MASTER´S THESIS IN INTERNATIONAL LAW AND HUMAN RIGHTS

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Irretrievably Prejudiced? The Right to Legal Aid in Exclusion Proceedings at First Instance within the European Union

Master's Thesis in Public International Law
Master's Programme in International Law and Human Rights
Supervisor: Catarina Krause
Åbo Akademi
2022

ÅBO AKADEMI – FACULTY OF SOCIAL SCIENCES, BUSINESS AND ECONOMICS
Abstract for Master´s Thesis

Subject: Public International Law, Master´s Degree Programme in International Law and Human Rights

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Abstract:

Article 1F of the Refugee Convention obliges contracting states to exclude individuals suspected of having committed certain grave crimes from the scope of the Refugee Convention. While taking place within the administrative setting of asylum procedure, exclusion proceedings share many similarities with criminal proceedings and may inflict severe and life-long consequences upon an individual. Regardless, asylum seekers subject to exclusion proceedings do not have the formal status of a defendant, and do not enjoy all procedural guarantees attached to criminal proceedings. Within the EU, legal aid, which is an inseparable part of the right to legal assistance, must be offered in the appeals procedure of refugee status determination, but is not offered consistently in procedures at first instance. Considering the complex nature of exclusion cases, their severe consequences and the inconsistent application of the exclusion clause between and within different jurisdictions, lack of legal aid may jeopardise equality of arms in this quasi-criminal procedure in case of impecunious applicants.

This thesis examines whether the right to legal aid should be considered applicable in exclusion proceedings at first instance within EU Member States through clarifying the significance of legal assistance in exclusion proceedings as well as examining the status of current legal norms concerning the right to legal aid in relation to exclusion proceedings within the EU. The thesis first offers a comparison of exclusion proceedings' elements with those of criminal proceedings, after which the possible applicability of the right to legal assistance and legal aid in exclusion proceedings is analysed through the relevant regional instruments, the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union. Furthermore, the adverse and possibly irretrievable implications of lack of legal aid in procedures at first instance is examined. Finally, the thesis offers an analysis of the conditions under which the right to legal assistance and legal aid should be considered applicable in exclusion proceedings.

Through the above described analysis, this thesis concludes that EU Member States should consider the right to legal assistance an applicable safeguard in exclusion proceedings when specific suspicion of an excludable act arises. Pieces of evidence amounting to specific allegations can be identified as confession, third party witness statement, information on official databases, extradition request, judgement, crime record and arrest warrant. General factors which may cause a minor level of suspicion but not trigger the applicability of the right to legal assistance can be identified as country of origin information, identity and travel documents, and place of residence or travel route. In the occurrence of specific allegations, an asylum interview should be suspended until access to legal assistance, through legal aid when necessary, has been ensured.

Key words: EU Asylum Law, Refugee Law, Exclusion Clause, Legal Aid, Legal Assistance

Date: 12.9.2022	Number of pages: 82 Number of words (excl. bibliography): 37 073

The abstract is approved as a maturity test:

ABBREVIATIONS AND ACRONYMS

CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union (Prior to December 2009, European Court of Justice, ECJ)
CoE	Council of Europe
EASO	European Asylum Support Office
ECHR	European Convention on Human Rights
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
EMN	European Migration Network
EU	European Union
HRC	Human Rights Committee
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ILC	International Law Commission
NGO	Non-Governmental Organisation
O.J.	Official Journal of the European Union
RSD	Refugee Status Determination
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNSC	United Nations Security Council

1. Introduction

1.1. Background

The overarching object and purpose of the Convention Relating to the Status of Refugees ("Refugee Convention" or "1951 Convention") is to offer international protection to those forced to flee their home countries due to fear of persecution. While the assessment of need for international protection is the best-known procedure in which those able to benefit of the rights under the 1951 Convention are determined, Article 1F of the Convention ("exclusion clause")[1] determines situations in which the Convention is not applicable despite risk of persecution owing to serious reasons for considering that an individual has committed certain grave crimes.[2] While taking place within the administrative procedure of Refugee Status Determination ("RSD"), exclusion proceedings under Article 1F differ from the general assessment of protection needs and can be characterised as quasi-criminal, as the aim therein is to determine whether there are serious reasons to consider that the applicant has conducted a criminal act as described under the Article.[3] In certain cases, the consequences of exclusion proceedings can be argued to be of greater gravity than those of criminal proceedings, as for an individual, they may mean a forced return to a country in which s/he is in danger of persecution.[4]

While the Refugee Convention determines the qualification criteria for eligibility as a refugee as well as rights of individuals falling within its scope in detail, it does not contain obligations concerning the procedural aspects of the RSD procedure, leaving contracting states with a large margin of appreciation regarding relevant procedural safeguards. This applies to exclusion also.[5] Although asylum procedure arguably takes the character of a quasi-criminal proceeding when exclusion is being considered, the applicant does not have a formal status of a defendant within it.[6] Thus, the applicability of minimum procedural guarantees of defendants established in human rights law within exclusion procedure is not a given. In the field of human rights law, criminal proceedings are accompanied with special procedural safeguards due to their potentially detrimental effect upon individuals.[7] One such guarantee which holds especially solid grounds in

[1] For the purposes of this thesis, "exclusion clause" refers explicitly to Article 1F, not any other exclusion clause under the Refugee Convention.
[2] Article 1F, Refugee Convention, 1951.
[3] Bliss, 2000, p. 99.
[4] Hathaway, 2014, p. 7.
[5] Gilbert, 2005, pp. 161–162.
[6] European Council on Refugees and Exiles ("ECRE"), Position on Exclusion from Refugee Status, 2004, doc. no. PP1/03/2004/Ext/CA, para. 9.
[7] Kälin et al., 2019, p. 467.

Europe is the right to legal assistance. The right to legal assistance is an essential element of the right to a fair trial, with the overarching object and purpose of ensuring equality of arms in judicial proceedings. Legal aid, on the other hand, is an inseparable component of the right to legal assistance; without legal aid, the right to legal assistance remains a dead letter for those lacking resources required to access legal assistance.[8]

As stated, the right to legal assistance holds a firm position in procedural fairness on the European continent. This thesis will focus on the possible applicability of the right to legal aid in exclusion proceedings in the European Union ("EU") Member States, which are all parties to the Refugee Convention.[9] All EU Member States are also bound by Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights ("ECHR" or "Convention") and the Charter of Fundamental Rights of the European Union ("CFREU" or "Charter"), both of which include the right to legal assistance and the right to legal aid. According to Article 6(3)(c) ECHR, an individual charged with a criminal offence should receive legal assistance for free, if s/he 1. lacks sufficient resources (means test), and; 2. the interests of justice so require (merits test).[10] The ECHR is a Council of Europe ("CoE") treaty binding 46 Member States[11], including all EU Members, but as of now the EU itself is not a party to the Convention.[12] The CFREU, on the other hand, is a treaty of the EU and binds the 27 Member States. In the CFREU, Articles 47 and 48 include the right to legal aid amongst other rights of the defence.[13] The Charter was originally established in 2000, but it did not become legally binding until the ratification of the Lisbon Treaty in 2009, when it was given a status of primary law within the EU legal order.[14] Prior to the establishment of the CFREU, the ECHR formed a special part of EU legal order, as the fundamental rights therein were considered stemming from constitutional traditions of EU Member States and consequently recognised as general principles of Community law.[15] The establishment of the CFREU has diminished the significance of the ECHR in EU legal

