid*, p. 13.
[193] *Ibid*, p. 6.
[194] *Ibid.*
[195] *Ibid.*
[196] Reijven, J., & van Wijk, J., "Caught in limbo: how alleged perpetrators of international crimes who applied for asylum in the Netherlands are affected by a fundamental system error in international law", *International Journal of Refugee Law*, 2014, Vol. 26, No. 2, p. 248.
[197] Cantor, van Wijk, Singer, & Bolhuis, 2016, p. 14.
[198] Reijven & van Wijk, 2014, p. 256.
[199] Cantor, van Wijk, Singer, & Bolhuis, 2016, p. 14.
[200] *Ibid*, p. 6.

possibilities of return is reassessed upon reapplication.[201] Location wise, Norway and Sweden impose no restriction of movement, while Germany places this group of people in a "designated area of residence". In the UK, restrictions on residence as well as detention are possible responses, and although common law principles prescribe that detention require a reasonable prospect of removal, courts have found that detention for years may be considered reasonable.[202] The UK employs a "restricted leave" for 1F-excluded persons who can't be returned, which is valid for 6 months at a time and comes with possible restrictions on employment, education and access to public funds.[203] The same group is "placed under close scrutiny with the aim of making the experience as uncomfortable as possible", to avoid "strong ties to the UK being made, which could trigger a claim under article 8 of the ECHR."[204]

Some of these measures seem to largely be a result of conflicting rules and interests, dealt with as balanced as possible, while others appear cynical, like the French policy of moving people in home custody around the country and the UK's ambition of making the stay "as uncomfortable as possible". Some measures seem to beg for negative consequences for the host State, such as barring access to employment. Other measures appear at odds with various human rights provisions, such as prolonged detention and denied access to social services. This will be elaborated on in chapter 5.

As regards legal status, many of the affected unreturnable individuals in Europe are effectively left in "legal limbo", a concept that merits extra attention and will therefore be further explored below.

4.3. Effects on individual level - legal limbo

The 2016 report on undesirable but unreturnable refugees state that a "considerable group" of excluded but unremovable individuals "will always remain in legal limbo, sometimes for many years."[205] Exclusion result in denial or loss of refugee status, while articles 3 of ECHR or CAT simply prohibit removal while being silent on the legal status.[206] The latter articles thus create unreturnable individuals but does not provide any guidance as to how to deal with them. As shown, Australia, Belgium, Denmark, France,

[201] Cantor, van Wijk, Singer, & Bolhuis, 2016, p. 6.
[202] *Ibid*, p. 20.
[203] Singer, S., "'Undesirable and Unreturnable' in the United Kingdom", *Refugee Survey Quarterly*, 2017, 36, p. 29f.
[204] Singer, 2017, p. 30f.
[205] Cantor, van Wijk, Singer, & Bolhuis, 2016, p. 3.
[206] Gil-Bazo, M-T., "Refugee protection under International Human Rights Law: From *Non-refoulement* to residence and citizenship", *Refugee Survey Quarterly*, 2015, 34, p. 33.

and the Netherlands do not provide even a temporary residence permit to excluded but unreturnable refugees.[207] The result is that these individuals are considered undocumented migrants, who consequently are unable to work, rent a home or enjoy health insurance.[208] In Australia, Belgium, Denmark and France there is no prospect of ever receiving a permanent status, whereas in Germany the unreturnable individual can apply for a permanent status after 18 months, in Norway after 10 years, and in Sweden after "several renewals, depending on the seriousness of the crime."[209]

The effect that people are left in legal limbo, unable to provide for themselves or benefit from State entitlements, seem detrimental to both the individual and the State. Certainly, dangerous persons are not rendered less dangerous if left to fend for themselves in poverty, homelessness, and unemployment. The risk for illegal activities to substitute the lack of income should be obvious. This risk seems to only be counteracted by detention, which is hardly a durable long-term solution.

For the individual, the consequences of being left in legal limbo are clearly negative. Harrowingly, Bond reports that while she prepared her report on the unwanted but unremovable in Canada, she "learned of several situations where persons in this class committed suicide after years of being in a state of indefinite limbo."[210] Reijven & van Wijk, who has interviewed excluded but unreturnable refugees in Holland, report grave social and economic deprivations, as well as both mental and physical strain.[211] The Conference report similarly conclude that on an individual level, current policy responses can have "severe social, economic, physical and psychological consequences."[212] States, it was argued, were "at a loss as how to respond to the issue", and all responses "cause economic and social harm to the individuals involved."[213] These adverse consequences are clearly unsatisfying. Goodwin-Gill & McAdam refer to this as a "protection gap", while Reijven & van Wijk goes even further, calling it a "fundamental system error".[214]

Unfortunately, it seems as if the number of people in legal limbo might be unnecessarily high, due to a debatable practice of revoking refugee status. The next section will explore and explain this complex, questionable practice.

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[207] Cantor, van Wijk, Singer, & Bolhuis, 2016, p. 6.
[208] *Ibid*, p. 4.
[209] *Ibid*, p. 6.
[210] Bond, 2017, p. 186.
[211] Reijven & van Wijk, 2014, p. 269.
[212] Cantor, van Wijk, Singer, & Bolhuis, 2016, p. 5.
[213] *Ibid*, p. 31.
[214] Reijven & van Wijk, 2014, p. 249.

4.4 A questionable revocation of refugee status

Related to the question of legal limbo is the fact that several States appear to withdraw a granted refugee status in an incorrect, or at least dubious way. In section 3.2.2 it was demonstrated that according to the UNHCR and leading refugee law scholars, crimes falling under exclusion clause 1F(b) – serious non-political crimes – perpetrated in the host country, after admission, does not lead to revocation of refugee status. UNHCR has stated that:

> "serious, non-political crimes must have been committed outside the country of refuge prior to admission. The logic of the Convention is that the type of crimes covered by Article 1F(b) committed after admission would be handled through rigorous domestic criminal law enforcement, as well as the application of Articles 32 and 33(2) of the 1951 Convention, where necessary. Neither Article 1F(b) nor Article 32 or 33(2) provides for the loss of refugee status of a person who, at the time of the initial determination, met the eligibility criteria of the 1951 Convention."[215]

Many European states expel *and* revoke the refugee status for individuals who commit ordinary crimes such as robbery or murder after admission. In light of the cited UNHCR comment, this appears inconsistent with the Refugee Convention. Hathaway & Foster agree that states who revoke refugee status based on later crimes of 1F(b)-character do in fact breach the Convention.[216] However, in the context of the EU, the Court of Justice of the European Union (CJEU) have found that revocation because of post-admission crimes does not breach the Convention. According to the Court, post-admission conduct and security concerns has no effect on the Refugee Convention status, however, the more extensive 'EU refugee status' can be revoked.[217] Thus, there is no breach of the Convention. The problem with this logic is that many of the Refugee Convention rights require lawful stay, such as the right to employment (articles 17-19), housing (article 21), and social security (article 24). The right to *residence* is an 'EU refugee right' – which is lost along with the 'EU refugee status', meaning that refugees who lose their EU refugee status are not considered lawfully staying in the country.[218] Even if it is not an outright breach, it is hardly compatible with the purpose of the Refugee Convention to revoke a status that cannot be revoked by calling it something

[215] UNHCR, *Annotated Comments on the EC Council Directive* 2004/83/EC, p. 29.
[216] Hathaway & Foster, 2014, p. 532.
[217] Joined Cases *C-391/16, C-77/17 and C-78/17*, ECLI:EU:C:2019:403, para. 98. Emphasis added.
[218] *C-391/16, C-77/17 and C-78/17,* para. 104.

else, thus withdrawing the residence permit and making several key Convention rights inaccessible. In effect, admitted refugees who commit common, serious non-political crimes and are non-removable are, instead of being fully considered refugees as per the Refugee Convention, reduced to "light-refugees" in the EU, to borrow the Czech Republics' critique.[219]

I would argue that the CJEU's approach – creating two distinguishable refugee statuses, one EU status that can be revoked and one Convention status that cannot – seem forced, and is ultimately unpersuasive. Article 78 of the Treaty of the Functioning of the EU require that the Union's policy on asylum must be in accordance with the Refugee Convention.[220] It's questionable whether this approach can be considered in full accordance with the Convention. Recognizing an individual as a Convention refugee without affording a residence permit renders the protection offered by the Convention seriously circumscribed.

Through this ruling, in addition to splitting the refugee status into two different concepts, the CJEU also approved the move of concerns for national security from the question of expulsion to the question of status, which deviates from the logic and rationale of the Refugee Convention. This Convention logic has previously been affirmed by the CJEU itself.[221] While a blunt departure from the systematic of the Refugee Convention, this move is perhaps unavoidable, since the logic between articles 1F and 33(2) is out of order because of the absolute prohibition of *refoulement*. As the French representative said during the preparations of the Convention, if State's cannot later rid themselves of dangerous elements, they would think twice before granting refugee status.[222] If removal can be barred in absolute terms, it may be natural that concerns for national security and public safety materialize earlier, at the time of the assessment of an asylum claim. It's probably fair to suspect that States have in fact always primarily had their own national security interest in mind when receiving refugees. idea Like Gilbert state, the "true fear that finds voice in Article 1F not that refugee status might be besmirched if it were to be applied to those falling within Article 1F, it is that the receiving State will be a safe haven."[223]

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[219] *C-391/16, C-77/17 and C-78/17*, para. 49.
[220] European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01, art. 78.
[221] *Bundesrepublik Deutschland v. B and D*, C-57/09 and C-101/09, European Union: Court of Justice of the European Union, 9 November 2010, para. 104.
[222] UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Summary Record of the Sixteenth Meeting*, 23 November 1951, A/CONF.2/SR.16.
[223] Gilbert, 2003, p. 478.

4.5 Effects on the State – providing a "safe haven"? Unreturnable refugees and prosecution

States have a legitimate interest, and a duty, to protect the population against threats to their life and security. In light of this protection duty, Governments routinely face criticism for harboring criminals and terrorists.[224] In some countries, allowing refugees convicted – or suspected – of serious crimes to remain on the territory spark fury among large portions of the population. Such a response is indicative of the fact that the issue here is a clash of interests, and that the protection of refugees is not the only concern. Terrorism, for instance, and perhaps most notably, is a serious concern which has caused demonstrable damage and destruction worldwide. It is clear, claims Bruin & Wouters, that the *opinio communis* is that no one who flee prosecution for terror acts should be granted a safe haven.[225] Reijven & Wijk state that it is the Dutch "no safe haven policy" that has led the country to the forefront of exclusion under article 1F.[226] As mentioned, States are probably not primarily worried that the "integrity of refugee law" is threatened if criminals are protected, "the true fear", Gilbert rightly claim, "is that the receiving State will be a safe haven."[227]

The UN Security Council resolution 1373, adopted shortly after the 9/11 terrorist attacks and binding on all UN member states, calls upon states to "take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts."[228] The provision is not phrased in mandatory terms, and thus does not override States' other, concurring international obligations by way of articles 103 and 25 of the UN Charter.[229] It's also worth noting the caveat that measures must conform with international law, including, thus, the absolute prohibition on *non-refoulement*. In contrast, the UNSC has *decided* that States *shall* "deny safe haven to those who finance, plan, support, or commit terrorist acts."[230] This provision is binding on Member States and, because of the hierarchy established by articles 103 and 25 of the Charter, it overrides other duties.

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[224] Cantor, van Wijk, Singer, & Bolhuis, 2016, p. 5.
[225] Bruin & Wouters, 2003, p. 5.
[226] Reijven & van Wijk, 2014, p. 252.
[227] Gilbert, 2003, p. 478.
[228] UNSC Res. 1373, para. 3(f).
[229] Charter of the United Nations.
[230] UNSC Res. 1373 para. 2(c).

Are human rights-abiding States safe havens for refugee terrorists? We can picture again our IS fighter from Syria, "seriously considered" to have committed terrorist acts or supporting a terrorist group, while also posing a danger to the present society. A most unwanted presence, but unreturnable nonetheless, because of the prospect of torture in Syrian custody. A perhaps intuitive way for host states to deal with such a person would be to prosecute him or her for the alleged crimes under universal jurisdiction or the principle of *aut dedere, aut judicare* – extradite or prosecute. The intersection of refugee law and criminal law is complex, however.[231] Bruin & Wouters argue that the possibility to prosecute serious offenders is indeed a way to reduce the tension between State's absolute commitment to *non-refoulement* and their responsibility for national security.[232] While it is agreed that this is important, the experiences of prosecuting excluded refugees paints an unpromising picture.

4.5.1 Exclusion and prosecution – the main concerns

Three main difficulties regarding the possibility to prosecute excluded but unreturnable refugees will be raised.

First, the standard of proof required to prosecute, not to mention convict, someone of crimes under article 1F is much higher than what is required to exclude someone from refugee status. For exclusion, "serious reasons for considering" is enough, whereas for criminal conviction, guilt "beyond reasonable doubt" needs to be established.[233] Because exclusion encompass those merely suspected of serious crimes, exclusion cases will always far outnumber the prosecutable cases. The gap between the evidentiary standard in criminal law and refugee law, while reasonable given the different objectives of the two regimes and their possible outcome, is the main reason why prosecution is largely unsuccessful as a solution to excluded but unreturnable, dangerous refugees.

Second, and related: war crimes, crimes against humanity, terrorism – these are complex crimes, and if they are at that perpetrated in another, faraway country, the difficulties of obtaining the required evidence are apparent. As Cryer *et. al.* points out, universal jurisdiction does not equal an obligation on the State where the crime was committed and/or the perpetrator is a national to assist in the investigation or provide

[231] Singer, 2014, p. 1075.
[232] Bruin & Wouters, 2003, p. 6.
[233] Reijven & van Wijk, 2014, p. 255.

evidence.[234] Prosecution is also subject to resource constraints, such as finance and time.[235] It is simply incredibly difficult, time-consuming and expensive to prosecute complex crimes committed in another country. Empirically, prosecution of excluded refugees is rare; for instance, in the Netherlands between 1992 and 2014, the exclusion/conviction rate was only 1.4%, and for countries such as Canada, Belgium and France the number was even lower. [236]

Third, even if prosecution is successful, States have attested that this does not offer sufficient protection for the communities.[237] Certain criminals might serve a short time in prison and then be out again, unremovable. Many States do not employ actual lifetime sentences, which means that prosecution doesn't solve the problem of "housing" dangerous elements, not even those convicted.[238]

The fact that unremovable refugees who are undesirable enough to be excluded – that is, suspected of serious crimes – can walk around free due to lack of evidence is unsettling, perhaps. This is true for all criminals who can't be incarcerated due to insufficient evidence, though. Problematic of course, but natural in a legal system that affords the accused the benefit of the doubt and sets high evidentiary standards for conviction.

Prosecution is an important tool, and the fight against impunity for the worst crimes should not be surrendered just because the fight is difficult. It is far from impossible – Germany, for instance, has been successful in prosecuting war criminals.[239] In a realistic approach to unwanted but unreturnable refugees, however, it needs to be acknowledged that prosecution is very seldom successful. Numbers could improve, perhaps, by additional funding or extended trans-national cooperation, but prosecution alone will never suffice as a measure to deal with unreturnable, dangerous refugees.

4.5.2 A safe haven?

If there are persons suspected of serious criminality who cannot be extradited, not be prosecuted, not be returned, and not put in indefinite administrative detention, then one way of looking at it is that these individuals are, in practice, afforded a safe haven as a

[234] Cryer, R., *An introduction to international criminal law and procedure*, 2nd ed., Cambridge University Press, Cambridge, 2010, p. 60.
[235] Cantor, van Wijk, Singer, & Bolhuis, 2016, p. 10.
[236] *Ibid*, p. 8.
[237] *Saadi v. Italy*, para. 117.
[238] Cantor, van Wijk, Singer, & Bolhuis, 2016, p. 10.
[239] *Ibid*, p. 9.

result of the absolute prohibition of *non-refoulement*. Surely, though, it's not for lack of motivation among States, but rather, reasonable legal obligations and practical issues hamper even the most ambitious prosecution aspirations. To describe this as serious criminals being "afforded" a "safe have" seem misguided. Being able to prosecute but choosing not to for political reasons would amount to affording a safe haven. Overly benevolent sentences might too. But adhering to international commitments such as the principle of *non-refoulement* cannot be interpreted as affording a safe haven.