[8] Flynn et al., 2016, pp. 209–214.
[9] United Nations Treaty Collection, "Status of Treaties: Convention Relating to the Status of Refugees", available at https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=_en (last visited 2 September 2022).
[10] Article 6(3)(c), ECHR, 1950.
[11] After 26 years of membership, the Russian Federation was excluded from the CoE 16 March 2022, diminishing the number of member states to 46. See CoE, "The Russian Federation is excluded from the Council of Europe", available at https://www.coe.int/en/web/portal/-/the-russian-federation-is-excluded-from-the-council-of-europe (last visited 25 April 2022).
[12] CoE, 2022. "European Convention on Human Rights", available at https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c= (last visited 24 March 2022); Peers, 2012, p. 439.
[13] Article 48, CFREU, 2012; Explanations Relating to the Charter of Fundamental Rights, Official Journal of the European Union ("O.J.") C 303/17, 14 December 2007 ("Explanations relating to the Charter"), Article 48.
[14] Article 6(1), Consolidated version of the Treaty on the European Union, 2012.; Zetterquist, 2011, p. 6.
[15] Article F(2), Treaty on European Union (Treaty of Maastricht), 1992; Zetterquist, 2011, p. 5.

order, but as all EU Member States are also parties to the ECHR, the Convention continues to set the minimum standard of protection within the CFREU and the EU. This is reflected in Article 52(3) CFREU, which articulates the ECHR to set the minimum standard of protection in the Charter, while also explicitly allowing for wider protection. Thus, while the two treaties have considerable overlaps, the protection level of the CFREU may – and in some instances, does – exceed that of the ECHR.[16] Through Article 52(3), the ECHR continues to form a significant interpretative tool in EU legal order.[17] Furthermore, corresponding Articles of the ECHR and the CFREU render European Court of Human Rights ("ECtHR" or "Strasbourg Court") jurisprudence under such Articles applicable in areas regulated by EU law. Consequently, the ECtHR case law is relevant when interpreting the rights of both the ECHR and the CFREU.[18]

As exclusion may inflict most serious consequences upon an individual, the United Nations High Commissioner for Refugees ("UNHCR") recommends that "rigorous procedural safeguards" be built into the exclusion procedure. The UNHCR recommends provision of legal assistance for the entire duration of the procedure as one such safeguard.[19] Within the EU's jurisdiction, free legal assistance within RSD is governed by the Recast Directive on common procedures for granting and withdrawing international protection (2013/32/EU, "Procedures Directive").[20] According to Article 20(1) of the Procedures Directive, "Member States shall ensure that free legal assistance and representation is granted on request in the *appeals procedures* […]."[21] As evident, access to legal assistance must consequently be ensured in appeals procedures, but EU law does not require Member States to provide legal assistance to asylum applicants, including those considered for exclusion, in the procedures at first instance.[22] This view is reflected by the European Asylum Support Office ("EASO") in its *Practical Guide: Exclusion*. The practical guide instructs the decision maker to "[e]nsure applicable procedural guarantees are in place" prior to an interview with a focus on exclusion, as special procedural guarantees *may* apply when exclusion is being

[16] Article 52(3), CFREU, 2012; The Charter includes rights absent from the ECHR, such as the right to asylum under Article 18 and the right to protection of personal data under Article 8.
[17] Borraccetti, 2011, p. 96.
[18] As Peers (2012, p. 458) explains, the preamble of the CFREU is very clear in that CFREU rights stem from ECtHR case law and are reaffirmed in the Charter. The wording of the preamble states that "[t]his Charter reaffirms […] the rights as they result, in particular, from […] the case-law of the Court of Justice of the European Union and of the European Court of Human Rights."
[19] 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 ("Background Note"), para. 98; UNHCR, Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures), 31 May 2001, UN doc. EC/GC/01/12, para. 50(g).
[20] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), O.J. L 180, 29 June 2013 ("Procedures Directive").
[21] Article 20(1), Procedures Directive, emphasis added.
[22] Article 20(2), Procedures Directive.

considered. The guide raises two possible additional procedural guarantees in particular: "Appointing a legal adviser if applicable" and "informing the applicant (and/or the legal adviser) that exclusion is being considered".[23] Both said procedural guarantees are applicable in criminal proceedings, where the right to legal assistance and the right to be informed of the nature and cause of accusations against oneself are essential guarantees of a defendant.[24]

The breadth of procedural guarantees can significantly affect the asylum seeker's ability to defend him/herself within exclusion proceedings, and access to legal assistance may also be crucial for the effective realisation of other (procedural) rights.[25] According to the Procedures Directive, asylum seekers are at liberty to consult legal advice at any point of the procedure, including that at first instance, at their own cost.[26] For many applicants, having left everything behind while fleeing, this right cannot be materialised without financial support. The examination of national regulation concerning access to free legal assistance during asylum procedures at first instance in EU Member States is beyond the scope of this thesis, but a brief overview of European Migration Network ("EMN") *ad hoc* surveys demonstrates that access to legal aid therein varies between Member States: while some states' national legislation ensures free legal assistance to all asylum seekers throughout the procedure, others only grant free legal assistance during appeals procedure, some restricting such assistance to as low as five hours. Some states do not offer free legal assistance during procedures at first instance but report that in practice such aid is available as it is regularly offered to applicants by NGOs.[27] Despite the insurance of access to legal assistance in appeals procedure, some applicants may significantly disadvantage from lack of legal assistance during the procedure at first instance, and some hindrances may be beyond repair in appeals procedure. As the objective of the Refugee Convention is to offer universal humanitarian protection to those persecuted in their home countries, it seems contrary to the Convention's object and purpose that the outcome of asylum proceedings, and more specifically exclusion proceedings, may differ between states in situations which are similar in their substance and context.[28]

[23] EASO, Practical Guide: Exclusion, 2017, p. 12.
[24] See e.g. Article 14(3), ICCPR, 1966; Article 6(3), ECHR, 1950.
[25] Bliss, 2000, p. 103; Anagnostopoulos, 2014, pp. 3–4; Symeonidou-Kastanidou, 2015, p. 69.
[26] Article 22(1), Procedures Directive.
[27] European Commission and EMN, Ad-Hoc Query on subsequent asylum applications and re-opened cases, 2015; European Commission and EMN, EMN Ad-Hoc Query on EE AHQ on accelerated asylum procedures and asylum procedures at the border (part 2), 2017.
[28] Holvoet, 2014, pp. 1047–1049.