4.6 Effects on the integrity of refugee law

The last effect of the clash between the Refugee Convention and the absolute prohibition on *non-refoulement* under human rights law to be discussed is a brief note on the respect for, or adherence to, international refugee law.

As we have seen, the drafters considered it crucial to include in the Refugee protection system both a duty to deny refuge under certain circumstances, and the right for States to protect its national security by later ridding themselves of dangerous elements. States appear as convinced of the necessity of this today, if not more. When States lose the right to *refoule*, as they have done through human rights provisions of the absolute prohibition on *refoulement*, by logic of the Refugee Convention they also lose the ability to balance national security concerns against protection needs, as this should only be done under article 33(2). This begs the question of whether human rights law has become too demanding on State's management of refugees?

Hathaway & Harvey argue that "if international refugee law is to command the respect of those tasked with its implementation, a defensible framework for offering and denying protection must be advanced."[240] Unless refugee law is *defensible*, they claim, we risk losing "public confidence in the logic of a duty to protect refugees arriving at their borders."[241] This is convincing, but Hathaway & Foster only relate this to exclusion, to denying protection to those underserving and to fugitives of justice, but why should the same logic not apply as much to the expulsion of recognized refugees who because of their later conduct are unwanted? Refugee law must be defensible in this respect too. National security and public safety are arguably more acute concerns for states than "the integrity of refugee law". The main objective for states when they deny or withdraw a refugee status on account of criminality would arguably be practical, to deny entry to the

[240] Hathaway & Harvey, 2001, p. 318f.
[241] *Ibid.*

territory, or to remove the individual from the territory. Hathaway & Harvey's notion that exclusion is "more fundamentally symbolic"[242] is, I think, too theoretical and out of touch with State policy.

In the light of serious threats to national security, particularly in the form of terrorism, some states have argued that the demands of article 3 ECHR in expulsion cases have become too strict. The UK, intervening on behalf of Italy in the ECtHR case *Saadi v Italy*, claimed that the principle of *non-refoulement* "because of its rigidity" had caused "many difficulties for the Contracting States by preventing them in practice from enforcing expulsion measures."[243] The UK argued that if an expulsion case revolve around threats to national security or public safety emanating from international terrorism, then the approach in *Chahal* – that national security concerns is not material in cases of expulsion and risk of *refoulement* – must be altered.[244] While it is not the intent of article 3 ECHR to make it impossible for States to care for their national security, the absoluteness of the article prevent the balancing between state security and refugee harm that States, for instance the UK, ask to be able to make in expulsion cases. This is the same balancing operation which was seen as natural by the drafters of the Refugee Convention and included therefore in article 33(2). Precluding the use of article 33(2) obviously doesn't make State's security concerns go away – they just move elsewhere, namely into to granting of refugee status, as acknowledged by the CJEU and discussed in section 4.4. A forced division between 'EU refugee status' and 'Convention refugee status' is hardly beneficial for the integrity of refugee law. While State support for the principle of *non-refoulement* is consistently strong, it is not without criticism and complaints.[245] If granting protection to fugitives of justice challenge public support for refugee law, so will a "rigid" principle, derived from treaties not particular to the question of refugees, which produce in effect dangerous non-prosecutable individuals excluded from protection but unremovable and stuck in legal limbo. Surely, a "fundamental system error" must be damaging for the credibility of refugee law. Solutions aimed at solving or mitigating this error and its adverse effects is thus key, and will be explored in the next chapter.

[242] Hathaway & Harvey, 2001, p. 318
[243] *Saadi v. Italy*, para. 117
[244] *Ibid*, para. 122
[245] Cantor, van Wijk, Singer, & Bolhuis, 2016, p. 32

5 Possible solutions

The universal and absolute prohibition of torture and ill-treatment reflects the recognition that such abuse dehumanizes not only its victims, but also its perpetrators and, ultimately, any society in which such practices are knowingly tolerated. Torture and ill-treatment inflict lasting trauma, cripple all bonds of humanity and seriously damage entire communities.[246]

In extreme and genuinely exceptional cases, the usual considerations of humanity must yield to the critical security interest of the receiving state.[247]

Chapter 2 described the concept of *non-refoulement* in international law. Chapter 3 examined the rationale behind exclusion from refugee protection, and the substantive requirements as provided by the Refugee Convention. Comparing the concepts, Chapter 3 ended with the conclusion that the provisions on exclusion and expulsion in refugee law, on the one hand, and the absolute prohibition of *refoulement* in human rights law, on the other hand, appear to clash. Chapter 4 explored the consequences of this clash. On an individual level, it was found that unreturnable refugees often end up in legal limbo, facing profound socio-economic hardship. For the State, we saw difficulties in protecting the communities from dangerous elements due to the diverging standards of proof in refugee and criminal law, creating not a "safe haven" per se, but a precarious situation nonetheless. On a systemic level, we saw the clash described as a fundamental system error and noticed how the clear division of labor between articles 1F and 33(2) is lost, giving rise to State's concerns for national security being muddled with the refugee definition. We also saw how some States question the rigidity of a broad, absolute prohibition on *refoulement*.

Scholars and practitioners have recognized that there is no coherent solution to the problem of undesired but unreturnable refugees.[248] In an EU context, the issue has been known for a good 20 years without a comprehensive solution being reached. This chapter will nevertheless discuss possible solutions to the issues identified in chapter 4.

5.1 Temporary residence permits to avoid legal limbo

As discussed in section 4.3, having undesired but unreturnable refugees in legal limbo seem problematic for both the State and the individual. It must be stressed again that if a refugee status is revoked on account of post-admission criminality, as is the practice in

[246] *Interim Report of the UN Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment: Note by the Secretary General, 2019*, UN doc. A/73/207, para. 3.
[247] Hathaway, 2005, p. 352.
[248] For instance, Cantor, van Wijk, Singer, & Bolhuis, 2016, p. 2; Reijven & van Wijk 2014, p. 50; Singer, 2017, p 10.

the EU, the individual retains his or her status as a Convention refugee and the rights attached to it. If a residence permit is not provided, though, significant rights such as the right to employment, housing and social services may still be stripped. Section 4.2 showed that not all States leave their unreturnable refugees in legal limbo. Germany, UK, Norway, and Sweden provide temporary residence permits and accordingly allow unreturnables to work.[249] The permits are combined with both regular review of the possibilities to remove the individual – in the perhaps unlikely but not impossible event that the situation in the country of origin changes for the better – as well as a future possibility of permanent status.[250] This must be the preferred way compared to the approach in the Netherlands, France, Denmark, and Belgium, for three reasons mainly.

First, it is simply irrational that someone who is present in a State because his or her removal is barred for human rights reasons cannot legalize the stay. To first be considered in need of protection from harm and then in effect punished because an order to leave the country is not complied with, is deeply unsatisfying.

Second, from a humanitarian point of view, it is unacceptable to leave people in the state of socio-economic deprivation that Bond and Reijven & Wijk describe. It should also be noted than in a European context, the ECHR must be observed and applies equally to all individuals within member states jurisdiction. The material standards discussed in *M.S.S. v Belgium & Greece*, if applicable in situations of expulsion to another country should be *a fortiori* applicable to people present on State territory. Article 3 and its absolute prohibition on inhuman and degrading treatment must not be overlooked domestically.

Lastly, having individuals who are excluded on suspicion of serious crimes go underground as undocumented migrants, unable to work or provide for themselves, is hardly an attractive outcome from the State's point of view. A dangerous individual is no less dangerous when turned into a depressed, unemployed, poor, and perhaps sick outcast of society.

Providing residence permits for individuals who cannot be removed is thus the preferred option. Because the protection offered by articles 3 ECHR and CAT is temporary in nature, it's natural that the residence permit offered is temporary as well. However, as Bond notes, temporary permits affect work and housing options too.[251] A right to employment is less meaningful if access to work is virtually barred in practice, as

[249] Cantor, van Wijk, Singer, & Bolhuis, 2016, p. 6.
[250] *Ibid.*
[251] Bond, 2017, p. 185.

it may be for an excluded and merely tolerated ex-refugee suspected of serious crimes. After years or even decades on a temporary permit, permanent status should be considered, as it is in Germany, the UK, Norway, and Sweden.[252]

Affording unreturnables temporary residence permits is also in line with recent developments in human rights law. Gil-Bazo notes a trend in which international human rights monitoring bodies are paying more attention to the question of status for unreturnables.[253] In *Aimei v Switzerland*, the CAT acknowledged that a breach of article 3 does not affect the decision on status, but the State party has a "responsibility to find solutions that will enable it to take all necessary measures to comply with the provisions of article 3."[254] In another case, the Committee specified the responsibilities under article 3 further, claiming that the granting of an extended temporary permit (in this case, for medical treatments) was *not sufficient* to fulfil the obligations under article 3.[255] Indeed, solutions should be durable and part of a holistic policy rather than ad-hoc, but demanding more than an extended temporary permit seems extensive. If the ECtHR was to follow suit, it would mean that an already implied duty not to *refoule* comes in turn with an implied duty to afford the nonreturnable something *more* than a temporary residence permit. Given that many States today afford even 'regular' refugees only temporary permits, such a duty would likely be met with resistance.

Are temporary residence permits too favorable? Perhaps people who are suspected of or have committed serious crimes deserve no more than to be stripped of every possible right. If they can't be deported, then at least the stay should be "as unpleasurable as possible", to quote the UK. For one, basic human rights and a decent humanitarian standard is hardly something that must be earned, and furthermore, undesirable but unreturnable refugees are a heterogenous group.[256] Far from all are presently dangerous. Norway attest that in its experience, the majority of persons excluded under article 1F will not cause problems or issues for the host State, on the contrary they "live perfectly quiet lives."[257] The welcomed prospect of unreturnable individuals living a perfectly quiet life without causing trouble must be expected to increase if they can work and are not considered an illegal presence.

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[252] Cantor, van Wijk, Singer, & Bolhuis, 2016, p. 6.
[253] Gil-Bazo, 2015, p. 33.
[254] CAT, *Seid Mortesa Aemei v Switzerland* (1997) Comm. No 34/1995, para. 11.
[255] CAT, *A.D. v Netherlands* (1999) Comm. No 96/1997, para. 7.3, emphasis added.
[256] Cantor, van Wijk, Singer, & Bolhuis, 2016, p. 4.
[257] *Ibid*, p. 16.

5.2 Decreasing the number of unreturnables through diplomatic assurances

One way of decreasing the number of unwanted but unreturnable refugees is to make more returns acceptable from a human rights perspective. A way of doing this is through diplomatic assurances from the country of origin, guaranteeing that the returnee will not suffer treatment contrary to article 3. This is obviously an uncertain mitigating mechanism, and the growing use of diplomatic assurances, particularly in cases regarding national security and alleged terrorists, has been criticized by a number of NGOs, for example Human Rights Watch.[258] As the Canadian Supreme Court stated in *Suresh v Canada*, it would be difficult to rely "too heavily on assurances by a State that it will refrain from torture in the future when it has engaged in illegal torture or allowed others to do so on its territory in the past."[259] The ECtHR reached the same conclusion in *Chahal v UK* – while not doubting the good faith of the Indian government who gave the assurances, against the background of the situation of human rights violations in India, demonstrated for instance by the UN Special Rapporteur on Torture, the assurances given were not persuasive enough.[260] A notorious case of failed diplomatic assurances is *Agiza v Sweden*, where diplomatic assurances given by Egypt, and relied on by the Swedish government in the course of a heavily criticized expulsion case involving the CIA, proved false, and Sweden was found to have breached article 3 of CAT.[261]

The ECtHR accepts that diplomatic assurances can at times enable a return otherwise precluded by article 3. The Court pronounced in *Saadi v Italy* that "the weight to be given to assurances from the receiving State depends, in each case, on the circumstances obtaining at the material time."[262] In *Othman v the United Kingdom*, regarding a high profile Islamist facing return to Jordan, the Court did find the diplomatic assurances given by Jordan to be sufficient, meaning that the return would not expose the applicant to a real risk of ill-treatment.[263] While the circumstances were indeed very different from those in *Agiza*, the Court's ruling is still questionable. It concluded that torture in Jordan was "as consistent as it is disturbing" and that the use of it was "routine and widespread",[264] but went on to state that only in rare cases will the "general situation in a country mean that

[258] Human Rights Watch, *Still at risk: diplomatic assurances no safeguard against torture*, accessed March 17 2021, https://www.hrw.org/report/2005/04/14/still-risk/diplomatic-assurances-no-safeguard-against-torture
[259] *Suresh v. Canada*, para. 124.
[260] *Chahal v. the United Kingdom*, paraa. 104-105.
[261] *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, CAT/C/34/D/233/2003, para. 13.4.
[262] *Saadi v. Italy*, para. 148.
[263] *Othman (Abu Qatada) v. the United Kingdom*, app. no. 8139/09, ECtHR, para. 205.
[264] *Ibid*, para. 191.

no weight at all can be given to assurances".[265] This is in stark contrast to, for instance, The UN Special Rapporteur on Torture, who has found diplomatic assurances to be "unreliable and ineffective in the protection against torture" and "not legally binding, therefore they carry no legal effect and no accountability", and they should, in conclusion, not be resorted to as a safeguard against torture or ill-treatment upon return.[266] I would argue that diplomatic assurances, given the practically unavoidable risk and the seriousness of the irreparable nature of harm caused by torture, is a very limited, and as a rule undesirable, strategy to rely upon when approaching the issue of unwanted but unreturnable refugees.

5.3 Using administrative detention to address serious threats to national security and public safety

In section 4.5, the legal and practical challenges pertaining to prosecution of excluded refugees were discussed. The prosecution rate was found to be incredibly low. In the Netherlands only 1.4% of the 1F excluded refuges were prosecuted between 1992 and 2014, and correspondingly 98.6% of these suspects of serious crimes were not prosecuted. Being "seriously considered" to be serious criminals, some of them might pose a threat to national security and public safety. Given the very real danger such individuals may pose and the duty to not create safe havens, it is unsurprising that some advocate for the possibility of prolonged, if not indefinite, administrative detention.

Administrative detention, known also as security or preventive detention, is an incarceration resulting from an administrative decision, as opposed to a penalty for someone who has been convicted of a crime by a competent court.[267] Detention is inherently a far-reaching measure, and should therefore be seen as a last resort, employed only when less interfering measure fail to achieve the stated aim.[268] Less interfering measures could be reporting duties, electronic monitoring devices, monitoring of phones and correspondence, house custody, prohibition on leaving a designated region, etcetera, which have all been suggested and practiced in response to unreturnable excluded refugees.[269] Sometimes though, confinement may be the most

[265] *Ibid*, para. 188.
[266] *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN doc. A/60/316, para. 51.
[267] Bantekas, I., & Oette, L., *International human rights law and practice*, third edition, Cambridge University Press, Cambridge, 2020, p. 385f.
[268] Rainey, B., Wicks, E., & Ovey, C., *Jacobs, White and Ovey: the European convention on human rights*, Seventh edition, Oxford University Press, Oxford, 2017, p. 242.
[269] Bond, 2017, p. 184.

appropriate response. Hathaway even consider unlimited detention: "the practice of some States to give dangerous refugees the option of indefinite incarceration in the asylum State as an alternative to *refoulement* is therefore one mechanism to be considered, since it protects the host community, yet averts the risk of being persecuted."[270] This is a bit unexpected, as indefinite detention doesn't seem compatible with other responsibilities; the HRC, for instance, has found Australia's use of indefinite detention of refugees to be a violation of international human rights law.[271] Even for shorter periods of detention, it seems like the ECHR complicates the matter yet again.