Several distinguished academics in the field of refugee law and exclusion, such as Jennifer Bond, James C. Hathaway and Michelle Foster, have also highlighted the inconsistent and broadening application of Article 1F both between and amongst different jurisdictions.[29] This inconsistency is especially unsettling to applicants unable to access legal assistance. Exclusion cases often come in great complexity and require the pondering of substance of national and/or international criminal law, the latter of which is an especially complex and developing field which is contested amongst legal experts. The practical possibilities of applicants to effectively defend themselves therein without access to legal assistance may consequently be challenging if not impossible. As one example, defences of international criminal law may be applicable in exclusion proceedings when determining individual criminal liability[30], and the ability of applicants to independently present possible defences or to even be aware of their significance is questionable. While acknowledging the differences between exclusion proceedings and criminal procedure, the many parallels between the two, including the severity of possible outcomes, indicate that fair trial guarantees cannot be categorically dismissed relying on the administrative classification of exclusion proceedings. For impecunious applicants, lack of legal aid places the equality of arms in this quasi-criminal procedure with most severe consequences in jeopardy.

What is more, it is not uncommon for asylum seekers to come from surroundings of conflict and violence. As Bond explains, many applicants have been surviving in fragile or failed states ruled by repressive state authorities or rebel groups. Under certain circumstances, applicants may have been forced to take part, indirectly or on a low level, to some crimes, e.g. by joining a terrorist organization knowing that to be the only way to get into a university, or knowing that not joining could lead to torture or kidnapping.[31] However, the exclusion clause was not established to exclude any and every individual with remote links to serious crimes or violent past. At the heart of Article 1F is the intention for its narrow application to prevent perpetrators of the most heinous crimes as well as fugitives from justice from bringing the asylum system into disrepute.[32] Many asylum applicants have been forced to survive under harsh and cruel conditions, and their inclusion within the Refugee Convention would not bring the system into disrepute.[33]

[29] Bond, 2013, pp. 3–4; Hathaway and Foster, 2014, pp. 591–595; Holvoet, 2014, pp. 1041–1049; Guild and Garlick, 2011, pp. 76, 81.
[30] Gilbert, 2003, p. 466; UNHCR, Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, 4 September 2003, UN doc. HCR/GIP/03/05 ("Guidelines"), paras. 21–22.
[31] Bond, 2013, pp. 25–26, 36–37, 49.
[32] UNHCR, Guidelines, para. 2
[33] Bond, 2013, pp. 25–26, 36–37.

Nevertheless, an individual in need and deserving of international protection may currently be subjected exclusion procedure where a decision maker does not sufficiently consider all aspects of criminal law in the case; where the applicant him/herself is not an expert in the complicated field of asylum law and criminal law; and is denied legal assistance due to lack of sufficient resources and legal aid in the process. Consequently, an individual who has never been found guilty of any crime before a Court, but upon whom a sufficient level of suspicion of participation in such a crime exists, may be excluded from the humanitarian protection offered by the Refugee Convention for the rest of their life. Without access to legal assistance, this may happen without real opportunity for the applicant to challenge the claims made against them.

While only applicable to a segment of applicants, the outcome of exclusion proceedings is of great gravity to those to whom they apply. Furthermore, a trend of increasing application of the exclusion clause has appeared since the 1990s[34], and the topic has consequently been researched thoroughly in the 2000s. While the need for and existence of procedural guarantees in exclusion proceedings have been researched on a general level[35], the applicability of the right to legal aid in exclusion proceedings specifically has not been closer examined in academia. Thus, a demand for the determination of the applicability of the right to legal aid within exclusion procedure exists.

1.2. Research Question, Method and Material

Despite its possible significance to the outcome of exclusion proceedings, the applicability of the right to legal aid in exclusion proceedings has not been examined in academia, as demonstrated above. This thesis aims to respond to this shortcoming and determine whether, and if so, under which conditions, the right to free legal assistance as a procedural safeguard should be considered applicable in exclusion proceedings at first instance in EU Member States due to the nature of these proceedings and their proximity to criminal charges. In order to answer the research question, this thesis also identifies possible disadvantages of non-accessibility to legal assistance during exclusion procedures at first instance, and the extent to which these disadvantages are irreversible in appeals proceedings. This thesis will not examine the right to free legal assistance in the broader RSD procedure, but focuses specifically on cases in which exclusion is being

[34] Gilbert, 2003, pp. 429–432; Kosar, 2013, p. 88.
[35] See e.g. Bliss, "'Serious Reasons for Considering': Minimum Standards of Procedural Fairness in the Application of the Article 1F Exclusion Clauses, 2000; Gilbert, "Current issues in the application of the exclusion clauses", 2002; Bond, "Principled Exclusions: a Revised Approach to Article 1(F)(a) of the Refugee Convention", 2013; Holvoet, "Harmonizing Exclusion under the Refugee Convention by Reference to the Evidentiary Standards of International Criminal Law Symposium: Exclusion and Post-Exclusion from Refugee Status, 2014, and; Li, "Exclusion from Protection as a Refugee: An Approach to a Harmonizing Interpretation in International Law, 2017.

considered. Furthermore, this thesis does not examine the conditions upon which an individual is deemed to lack sufficient resources as required by Articles 47 and 48 CFREU and Article 6 ECHR, whereas the merits test of the right to legal aid, namely *when the interests of justice so require,* will be analysed in relation to exclusion proceedings. While all EU Member States are also parties to International Covenant on Civil and Political Rights ("ICCPR"), Article 14(3)(d) of which guarantees the right to legal aid when the interests of justice so require, the Covenant is of little relevance in relation to exclusion proceedings in the absence of formal criminal charges.[36] This is due to the fact that the Human Rights Committee ("HRC") has interpreted Article 14(3) stringently to only apply once formal charges have been brought against a defendant, a standard which falls short of both the above mentioned European human rights instruments.[37] Consequently, the examination of protection under ICCPR is excluded from the scope of this thesis.