Preventive detention is generally not prohibited by international human rights law, with the exception of the ECHR.[272] In the context of the ECHR, a detention is only lawful if it falls within any of the subparagraphs in article 5, which guarantee the right to liberty and freedom.[273] The relevant provision in relation to asylum seekers and refugees is subparagraph 5(f), which allows for the detention of persons against whom "action is being taken with a view to deportation". Reasonably, the cited requirement will usually not be met when deportation is barred because of risk for ill-treatment in the receiving State.[274] There are no active attempts to remove such a person, save for perhaps continuous review of the circumstances in the country of origin, which the ECtHR has considered doesn't qualify as "action being taken".[275] This means that the detention of a dangerous refugee who cannot be removed because of the principle of *non-refoulement* generally cannot be based on article 5(f) ECHR. As such, the detention does not fall within the categories stated in article 5 and is therefore unlawful.

A possible way around this is to derogate from the obligation altogether. Article 5 may, according to article 15, be derogated from entirely in times of emergency. Following the 9/11 terrorist attacks, many States have done just that, enabling prolonged administrative detention of real or perceived terrorist suspects, and others.[276] This was in fact the recommended course of action in the EU Working Paper from 2001: because the envisaged extent of detention would likely breach article 5(f) of the ECHR, since no action is being taken when deportation is barred by *non-refoulement*, States could opt to derogate from the obligation to make long-term detention lawful.[277]

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[270] Hathaway, 2005, p. 352.
[271] HRC, *F.J. et al. v. Australia*, No. 2233/2013, 18 April 2016, para. 10.3.
[272] Bantekas & Oette, 2020, p. 385.
[273] Rainey, Wicks, & Ovey, 2017, p. 240.
[274] *A. and Others v. the United Kingdom*, app. no. 3455/05, ECtHR, para. 167.
[275] *Ibid*, para. 167.
[276] See, for instance, *A and others v. United Kingdom*.
[277] Commission of the European Communities, 2001, p. 15.

Even if action is somehow taken in view of deportation and derogation is avoided, relevant procedural safeguards must be observed, and measures need to be proportionate. In this regard, the ECtHR have been surprisingly generous: in *Chahal*, the Court found over 6 years of pre-deportation detention to not breach article 5.[278]

Derogating from the right to liberty is legally possible, and sometimes surely necessary, but it is an extraordinary measure, reserved for emergencies. It should be stressed that an individual who is administratively detained is still deprived of his or her freedom, under circumstances that are closely resemblant of regular imprisonment. These people are not convicted of any crime, or they are and have already served their time, and should therefore be considered innocent or having already atoned. Additionally, the very broad definitions of "terrorism" and "support for terrorism" is inherently abusable – "one man's terrorist is another man's freedom fighter" is perhaps a cliché, but counter-terrorism legislation has undeniably allowed for more repressive measures and has been misused to curb political opposition and capture those perceived as troublemakers.[279] Furthermore, when national security is at stake, oftentimes the material on which the detention decision was based will be confidential, making it difficult to review or challenge. This is a general concern of course, not specific to exclusion cases, but a relevant caveat, nonetheless.

It is indisputable that excluded but unreturnable refugees sometimes pose a serious risk to security and safety. It is therefore obvious that States need tools beyond prosecution to address dangerous elements and protect their communities from harm. But unless an ECHR Member State can show that actions are being taken with a view to deportation, article 5(f) does not apply, and derogation will be necessary. Derogating from a fundamental right to facilitate detention is a measure that should be approached with outmost caution.

5.4 Challenging the nature of the principle of *non-refoulement*

The main culprit behind the creation of undesirable but unreturnable refugees is in a sense the absolute nature of *non-refoulement*, as it is this rigid prohibition that bar even the most legitimate deportation ambitions. It is also the principle of *non-refoulement* under human rights law that has put the logical relationship between articles 1F and 33(2) of the Refugee Convention out of order. One way of solving the problem would therefore

[278] *Chahal v. the United Kingdom*, para. 123.
[279] Sing Juss, 2012a, p. 495f.

be to reject an absolute principle of *non-refoulement* and return to the original version in article 33(2). This would enable more returns, and thus fewer undesirable refugees would be unreturnable. Another way would be to challenge the wide scope of the principle, as interpreted by the ECtHR, in favor of a more limited version that only prohibit removal to risk of torture, not ill-treatment. If there is no protection against ill-treatment, more returns would be lawful, and fewer refugees unreturnable. These two narrower versions of the principle of *non-refoulement* will be explored respectively below.

5.4.1 Challenging the absolute nature

The case for a non-absolute principle of *non-refoulement* is supported by at least the original signatories to the Refugee Convention, the Canadian Supreme Court in *Suresh v Canada*, arguing that expulsion to torture might at times be justified,[280] the UNGA Declaration on Territorial Asylum, and the UK intervening on behalf of Italy in *Saadi v Italy*.[281] We remember from section 2.1.1 that the drafters of the Refugee Convention saw it as natural to include limitations to the prohibition of *refoulement*, or else States would think twice before granting asylum, and before acceding to the Convention.

The fact that a non-absolute principle of *non-refoulement* is what was originally envisioned by the drafters of and original signatories to the Refugee Convention is compelling. In the context of expulsion of refugees, the Refugee Convention is *lex specialis*. When drafted, the considerations discussed and examined were pertaining to the protection of refugees in particular. It is a deliberate and fine-tuned account of State's responsibilities towards people in need of refugee protection. Human rights treaties primarily regulate the State's conduct towards its own citizens. As the UK argue in *Saadi*: "The Convention [ECHR] did not guarantee the right to political asylum. This was governed by the 1951 Convention relating to the Status of Refugees, which explicitly provided that there was no entitlement to asylum where there was a risk for national security or where the asylum seeker had been responsible for acts contrary to the principles of the United Nations."[282] It's not surprising that States, when dealing with refugees, wish to rely on provisions in a Convention governing this matter precisely, rather than being limited by a more general Convention obligation. Lauterpacht & Bethlehem claim that we cannot fetter Article 33(2) to the conception of

[280] *Suresh v. Canada*, para. 78.
[281] *Saadi v. Italy*, para. 122.
[282] *Saadi v. Italy, para.* 119.

the drafters,[283] but perhaps that version is more persuasive and better suit present day conditions, including serious threats of terrorist attacks. At least so it has been argued.

In *Saadi*, the UK held that the line in *Chahal* – that national security concerns, even in light of terrorist threats, never motivates expulsion if there is risk for *refoulement* – should be abandoned. The UK argued, correctly, that this line was contrary to the intentions of the signatories of the Refugee Convention.[284] Terrorism, the UK further claimed, seriously endangers the enjoyment of the right to life, which is the foundation of all human rights and a precondition for the enjoyment of other rights and freedoms, and States must be able to use immigration legislation to protect themselves from such threats.[285] Thus, the threat a person presents should be allowed to be weighed against the possibility and the gravity of the ill-treatment that person would face if deported.[286]

It's tempting to agree with this. Absoluteness does inevitably come with a loss of nuance. But if the absolute nature is abandoned, and balancing permitted, what is a fair balance between State security and risk of torture? When the Canadian Supreme Court does not rule out that deportation to torture might be justified "in exceptional circumstances"[287] – what are the circumstances referred to more precisely? The Court does not specify this, simply asserting that the balance will "rarely" be struck in favor of deportation to torture, and the ambit of these exceptional circumstances "must await future cases."[288] Does being an IS fighter warrant deportation to torture? While it is a convincing statement that balancing can "sometimes" be necessary, it is less clear when, if ever, a fair balance would point in favor of deportation to torture. Moreover, Vedsted-Hansen point out that "all relevant facts" will rarely be known – this is what hamper prosecution – and thus balancing them may not be a realistic ambition.[289]

Rejecting a rigid prohibition of *refoulement* is a possible solution to the problem of undesirable bur unreturnable refugees. It unties the knot between exclusion under refugee law and *non-refoulement* under human rights law. It enables more returns of unwanted refugees. However, a non-absolute prohibition ultimately offers more State flexibility to the detriment of refugee protection, and while in line with State concerns, it is out of tune with the rising human rights standards.

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[283] Lauterpacht & Bethlehem, 2003, p. 132, para. 157.
[284] *Saadi v. Italy*, para. 122.
[285] *Ibid*, para. 119.
[286] *Ibid*, para. 122.
[287] *Suresh v. Canada*, para. 78.
[288] *Ibid.*
[289] Vedsted-Hansen, 2011, p. 59.

5.4.2 Challenging the wide scope

Perhaps the problem is rather that the principle of *non-refoulement* is both absolute and wide in scope. Is it reasonable that a serious risk of material deprivation can bar expulsion of a mass murderer? The rigidity might be more acceptable if the scope was narrowed to include only torture, as defined in the more limited article 3 CAT-version. If a serious risk of torture – severe pain or suffering intentionally inflicted by a person acting in some kind of official capacity – is established, removal would be barred in absolute terms, "however undesirable or dangerous" the refugee might be. As a trade of, removal would never be barred by serious risk of persecution or ill-treatment, such as material deprivation, generalized violence, or poor health.

The broadening of acts or circumstances amounting to ill-treatment under article 3 ECHR has been criticized in the literature. Greenman argue in favor of a restricted scope, even claiming that the prohibition of *refoulement* lacks a solid legal foundation in the ECHR altogether.[290] The UK argued along these lines in *Saadi*, questioning the wide scope of an implicit obligation, and challenging the fact that not only "extremely serious forms of treatment, such as torture" was prohibited by article 3 ECHR, but also the "relatively general concept of 'degrading treatment'".[291] It is debatable whether the concept of degrading treatment is in fact "relatively general"; the requirements that the ECtHR has established so far have, while indeed covering new types of circumstances, been set incredibly high. Ill-treatment is rightly a wide concept since the reality of human suffering is much wider and immensely more complex than what can possibly be captured by a narrow torture definition. As Grahl-Madsen accurately claimed, "it seems clear that if a person will be excluded from institutions of higher learning in his home country for political reasons, this will affect his whole life much more profoundly than a relatively short term of imprisonment".[292] Torture represents an inexcusable, barbaric form of treatment, the *jus cogens* status of its prohibition is indeed well earned, but other types of treatment can be if not as, then nearly as egregious. Protracted destitute can be life-defining for whole families, for generations.

That said, it is understandable that it may come across as offensive or unbalanced to protect a notorious terrorist against deportation to poor conditions in a refugee camp, to paraphrase the outcome in *Sufi & Elmi*. To command respect, the principle of *non-*

[290] Greenman, K., "A Castle Built on Sand? Article 3 ECHR and the Source of Risk in *Non-Refoulement* Obligations in International Law", *International Journal of Refugee Law*, 2015, Vol. 27, No. 2, p. 265.
[291] *Saadi v. Italy*, para. 121.
[292] Grahl-Madsen, A., *The Status of Refugees in International* Law, Sijthoff, Leiden, 1966, p. 215.

refoulement must be reasonable. Maybe – and this is but a careful, whispered thought – maybe excluded refugees have brought the prospect of removal upon themselves through their conduct, and should therefore be so lucky to at least not be sent back to outright torture. Maybe. If weight is to be given to the vision of the Refugee Convention's drafters, it's worth noting that the scope of *non-refoulement* under article 33(2) is even wider, covering also persecution that does not amount to degrading treatment. However, the principle's wide scope is compensated by not being absolute. Maybe a principle of *non-refoulement* that is to command the respect of those assigned to implement it cannot be both rigid and wide in scope.

Even with a narrower principle of *non-refoulement* in terms of treatment that is prohibited, States would still be faced with dangerous persons who cannot be removed because of overriding human rights obligations, as the prohibition on removal to torture would still be absolute and not yield to appeals to national security. It would, however, reduce the quantity of unremovable cases as removal to ill-treatment would be permitted. For the individual, the protection is clearly circumscribed compared to the fuller version that include ill-treatment. This version too would thus represent a step back protection wise. Perhaps, though, reserving the absolute prohibition for the absolute worst treatment is a fair compromise between protection and national security.

6 Conclusions

Based on the results and discussions in the previous chapters, I draw four key conclusions regarding excluded or unwanted refugees who are unreturnable due to an overriding obligation not to *refoule*. These will be advanced below.

6.1 The principle of *non-refoulement* should be absolute in nature

It appears as if the rigidity of the principle of *non-refoulement* is what bother States the most when they are faced with unwanted refugees. Threats to national security *must* at times be allowed to trump a need for protection, it is implored. We cannot have a dangerous IS fighter who is excluded from protection but not prosecutable remain on the territory, right? This is no doubt a persuasive rhetoric, illustrating indeed a serious issue. However, like other non-derogable human rights, however, the principle of *non-refoulement* is about setting a minimum standard. It seems important to not just rely on the absoluteness of the principle of *non-refoulement* and state it as a mere legal fact. We must motivate compellingly *why* the prohibition is, and must continue to be, absolute.

I agree with the ECtHR when it asserts that the prohibition of torture and ill-treatment "enshrines one of the fundamental values of the democratic societies."[293] I will argue that the absolute prohibition of *refoulement* is a necessary consequence of decency and humanism. It has nothing to do with whether a returnee is deserving of such a generous treatment or not. Surely at times they are far from it, but progressive, human rights-oriented States do not take part in the facilitation of torture or ill-treatment in any way whatsoever, however heinous the crime. We reject talion law, an-eye-for-an-eye, meaning that even those who torture others do not themselves deserve to be tortured. We set a standard for human rights, applicable to all, and no one, however undesirable or dangerous, must be treated subpar that standard. There is no satisfying, philosophically defendable way around an absolute prohibition of torture and ill-treatment that does not also include by necessity an absolute prohibition of *refoulement*. Because a deportation is an active measure taken by the State, deportation to torture or ill-treatment is an active enablement of, or contribution to, such treatment. That cannot be acceptable. The very small number of excluded but unremovable refugees are a tolerated presence, simply because the alternative is worse. Actively subjecting a person to torture or ill-treatment through deportation is worse. Of course. We might venture

[293] *Soering v. the United Kingdom*, para. 88.

into "but, maybe"-thoughts when we hear of gruesome acts and unforgivable crimes which we can't even hold the person accountable for, but upon closer consideration, nothing motivates subjecting someone to torture or ill-treatment.

It was asked earlier in the thesis why it is practically self-evident that someone can be unworthy of refugee protection but not unworthy of protection against *refoulement*. This is why – you cannot ever be deserving of torture; therefore, you cannot be undeserving of protection against it. We do not go below the minimum standard guaranteed to everyone. The granting of refugee status is a positive obligation, States are required to recognize individuals who meet the criteria as refugees and to treat them accordingly. *Non-refoulement* however, is in essence a negative duty to refrain from doing something. As Vedsted-Hansen puts it, "contracting States are able to fulfil their obligations under Article 3 in this regard by simply staying passive, refraining from carrying out the disputed measure of expulsion."[294] We do not go below the minimum standard guaranteed to everyone, in any way whatsoever. The question of whether human rights law is interfering too much with refugee law seem absurd when really, what it has done is recognized refugees as humans, entitled to the same absolute rights as anybody.

Lastly, we like to picture the ideal refugee, a Plato's version of "the Refugee", someone who is innocent and noble, a harmless victim of injustice and oppression, hard-working and eternally grateful for the sanctuary given. Such standards are both unfair and unrealistic. We must accept that the same one person can be both a victim of human rights abuses and a perpetrator of human rights abuses. If we accept this, it is perhaps less paradoxical that someone can be fundamentally undeserving of protection under one instrument while eligible for protection under a different instrument.

6.2 The principle of *non-refoulement* should cover ill-treatment

For the previous segment to be valid, there needs to be some limits to the expansion of the principle of *non-refoulement*. Its rigidity is motivated by the fact that it protects against only the worst treatment, treatment that no one is ever deserving of – a minimum standard which we do not go below. To command respect and to come across as well-balanced when related to other key interests, I agree with Greenman who argues that it is essential that some "proper limits on the scope of the principle of *non-refoulement*" are

[294] Vedsted-Hansen, 2011, p. 58.

established.[295] Greenman argues from the point of view that the implicit prohibition of *refoulement* in the ECHR lacks a legal foundation, with which I disagree. An implicit prohibition of *refoulement* is a necessary and logical consequence of the absolute nature of Article 3. It is true, however, that the scope must not be allowed to stretch so much that the principle is watered down. Luckily, there is little to suggest that this is happening.