To answer the research question, the relationship between criminal law and exclusion will first be examined. A comparison of exclusion procedure's elements with those of criminal proceedings will be conducted through examination of relevant treaties supported by UNHCR sources and academia to grasp the similarities and differences in the procedures' characteristics. As no uniform procedure of exclusion exists between EU Member States, UNHCR sources will be used to demonstrate the nature of exclusion proceedings. Although non-binding in their nature, UNHCR's guidelines are an authorative source of interpretation aiming to guide national authorities in the application of the 1951 Convention.[38] Additionally, the works of the most distinguished scholars in the field of asylum law and exclusion will be utilised to complement determinations offered by the UNHCR. The scope of the right to legal assistance and legal aid in the ECHR and the CFREU as well as EU Directives will then be examined through the treaties themselves as well as relevant jurisprudence from the ECtHR and the Court of Justice of the European Union ("CJEU") with a view to possible relevance during exclusion proceedings. Then, implications of lack of legal assistance in procedures at first instance will be examined with a view to RSD and exclusion specific characteristics. This analysis will be conducted by utilising EU Member States' treaty obligations and ECtHR jurisprudence, as well as UNHCR and United Nations ("UN") sources supported by academia. Finally, the conditions under which the right to

[36] United Nations Treaty Collection, "Status of Treaties: International Covenant on Civil and Political Rights", available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en (last visited 8 August 2022).
[37] HRC, *Rogerson v. Australia,* Communication No 802/1998, U.N. Doc. CCPR/C/74/802/1998, 3 April 2002, para. 9.2.
[38] Article 35, Refugee Convention, 1951; Hathaway, 2012, pp. 179, 181.

legal aid should be considered applicable in exclusion proceedings will be examined utilising statutes of international criminal tribunals and ECtHR jurisprudence supported by UNHCR sources and academia. The selection of cases used in the analysis, while not identical to exclusion proceedings, is crucial for the determination of the scope and limits of the right to free legal assistance. The cases examined represent both cases in which the respective Courts have demonstrated the reasoning behind the need for legal aid as well as borderline cases in which the nature of proceedings has not been identified as "criminal charges" nationally, but for which the assurance of legal assistance was nevertheless considered essential by one of the Courts. This examination will clarify the possibility to consider exclusion procedure within the scope of the right to free legal assistance, as it arguably shares many characteristics with criminal proceedings, notwithstanding its administrative classification.

For the purposes of this thesis, "procedures at first instance" refers to national RSD procedure in which first decision as to the need for international protection is taken. This decision is usually taken in administrative proceedings and not before a court, and is referred to as such also in the Procedures Directive.[39] The term "legal aid", for the purposes of this thesis, is synonymous with "free legal assistance" and refers to the definition given in Directive (EU) 2016/1919 of the European Parliament and of the Council on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings ("Legal Aid Directive")[40], namely "funding by a Member State of the assistance of a lawyer, enabling the exercise of the right of access to a lawyer."[41]

[39] Article 31, Procedures Directive.
[40] Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, O.J. L 297/1, 4 November 2016 ("Legal Aid Directive"). The deadline for national implementation of the Directive was on 25 May 2019.
[41] Article 3, Legal Aid Directive.

2. Exclusion in Context – Administrative Procedure with Implications and Substance from Criminal Law

2.1. Nature of Exclusion Proceedings within Refugee Status Determination

The divergencies between exclusion proceedings and the general asylum procedure begin from their very aim. The object and purpose of asylum procedure generally is to determine the risk in which an applicant is, was he or she returned to their country of origin, and to effectively grant refugee status to those to whom well-founded risk of persecution applies upon return.[42] The object is therefore humanitarian; it is to prevent an individual from having to return to a place in which he or she is likely to be subjected to persecution. The rationale behind Article 1F is that certain crimes are so grave they render their perpetrators undeserving of international protection.[43] Article 1F reads as follows:

> 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 provisions in respect of such crimes;
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.[44]

The overarching purpose of Article 1F is to protect the integrity and credibility of the asylum system by excluding individuals, the sheltering of whom would bring the system into disrepute.[45] According to the *travaux préparatoires* of the Refugee Convention, this aim is pursued through two objectives very different to those of an asylum procedure generally. First, Article 1F seeks to prevent abuse of the institution of asylum by perpetrators of such grave crimes who are, due to their previous acts, undeserving to benefit from it. Secondly, it aims to ensure those guilty of serious crimes cannot escape from prosecution and responsibility by obtaining a refugee status.[46] Owing to the serious consequences of exclusion, Article 1F must be applied restrictively, and each exclusion decision must be taken based on an individual consideration; assumptions about collective guilt or innocence are not to be applied.[47] The list of acts to which exclusion under Article 1F applies is exhaustive, and the application of exclusion to individuals who fall under the

[42] Hathaway, 2012, pp. 182–185.
[43] UNHCR, Guidelines, para. 2.
[44] Article 1F, Refugee Convention, 1951.
[45] Hathaway and Foster, 2014, pp. 526–528.
[46] UNHCR, Guidelines, para. 2; Gilbert, 2003, pp. 427–428.
[47] UNHCR, Guidelines, para. 2; Hathaway and Foster, 2014, p. 534.

scope of Article 1F is obligatory to state parties.[48] The absence of state discretion in the application of Article 1F is also designed to uphold the integrity of the asylum system by ensuring that offenders of serious crimes are not recognised as refugees anywhere.[49] Nevertheless, expiation of previous crimes is of relevance to exclusion, especially with regard to serious common crimes under Article 1F(b). In principle, exclusion is no longer relevant when expiation of crimes falling under the scope of Article 1F(b) has taken place, as perpetrators of such crimes are not fugitives from justice. Different factors, such as passage of time and nature of the crime, may also affect whether the application of the exclusion clause is relevant in a specific case. However, some crimes, especially those under Article 1F(a), may be so heinous that inclusion of their perpetrators may bring the asylum system into disrepute even if they have already suffered consequences stemming from their actions.[50]

While contributing to the overarching purpose of protecting the asylum system from disrepute, Articles 1F(a), (b) and (c) apply to distinct situations and serve different purposes under the exclusion clause. Article 1F(a) is firmly based in international criminal law, and applies to individuals upon whom there are serious reasons for considering that they have committed a crime against peace, a war crime or a crime against humanity. The purpose of this paragraph is to render perpetrators of the most heinous international crimes outside the scope of the Refugee Convention, as their inclusion, owing to these acts, would bring the asylum system into disrepute. The determination of whether an act has amounted to one of these grave crimes must based on clear, settled and current principles of international criminal law, relying on both international treaty norms as well as relevant jurisprudence. Exclusion under Article 1F(a) should not be based on unsettled norms of international criminal law, and where inconsistency exists, the most restrictive interpretation of the said crime should be applied.[51]

The primary objective of Article 1F(b), which concerns serious common crimes, is to protect the integrity of the asylum system by not granting refuge to fugitives from justice who are facing legitimate charges in their country of origin and who cannot be prosecuted in the receiving state. Article 1F(b) is restricted both temporally and geographically; it is only applicable to crimes committed outside the country of refuge and prior to admission as a refugee. The paragraph's application requires serious, unexpiated criminality. According to Hathaway and Foster, an act

[48] UNHCR, Guidelines, paras. 3, 7.
[49] Hathaway and Foster, 2014, p. 528.
[50] UNHCR, Background Note, paras. 72–75; Rikhof, 2017, pp. 112–113.
[51] Hathaway and Foster, 2014, pp. 567–586; Bond, 2013, pp. 14–17.