Torture, as defined in article 1 of the CAT, covers the comparably particular circumstance where a State official inflicts severe physical or mental harm for the purpose of punishment, intimidation or obtaining information. There is a tremendous amount of very serious human suffering that falls outside of that scope. As long as the requirements remain high, as they are today, the absolute prohibition of *refoulement* should protect against inhuman or degrading treatment or punishment as well. Even by that standard, the vast majority of actual human suffering that people experience will *not* be covered. Any asylum lawyer will likely attest to the fact that it is extremely difficult to successfully bar expulsion through an ECHR article 3-claim. The standards established under, for instance, *Paposhvili v Belgium*, *Sufi & Elmi v the United Kingdom* and *M.S.S v Belgium and Greece* are incredibly high. When those high standards are met, subjecting someone to "a significant reduction in life expectancy" or "the most extreme material poverty" will indeed be tantamount to torture, and thus, active contribution to such treatment should be prohibited in absolute terms.

It is inherently difficult to compare and weigh different sufferings against each other. Not all human sufferings should, or can, be cover by the absolute prohibition on ill-treatment. However, not recognizing that other types of treatment come very close to torture risks rendering the concept less relevant and out of step with the wider human rights development. To quote Gilbert: "ignoring the developments in international human rights law since 1951 renders international refugee law peripheral. Protection of the individual is an overriding principle in the implementation of international law and for international refugee law to maintain a policy based on an anachronistic understanding thereof, leaves it open to a charge of redundancy."[296] To not be peripheral or anachronistic of the general development and raised human rights standard, a prohibition on torture and inhuman or degrading treatment or punishment should cover circumstances of actual, severe sufferings, regardless of whether it resembles "ordinary" torture or not.

[295] Greenman, 2015, p. 296.
[296] Gilbert, 2003, p. 478.

An absolute prohibition of *refoulement* at times overrides legitimate concerns for security and safety. Doing so, the scope cannot be too wide, the conduct covered needs to reach, as the ECtHR has confirmed, a "minimum level of severity".[297] This minimum standard should be set high so that it doesn't water down the connotations of ill-treatment. It remains to be seen if the ECtHR or any other monitoring body will lower the severity threshold to that extent in the future.

6.3 Securitization, broad definitions of criminality and the expansion of exclusion is more alarming than the expansion of *non-refoulement*

Initially, the thesis presupposed an expansion of the scope of *non-refoulement* that was at least in part problematic. However, by exploring the subject further, the expansion of *non-refoulement* appears to fade in comparison to State practice regarding *refoulement* and the expansion of exclusion[298] and excludable acts. This is not least so in measures implemented to combat terrorism. A 1996 UNGA Declaration, for instance, provide that UN Member States should ensure that asylum seekers are not suspected or convicted of "offences *connected* with terrorism".[299] The wide range of conduct covered by these types of notions, and the wide range of support or participation that is criminalized in national legislation, risk making alleged offenders of minor misdemeanors excludable.[300] Simeon argue that the "prioritisation of security and the proactive measures taken to address internal and external terrorist threats" has had an "especially pernicious effect on those who sought asylum".[301] Similarly, Syring criticize legislations that include language "that excessively broadens the scope of what may constitute terrorism, thus, leading to exclusion from refugee status of numerous persons who otherwise would have a legitimate claim to protection".[302] Former High Commissioner for Refugees, António Guterres, has claimed, probably correctly, that embedded in the frequent use of terms like national sovereignty and national security is

[297] *Soering v. the United Kingdom*, para. 10.
[298] Cantor, van Wijk, Singer, & Bolhuis, 2016, p. 17.
[299] UNGA, *Declaration to Supplement the 1994 Declaration on Measures to Eliminate International terrorism*, A/RES/51/210, Annex para. 3. Emphasis added.
[300] Saul, 2004, p. 2.
[301] Simeon, J., "Complicity and culpability and the exclusion of terrorists from Convention Refugee Status post 9/11", *Refugee Survey Quarterly*, 2011, vol. 29, no. 4, p. 104.
[302] Syring, T., "Protecting the protector or victimizing the victims anew? 'Material support of terrorism' and exclusion from refugee status in U.S. and European Courts", *ILSA Journal of International and Comparative law*, 2012, vol. 18, no. 2, p. 599.

often a populist wave of anti-foreigner sentiment.[303] Sing Juss quotes the UNSC resolution 1373 as being a "tyrant's dream" the way that it has paved the way for repressive regimes to phrase oppression of internal dissent in counter-terrorism rhetoric.[304] Hathaway and Foster worry that article 1F(c) has become "a ravenous omnivore".[305] The absence of an international refugee court and universal definitions of terrorism and "serious non-political crimes", combined with a securitized approach to migration and asylum with push-backs and closed borders, the increased use of exclusion, and an "anti-foreigner sentiment", are genuinely harmful to refugee protection – much more so than the threat to national security and public safety is harmed by an arguably wide and rigid principle of *non-refoulement*.

Unwanted but unreturnable refugees is as we remember, a small group in terms of volume, although expected to increase. Within this group, an even smaller number of people are currently and actively dangerous. It is furthermore unrealistic to expect a zero tolerance on dangerous elements in society. Citizens are also dangerous, and they are always unremovable. When States are faced with unreturnable refugees who are serious security threats, they do have a quite an assorted toolbox at their disposal, containing both the ordinary criminal system and universal jurisdiction and international tribunals, as well as the principle of *aut deder, aut judicare*, diplomatic assurances, and the possibility of administrative detention and derogation if necessary. Together, these measures should mitigate any risk for "safe havens".

Saul makes a critical point: "There is little evidence that international refugee law has been misused by suspected terrorists to gain admission to other States or as a means of safe haven."[306] He continues: "terrorists are far more likely to pursue illegal migration channels to infiltrate a State than to use asylum procedures. Asylum seekers are subject to rigorous identity and security checks, document verification, administrative scrutiny and suspicion of credibility, and, in some States, mandatory administrative detention."[307] This is a crucial point to make, and it begs the question of whether an increase in exclusion reflects the fact that more unworthy individuals apply for asylum, or whether States simply consider more individuals who apply for asylum undesirable. Saul insists

[303] A. Guterres, Remarks at the Opening of the Judicial Year of the European Court of Human Rights, Strasbourg, 28 January 2011 [1], accessed March 17 2022, https://www.unhcr.org/admin/hcspeeches/4d4693259/antonio-guterres-united-nations-high-commissioner-refugees-remarks-opening.html
[304] Sing, Juss, S., 2012a, p. 495f.
[305] Hathaway & Foster, 2014, p. 594.
[306] Saul, 2004, p. 12.
[307] *Ibid.*

that we "reject unwarranted linkages between terrorists and asylum" and firmly hold that "refugee law does not provide safe haven for terrorists and does not prevent prosecution of suspects."[308] Unwarranted linkages between terrorists and asylum demonstrates the power of narrative. It must not be overlooked that post 9/11, the narrative pertaining to refugees has largely revolved around danger, threats, and security, with a focus on the adverse sides of refugee "influx". Europe is as of this very moment experiencing the largest refugee crisis since the second World War, and the narrative pertaining to these Ukrainian refugees is less antagonistic. Humanitarianism, solidarity, and sympathy suddenly triumph over security and sovereignty. Whether some of these refugees will turn out to be undesirable but unreturnable seem immaterial at this point.

As the UNHCR has stressed, "security and refugee protection are not mutually exclusive. An important starting point is to recognize that refugees are themselves fleeing from persecution and violence, including terrorist acts."[309] Indeed, this should be the presumption, as nothing suggests that terrorists routinely abuse the asylum system. If they do, States must respond within the boundaries that international law set. The hardship that States face when unable to return unwanted criminals is marginal compared to the hardship that the 84 million forcibly displaced people in the world face if they are denied protection on vague, dubious grounds.

6.4 Judicial review and procedural safeguards might be most important

Considering the foregoing section, a comment will be given on the unmistakable importance of judicial review and procedural safeguards. In times of emergency, danger, crisis, war, conflict, and unrest – legitimately concerning as they might be – the respect for human rights notoriously declines.[310] Terrorist violence constitutes a real, and grave, threat to the enjoyment of human rights, indeed, and in dangerous times governments need more leeway to fulfill their duties towards its citizens. Unfortunately, or consequently, times of emergencies are also especially prone to manipulation and politicization. It has been stated here that the respective requisites in the discussed provisions will not be analyzed in any depth, because there "are simply too many vague, ambiguous, and contested concepts contained in the relevant rules". But the burning

[308] Saul, 2004, p. 12.
[309] UNHCR, *A guide to international refugee protection and building state asylum systems*, 2017, Handbook for Parliamentarians N° 27, p. 73.
[310] Criddle & Fox-Decent, "Human rights, emergencies and the rule of law", *Human Rights Quarterly*, 2012, 34, p. 5.

issue may lie precisely in these vague and contested concepts. Who is a terrorist? What is a terrorist organization, and what is a legitimate group fighting for a justifiable cause? Who is a peaceful protester? Who is not peaceful but still just a protestor? When does an administrative detention cease to be proportionate? Designations such as "terrorist", "supporting terrorism", "terror organization", or for that matter "serious non-political crimes", lacking universal definitions as they do, are inherently stretchable and thus need to be subject to scrutinizing judicial review, and the practices surrounding them need to be accompanied by rigorous procedural safeguards. Courts play a crucial role in helping to keep the much-desired balancing operations just that – balanced, and fair. Access to court and effective remedies is imperative for any alleged criminal. The emphasis here is on national courts and national procedures – as the ECtHR pointed out in *Othman v the United Kingdom*, it is "no part of this Court's function to review whether an individual is in fact such a threat" as claimed by the UK.[311] Who can be excluded, who qualifies as a supporter of terrorism, who can be put under surveillance, who is a threat to national security, what is a "serious" crime, what is "serious reasons for considering", who can be rejected because of credibility, which countries of origin are considered safe, what is a sufficient diplomatic assurance – these and similar questions are likely more important for refugees at large. And as Costello point out, the ECtHR is not and should not ever become a "surrogate refugee court"; adjudication in national courts, the academic discussion, and grassroots organizations activism remain more important for the development of refugee protection.[312] Singh Juss notes that courts in the EU have generally been successful in "pushing back the more repressive measures" imposed or aspired by States to counter terrorism and other criminality.[313] This is laudable. Rigorous procedural safeguards and access to independent judicial review is what makes the inherent conflict between national security and human rights balanced. It is knowing that State measures can be challenged, and their proportionality reviewed that makes, for instance, administrative detention acceptable. Making sure that the substantive content of the exclusion clauses and the tools used to address unwanted but unreturnable refugees are interpreted and implemented with due caution and proportionality is perhaps the most important aspect of this issue.

[311] *Othman v. the United Kingdom*, para. 184.
[312] Costello, 2016, p. 208.
[313] Singh Juss, S., 2012b, p. 495f.

7 Summary

This thesis has looked at a clash between international refugee law and international human rights law that create undesirable but unreturnable refugees. The clash creates a noteworthy, but not overwhelming problem. The number of affected individuals is small, although expected to grow. The issue of legal limbo is detrimental to both States and individuals, particularly to the latter. The problem can be mitigated by affording unreturnable refugees a temporary residence permit, allowing them to work and benefit from basic social services. Cynic approaches aiming to make the stay as uncomfortable as possible should be avoided. Unremovable refugees who are actively dangerous should be dealt with through the ordinary criminal justice system when possible and as a last resort by administrative detention, if necessary and proportionate. Resources need to be allocated so that past international crimes can be prosecuted, to fight impunity and uphold the respect for the institution of asylum. Diplomatic assurances should normally not be relied on.

I argue that the revocation of the "EU refugee status" because of later criminal conduct falling under article 1F(b) is questionable. The interpretation of the CJEU in this regard fails to do justice to the Refugee Convention, and to the individuals entitled to protection under it.

The current principle of *non-refoulement* is viable today, even considering serious challenges presented by criminality and terrorism. An absolute prohibition, covering ill-treatment while mindful against over-extension, is the most preferred version.

Procedural safeguards such as access to independent judicial review and effective remedies are crucial, and the expansion of exclusion and its provisions is more worrying than the expansion of the scope of *non-refoulement*.

Finally, it is not my intention to trivialize the problem of undesirable but unreturnable refugees. It is a complex problem, operating in a nexus of conflicting interests, encompassing national law and the different international legal regimes of criminal law, refugee law, human rights law, and humanitarian law. The issue is politically sensitive and challenging. However, I will end by reiterating that refugee law does not provide a safe haven for terrorists, and that terrorists seldom abuse the asylum system. And for the few who does – of course we should not send them back to torture. Of course not.

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ANNEX - table of articles and their functions

	RC arts. 1F (a) and (c)	RC art. 1F(b)	RC art. 33(2)	ECHR art. 3
Treaty text	*The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:* **(a)** he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; **(c)** he has been guilty of acts contrary to the purposes and principles of the United Nations.	*The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:* **(b)** he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;	The benefit of the present provision [*non-refoulement*] may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.	No one shall be subjected to torture or to inhuman or degrading treatment or punishment.
Purpose or rationale	Preserving the integrity of refugee law, by setting limits to the concept of "refugees" and the scope of protection offered by the RC. Art. 1 asks "who is a refugee?" and 1F forms part of the definition by stating who is *not* a refugee. Rejects those fundamentally unworthy of protection.	Preserving the integrity of refugee law, by setting limits to the concept of "refugees" and the scope of protection offered by the RC. Art. 1 asks "who is a refugee?" and 1F forms part of the definition by stating who is *not* a refugee. Rejects those fundamentally unworthy of protection.	Protection of the host State against dangerous refugees. Enables expulsion of even recognized refugees if there are overriding concerns for national security or public safety. An exemption to the prohibition of non-refoulement. Not related to the question of refugee status or definition. Does not	Protection of everyone on Member States jurisdiction from torture and ill-treatment, including forcible removal to such treatment in a different country. Implies an absolute prohibition of refoulement, est. in *Soering*. Unrelated to refugee status. Bars expulsion or removal, of everyone in risk.
Temporal and geographical significance - effect when a crime is committed by refugee *prior* to admission, *outside* the host country	Exclusion from status and the protection of RC. Person is per definition not a refugee. Recognizing perpetrators of these crimes as refugees would challenge the respect for refugee law.	Exclusion from status and the protection of RC. The host state does not have jurisdiction over these crimes if committed elsewhere – if refugee recognized = fugitive of justice, and being able to abuse refugee law that way would challenge the respect for it.	No effect, the article is not triggered. If an asylum seeker is excluded, no articles in RC apply, meaning the person is not protected against removal by virtue of 33(1) in the first place. No need to apply exemption.	If there is risk for torture or ill-treatment in the country of origin, removal is prohibited in absolute terms. Does not affect the status. Thus, the asylum seeker may be excluded from refugee protection but unreturnable.
Temporal and geographical significance - effect when a crime committed by refugee *post*-admission, *inside* the host country	Revocation. The crimes are so grave that status is lost. Perpetrators of these crimes are per definition not refugees in the eyes of the Convention.	No effect. The refugee should be handled through the host State's criminal justice system like ordinary citizens who commits serious non-political crimes. The crimes are not grave enough to warrant loss of refugee status. The person is not a fugitive of justice since host State has jurisdiction.	If crime falls under 1F(a) or (c), then status is revoked and no RC rights apply, including 33(1). No need to engage the exemption in 33(2). If crime falls under 1F(b), the criminal does not lose the refugee status. RC rights apply. If the refugee is dangerous to the host State, 33(2) permits removal if overriding security concerns.	If there is risk for torture or ill-treatment in the country of origin, removal is prohibited in absolute terms. If unremovable, art 1F(a) and (c) individuals remain in the host State without refugee status, and 1F(b) individuals remain with refugee status.