leading to exclusion under Article 1F(b) must be a common crime both when and where committed as well as in the receiving state; it must be serious in nature, indicated by a severe penalty; and, additionally, it must not fall short of the minimum standards of extraditable criminality. Furthermore, the crime must not be of political nature, although crimes which serve a political objective may be excludable if they are not targeted and proportionate to the aim served. For example terrorist acts, while not strictly confined in their determination, would normally amount to disproportionate means in order to serve a political purpose.[52] According to the UNHCR, crimes such as murder, rape and armed robbery would fall under Article 1F(b).[53]

Out of the paragraphs, Article 1F(c) is the one most vaguely grounded in criminal law. The wording of paragraph (c) is different to that of (a) and (b); it requires that an asylum seeker "has been *guilty* of acts contrary to the purposes and principles of the United Nations".[54] Due to the word choice "guilty", the application of the paragraph was originally interpreted to be confined to individuals in a position of power in a government of a member state to the UN; this owing to the fact that the UN Charter, Articles 1 and 2 alongside the preamble of which are generally considered to determine the principles and purposes of the UN, is only binding on states, not individuals. Consequently, while individuals certainly can *commit* acts contrary to those purposes and principles, only significantly contributing to such an act in a member state could render that individual *guilty* of it.[55] However, over time the possible application of Article 1F(c) has been broadened to touch upon, under some extraordinary circumstances, also individuals not in position of power in a member state government, and it is no longer strictly confined to state authorities.[56] Even so, according to the UNHCR, "Article 1F(c) is only triggered in extreme circumstances by activity which attacks the very basis of the international community's coexistence."[57] The act in question must have an international dimension that is capable of, due to its nature and gravity, impacting the fundamental international order, including international peace and security and the relations between states. Serious and sustained violations of human rights may also fall under the scope of Article 1F(c).[58] The assessment of the international nature of the act and its capability of

[52] Hathaway and Foster, 2014, pp. 537–567.
[53] UNHCR, Background Note, paras. 38–40.
[54] Article 1F(c), Refugee Convention, 1951, emphasis added.
[55] UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, Reissued, February 2019, UN doc. HCR/1P/4/ENG/REV. 4 ("Handbook"), para. 163; UNHCR, Guidelines, para. 17; Hathaway and Foster, 2014, pp. 586–587.
[56] UNHCR, of the 1951 Convention, 2009, p. 29; Hathaway and Foster, 2014, pp. 587–588.
[57] UNHCR, Guidelines, para. 17.
[58] *Ibid.*; UNHCR, Statement on Article 1F of the 1951 Convention, 2009, p. 29.

truly affecting international order is at the heart of the paragraph; as the "purposes and principles of the United Nations" is a general an expansive concept which could imply a plethora of acts, the paragraph should be read narrowly and applied with caution.[59] Due to the vague and potentially broad scope of Article 1F(c), exclusion clauses (a) and (b) should rather be used where applicable, as they are better grounded in well-known standards and procedures as regards the substance of the act as well as the establishment of individual criminal liability.[60] Article 1F(c) should therefore only be applied when an act which renders an individual undeserving of refugee status is regulated by neither international nor domestic criminal law, as both of these areas are caught within the more clearly codified Articles 1F(a) and (b). In cases where international and domestic criminal law are inapplicable but the granting of refugee status would nevertheless bring the asylum system into disrepute, the application of Article 1F(c) is appropriate.[61]

Under EU law, the counterpart to Article 1F of the Refugee Convention can be found in Directive 2011/95/EU of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) ("Qualification Directive")[62], Article 12(2) of which lays down the conditions for exclusion. While Article 12(2) is not identical to the exclusion clause of the Refugee Convention, the CJEU has ruled it should be interpreted in light of and in consistence with Article 1F, on which it is based.[63] The additions in Article 12(2) which cannot be found from the Refugee Convention are mostly in line with the interpretative positions taken by the UNHCR in relation to Article 1F. Article 12(2)(b) spells out that "particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes"[64], while Article 12(2)(c) specifies that the purposes and principles of the UN refer to those "set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations."[65] Finally, an additional paragraph, Article 12(2)(3) specifies the establishment of individual criminal liability – which will be further examined in Chapter 2.2.3. – by stating that "[p]aragraph 2 applies to

[59] UNHCR, Guidelines, para. 17; UNHCR, Handbook, para. 163; Hathaway and Foster, pp. 587–591.
[60] UNHCR, Guidelines, para. 17; Hathaway and Foster, pp. 591–594.
[61] Hathaway and Foster, 2014, p. 598.
[62] Directive 2011/95/EU of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), O.J. L 337/9, 20 December 2011 ("Qualification Directive").
[63] CJEU, C-573/14, *Commissaire général aux réfugiés et aux apatrides v. Mostafa Lounani*, Judgement (GC) of 31 January 2017, paras. 41–42.
[64] Article 12(2)(b), Qualification Directive.
[65] Article 12(2)(c), Qualification Directive.

persons who incite or otherwise participate in the commission of the crimes or acts mentioned therein."[66] As can be seen from the overview of Article 1F and its recommended application by the UNHCR above, these additions of the Qualification Directive do not seem to broaden the scope of application of the exclusion clause, but rather explicitly state certain already established interpretations concerning its application, and the UNHCR has not considered any of them in contrast with the 1951 Convention in its annotated comments concerning the Directive.[67] However, the UNHCR has considered an addition concerning the temporal and geographical applicability of Article 12(2)(b) of the Qualification Directive to be inconsistent with the corresponding Article 1F(b) of the Refugee Convention. Article 12(2)(b) of the Qualification Directive specifies the applicable temporal and geographical scope of commission of a serious non-political crime as one committed "outside the country of refuge prior to […] admission as a refugee, *which means the time of issuing a residence permit based on the granting of refugee status*"[68], the emphasised part being the addition to the wording of the 1951 Convention. The UNHCR considers the term "admission" as merely referring to a convention refugee's presence in a state where protection is sought, and it has consequently considered this addition not in line with obligations under the 1951 Convention.[69] As this thesis is not concerned over which crimes qualify as excludable acts, this differentiation does not have a bearing on the research at hand.

Next, a further examination of the nature of the exclusion procedure will be conducted through a comparison of its elements and structure with those of criminal proceedings. This analysis will enable the recognition of similar and divergent features as well as indicate structural differences which may render the direct use of criminal law principles in exclusion procedure problematic.

2.2. Comparison of Elements – Criminal Procedure and Exclusion

2.2.1. Nature of Rules in Criminal Proceedings

When examining the similarities and differences between exclusion procedure and criminal proceedings, a distinction between substantive and procedural rules in criminal law must be acknowledged. Substantive rules of criminal law determine which acts constitute crimes; whereas

[66] Article 12(3), Qualification Directive.
[67] 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) ("Annotated Comments"), 2005, pp. 27–28; But see Guild and Garlick, 2011, pp. 72–73, 81.
[68] Article 12(2)(b), Qualification Directive, emphasis added.
[69] UNHCR, Annotated Comments, p. 27. The significant departure of the Qualification Directive from the Refugee Convention in this respect has also been noted in academia, see e.g. Guild and Garlick, 2011, pp. 72–73.

procedural rules determine the consequences of an act constituting a crime under the substantive rules and concern the efficiency of proceedings, procedural safeguards for the defendant, as well as the punishment applied.[70] While rules of criminal law within the EU are uniquely organised within each state, all Member States must follow certain international standards of criminal law – both procedurally and substantively. The most relevant procedural norms in the context of this thesis are Article 6 ECHR, which guarantees everyone charged with a criminal offence certain procedural safeguards; as well as Articles 47 and 48 CFREU, which at minimum offer the same level of protection as Article 6 ECHR.[71] All EU Member States are also parties to the ICCPR, Article 14 of which resembles Article 6 of the ECHR.[72] While most constitutions are more concerned over procedural than substantive rules, a common denominator in substantive criminal law amongst virtually all states is the principle of *nullum crimen sine lege*, which prohibits the use of retroactive laws.[73] States are also under international obligations to criminalise certain acts under their substantive criminal law.[74]

2.2.2. Outcome of Proceedings – Object, Severity and Nature

An examination of the objectives of criminal procedure and exclusion reveals both congruent and differing elements. As stated, the overarching aim of the exclusion clause is to protect the integrity of the asylum system through the exclusion of undeserving individuals as well as fugitives from justice. The object and purpose of criminal proceedings, on the other hand, is punishing the perpetrator and preventing future crimes through deterrence.[75] Prevention of crimes through deterrence is an objective in both domestic and international criminal law, the latter of which is especially dependent on its deterrent function, as it focuses in the prosecution and punishment of high ranking individuals and concentrates resources in high profile trials. Instead of prosecuting all perpetrators of international crimes, international criminal law aims to prevent future human rights violations by producing "a normative message that extends far beyond the particular criminal accused."[76] This refers to general deterrence, which aims to prevent crimes through displaying their negative consequences to the public. In comparison, while the normative value

[70] Fletcher, 1998, pp. 7–10.
[71] Article 52(3), CFREU, 2012.
[72] Article 14, ICCPR, 1966; United Nations Treaty Collection, "Status of Treaties: International Covenant on Civil and Political Rights", available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en (last visited 8 August 2022).
[73] Fletcher, 1998, pp. 9–10.
[74] See e.g. Article 4, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), 1984; Article 1, Convention on the Prevention and Punishment of the Crime of Genocide, 1948.
[75] Fletcher, 1998, pp. 30–33.
[76] Bond, 2013, p. 18.

of Article 1F should not be considered entirely irrelevant, general deterrent prevention plays a minor role in the objects of exclusion. Due to the administrative nature of most exclusion decisions and the confidentiality therein, most decisions are not available for public, which limits their normative and deterrent value.[77] The aim to reject fugitives from justice from receiving international protection can be argued to collide with the object of ending impunity, a goal in both domestic and international criminal law, and thus contributing to general deterrence[78] – although the actual prosecution of a crime must then be done outside of exclusion. When it comes to special deterrence, which aims to prevent an individual offender from committing further crimes, the denial of legal residence through refugee status can, when followed by removal of an individual from a host state, most certainly prevent him/her from committing crimes within that state.[79] However, it does not go any further in special prevention of crimes, as exclusion procedure is on its own uncapable of e.g. imposing deprivation of liberty as a sanction.

The second object of criminal charges, punishment, may have more in common with the object of exclusion procedure. Exclusion aims to not grant those *undeserving* of protection an asylum, clearly indicating a normative and a potentially punitive function. As a matter of fact, the UNHCR has held that in addition to the objective of protecting the integrity of the asylum system, the object and purpose of the exclusion clause is "to provide for a sanction against persons not deserving international protection".[80] This clearly indicates an objective which collides with that of criminal law. Furthermore, the impact and severity of the outcome of proceedings for an individual subject to them is considered one indicator of the existence of a punishment in criminal law terms.[81] As already stated, the consequences of exclusion are of great gravity. In addition to the possible return of an excluded individual to a state in which he or she may face persecution, excluded individuals are excluded from the scope of the Refugee Convention entirely. Thus, they can no longer receive essential services from the UNHCR, which may include access to food, health care, shelter and education.[82] The potential denial of access to such elements fundamental to human dignity underlines the severity of the outcome of exclusion proceedings.

Another potential consequence of exclusion concerns the emergence of the principle of *non-refoulement* as a *jus cogens* norm under international law. Article 19(2) CFREU prohibits

[77] Bond, 2013, pp. 18–19.
[78] Li, 2017, p. 77.
[79] *Ibid.*, pp. 76–77.
[80] UNHCR, Statement on Article 1F of the 1951 Convention, 2009, p. 35.
[81] Fletcher, 1998, pp. 26–30.
[82] Bond, 2012, p. 56.

removing, expelling or extraditing an individual to a state where they run a serious risk of being subjected to death penalty, torture, or other inhuman or degrading treatment.[83] The ECtHR has also ruled that state parties have an absolute prohibition of returning an individual, for any reason whatsoever, to a country in which they would run the real risk of being subjected to treatment contrary to Article 3 ECHR, namely torture or inhuman or degrading treatment or punishment.[84] In effect, this means that excluded individuals who nevertheless face risk of such treatment upon return cannot be *refouled* and may consequently remain in the state which has excluded them from refugee protection.[85] What is more, individuals excluded from refugee status must also be excluded from receiving subsidiary protection in all EU Member States, as per Article 17 of the Qualification Directive.[86] While some states may offer other ways of legal residence despite exclusion, in reality many un-returnable excluded persons face the fate of remaining in state territory as undocumented.[87] Undocumented status seriously and holistically affects an individual's life in modern societies. This is due to an increasing trend, specifically in many countries in the Global North, for a requirement to present one's immigration status in order to receive basic public services. This follows an effort by governments to track down and deport undocumented migrants, which in turn creates fear among undocumented individuals to access public services. This fear often prevents undocumented migrants from accessing health care, putting their children to school, reporting witnessed or experienced violence or reporting on work exploitation, to list a few situations which significantly affect an individual's life.[88] The impact of an undocumented status on human rights such as the right to medical care, right to education, employment related rights and many more cannot be overstated, and must be perceived as a severe consequence when stemming from exclusion.

[83] Article 19(2), CFREU, 2012.
[84] ECtHR, *Saadi v. Italy*, (Appl. No. 37201/06), Judgement (GC) of 28 February 2008, para. 138; see also Article 19(2), CFREU, 2012.
[85] Rikhof, 2017, p. 99–100.
[86] Article 17, Qualification Directive, 2011. Article 17 resembles Article 1F Refugee Convention and Article 12(2) of the Qualification Directive, but presents a lower threshold for exclusion, specifically in relation to Article 1F(b) of the Refugee Convention: The Directive merely requires that an applicant has committed a serious crime, thus removing the temporal and geographical as well as political restrictions of Article 1F(b). Furthermore, Article 17 obliges states to exclude individuals who constitute a danger to the community or security of the state in which they are, a ground absent from the exclusion clause of the Refugee Convention; as well as to exclude individuals who have committed (a) crime(s) punishable by imprisonment if the applicant has left his/her country of origin in order to avoid prosecution against such (a) crime(s). For further analysis, see e.g. Guild and Garlick, 2011, pp. 73–74.
[87] For example Finland offers a residence permit for up to one year to excluded individuals who cannot be removed from state territory due to risk of capitol punishment, torture, persecution or other inhuman treatment, see Finland Alien's Act, 89§; Bond, 2017, p. 169, 181–182.
[88] Crepeau & Hastie, 2015, pp. 158–159; Bond, 2017, pp. 184–186.

The consequences of exclusion described above are of utmost severity to an individual, which supports the argument of exclusion's punitive function in criminal law terms. Other colliding factors between exclusion and criminal law which seem to support the argument of the punitive nature of exclusion include the fact that exclusion is an adverse consequence which results from an act by an individual, upon whom this consequence is inflicted. The consequence is administered by public authorities, like in the case of a criminal punishment. Exclusion also expresses public disapproval of the act committed, as is clear from the moral indication of the *undeserving* asylum seekers. The fact that expiation is a relevant factor which, at least in the application of Article 1F(b), generally means exclusion is no longer necessary, also demonstrates the similarities between exclusion and criminal punishment.[89] However, this argument only works one way; while a serious common crime should not render an individual ineligible for international protection if expiated[90], exclusion of a fugitive from justice does not prevent future criminal proceedings from taking place. To the contrary, the objective of Article 1F(b) is to enable prosecution of perpetrators by denying them protection under the Refugee Convention. This speaks against considering exclusion as a punishment similar to a criminal sanction. If exclusion was considered a genuine punishment in criminal law terms, prosecution post-exclusion would be problematic from a human rights perspective, as this would mean an offender might be punished twice for the same crime.[91] It can hardly be argued, however, that exclusion would amount to a final conviction or acquittal as required by Article 14(7) ICCPR and Article 50 CFREU, which prohibits trial or punishment for an act already expiated. This, again, underlines the differences between punishment in criminal law terms and exclusion.

Finally, a considerable difference between the outcome of exclusion and criminal proceedings is the binary nature of exclusion decisions which lacks the nuance of judgements of criminal law. Due to their binary nature, exclusion decisions do not consider the level of participation in a criminal offence beyond individual criminal liability. Criminal law procedure, on the other hand, works directly in contact with the sentencing procedure, under which the level of participation and other contextual elements may modify the punishment applied. This sentencing procedure and discretion therein are entirely absent from exclusion procedure.[92]

[89] Li, 2017, pp. 71–72.
[90] As the objective of Article 1F(b) is to prevent fugitives from justice from exploiting the asylum system, perpetrators of serious common crimes who have served their sentence – and thus are not fugitives from justice – should not be excluded under Article 1F(b).
[91] See Article 14(7), ICCPR, 1966; Article 50, CFREU, 2012.
[92] Bond, 2013, pp. 22–25.

2.2.3. Individual Criminal Liability

According to the UNHCR, exclusion under Article 1F must be based on individual responsibility, which is an element of substantive criminal law. Article 1F follows the determination of individual criminal liability under criminal law, according to which individual responsibility may be established not only through physically committing a crime, but responsibility may also flow from substantially contributing to or facilitating a criminal act. Instigating, aiding and abetting as well as participation in a joint criminal enterprise can establish individual responsibility under Article 1F.[93] As in criminal law, the UNHCR considers *actus reus* (material elements) and *mens rea* (mental element) as decisive for the establishment of criminal responsibility and exclusion under Article 1F. These elements fundamental to the establishment of individual criminal liability mean that in addition to committing an act which fulfils the material elements of a crime, *actus reus,* the crime must have been in principle committed with intent and knowledge, which amounts to *mens rea.*[94] The substance of these elements differs depending of the crime in question[95], and when determining whether grounds for exclusion exist, individual criminal liability must be established in accordance with present provisions and jurisprudence in international criminal law and domestic criminal law respectively.[96]

Furthermore, UNHCR follows criminal law, and specifically, the Rome Statute, in its guidance concerning grounds for rejecting individual responsibility: general defences to criminal responsibility, such as superior orders and duress, should also be considered within the exclusion procedure.[97] The defence of duress means that criminal liability may not be imposed if the crime in question was committed in order to avoid an imminent threat of death or bodily harm, and the harm imposed is not greater than that sought to be avoided. Superior orders may be a defence when an offender was under legal obligation to obey an order, they had no knowledge of the unlawfulness of that order and the order was not manifestly unlawful, which would be the case when ordering genocide or crimes against humanity.[98] Defences of criminal law negate individual criminal liability and prevent exclusion.[99]

[93] Article 25, Rome Statute of the International Criminal Court ("Rome Statute"), 1998; UNHCR, Guidelines, para. 18.
[94] UNHCR, Guidelines, para. 21; For criminal law counterparts see e.g. Article 30, Rome Statute, 1998.
[95] See e.g. Article 7–8, Rome Statute, 1998; Hathaway and Foster, 2014, p. 552.
[96] Article 1F(a), Refugee Convention, 1951; Bond, 2013, p. 14; Hathaway and Foster, 2014, pp. 550–553.
[97] UNHCR, Guidelines, para. 22; For criminal law counterparts see Articles 31–33, Rome Statute, 1998.
[98] UNHCR, Guidelines, para. 22; Articles 31(1)(d), 33, Rome Statute.
[99] UNHCR, Guidelines, para 22.

2.2.4. Burden of Proof

Similarities between exclusion proceedings and criminal charges can also be found from the applicable procedural rules. Article 6(2) of the ECHR and Article 48(1) CFREU ensure the procedural guarantee of the presumption of innocence until proven guilty according to law in criminal proceedings. The presumption of innocence requires that laws maintain the burden of proof on the state; subjective elements of a crime must be proven by the prosecution, and not assumed to exist due to the absence of evidence to the contrary.[100] Excluding some extraordinary circumstances, the burden of proof in exclusion proceedings also rests with the state or the UNHCR respectively, contrary to the general asylum procedure, in which the burden of proof is shared between the asylum seeker and state. According to the UNHCR, presumptions of excludability are not to be applied lightly: the mere membership or even a senior position in an organization or government which has conducted unlawful violence is not enough to presume individual responsibility for excludable acts. However, in some cases a sustained membership or position in an entity clearly involved in excludable activities may create a presumption of excludability, but such presumption must be applied cautiously and on a case-by-case basis. In such circumstances, the burden of proof may be shifted to the applicant to rebut individual responsibility. Indictment by an international criminal tribunal may also reverse the burden of proof in exclusion proceedings.[101]

2.2.5. Standard of Proof

The required standard of proof is arguably the most significant procedural distinction between exclusion and criminal procedure. To satisfy the standard of proof in criminal proceedings, the defendant must be found guilty "beyond reasonable doubt".[102] The threshold in exclusion proceedings, on the other hand, is lower. The wording of Article 1F requires "serious reasons for considering that" and individual has committed one of the excludable acts, a non-traditional evidentiary standard which does not directly convert to other existing standards.[103] According to the UNHCR, the "serious reasons to consider" threshold requires "clear and credible evidence", which does not convert to the standard of criminal proceedings; yet the standard must be above "balance of probabilities", a standard commonly applied in civil law cases.[104] While the UNHCR

[100] Kälin et al., 2019, p. 477.
[101] UNHCR, Background Note, para. 105; UNHCR, Guidelines, paras. 19, 34.
[102] Fletcher, 1998, pp. 16–18.
[103] Article 1F, Refugee Convention, 1951; Hathaway and Foster, 2014, pp. 532–533.
[104] UNHCR, Background Note, para. 107.

has clearly indicated for the balance of probabilities to remain a threshold too low for a decision to exclude, its suggested standard is by no means applied consistently by state parties to the Refugee Convention. Some states place the standard of proof between "mere suspicion" and "balance of probabilities"; e.g. Canada has accepted that the threshold required for exclusion is lower than that of "balance of probabilities", while the US Board of Immigration Appeals has suggested that there must be more evidence for than against in order to exclude, fulfilling the standard of "balance of probabilities". Some states claim the standard to be unique and separate from previously familiar thresholds.[105] The ambiguous nature of the standard was, however, already recognised during the drafting of the Convention, which may indicate that the unclear wording of the Article was intentional to leave states with margin of appreciation in relation to the evidentiary standard of exclusion.[106] While there is certainly no consensus of the standard of proof in exclusion cases, it is clear that nowhere is the threshold considered as high as in criminal proceedings.[107]

It is important to comprehend, however, that the lowered *evidential* threshold of exclusion in comparison with that of criminal proceedings does not mean a lowered threshold of substantive criminal law in excludable acts. This is evident in the wording of the exclusion clause: while the evidentiary threshold of "serious reasons to consider" is clearly set in the first paragraph, paragraphs a), b) and c), which differentiate the excludable crimes, use the wording "has committed a crime" and "has been guilty", clearly referring to the substantive principles established in criminal law as opposed to any kind connection with these crimes.[108] In practice, this means that while no determination of guilt is required to exclude an individual, there must be "serious reasons to consider" that an applicant has "committed" or is "guilty" of an excludable crime as per substantive standards of those words in criminal law – requiring, in substantive terms, the finding of individual criminal liability as covered in Chapter 2.2.3. If no clear and convincing evidence that acts of the applicant fulfil the substantive elements of excludable crimes under Article 1F can be found, the evidentiary threshold of "serious reasons to consider" need not be deliberated.[109]

[105] Bond, 2013, pp. 21–22; *Ramirez v. Canada (Minister of Employment and Immigration),* [1992] 2 F.C. 306 (Canada Federal Court of Appeal), Judgement of 7 February 1992.
[106] Hathaway and Foster, 2014, p. 533.
[107] Bond, 2013, pp. 21–22.
[108] Article 1F, Refugee Convention, 1951; Hathaway and Foster, 2014, p. 535.
[109] Hathaway and Foster, 2014, pp. 535–536.

As with many other aspects of exclusion proceedings, no uniform standard of proof is applied between EU Member States.[110] From a practical viewpoint the difference in the standard of proof between exclusion and criminal procedure is logical, as the procedures take place in entirely different contexts – fact finding and undergoing an investigation of acts of an individual applying for asylum outside his or her country of origin to the same extent as in national criminal proceedings may be very challenging, if not impossible.[111] While the standard of proof between exclusion proceedings and criminal procedure arguably forms a significant difference between the procedures, the lower standard of proof in exclusion proceedings underlines the crucial nature of legal aid in the procedure, as this means authorities have a lower threshold in proving their case and subjecting an individual to the serious and life-long consequences of exclusion.

2.2.6. Lack of Prosecutorial Discretion in Exclusion Proceedings

The relationship between international criminal law and exclusion, while inevitable specifically in the context of Article 1F(a), is not entirely unproblematic. Bond skillfully breaks down some of the problems arising from the fact that international criminal law has not been developed for the purposes of exclusion, but for establishing individual criminal liability in international tribunals. As discussed in Chapter 2.2.2. above, international criminal law is primarily targeted at ending impunity and preventing future violations, and consequently it has developed in the direction of catching the "big fish" and making an impact through deterrence. While in international tribunals wide prosecutorial discretion is applied, states are under obligation to apply Article 1F to all individuals falling within its scope, resulting in a significantly higher amount of "cases" in comparison with international criminal law tribunals. What is more, individuals tried before international criminal law tribunals are mostly high-ranking officials, and where individuals in lower positions have been targeted, they have been accused of having been directly involved in international crimes. In comparison with perpetrators tried at international tribunals, individuals considered for exclusion are more likely to have occupied low-ranking positions in violent regimes or insurgent groups, and therefore likely to have indirect or remote links to crimes under Article 1F(a), as high-ranking officials often possess the economic and political resources to safely relocate without relying on the asylum system.[112] As a matter of fact, the knowing participation in international crimes by an individual subject to exclusion proceedings may be so remote or minimal that such cases have never been considered under international criminal law

[110] Holvoet, 2014, pp. 1041–1047; Bond, 2013, pp. 21–22.
[111] Bond, 2012, pp. 46–47.
[112] Bond, 2013, pp. 19–21.

due to its focus on high-ranking perpetrators. This lack of existing precedence may create significant challenges in the application of principles of international criminal law to exclusion decisions.[113]

Furthermore, defences established in international criminal law, such as duress and superior orders, are more likely to apply to low-ranking perpetrators than those charged in international tribunals, which underlines the importance of the examination of defences in exclusion procedure. Without access to legal assistance, the ability of applicants to present possible defences or to even be aware of their significance may be questionable.[114] Regarding the matter of defences, EASO offers rather confusing guidance to case officers in its *Practical Guide: Exclusion.* The guide first declares: "Issues regarding defences would usually be brought up by the applicant"[115], implying that the consideration of applicable defences should be initiated by the applicant – who may be oblivious of defences' legal substance and scope, or even of their existence. The guide continues: "However, it is the duty of the case officer to explore all circumstances fully, including defences, whether they are explicitly raised by the applicant or not."[116] Despite this confusing guidance by EASO, it is not difficult to imagine that in the absence of an applicant raising the subject of defences, this very significant area of criminal law may be overlooked in the process. E.g. the defence of duress[117] is rarely found from exclusion decisions despite its prominent occurrence in cases of international criminal law.[118] The fact that exclusion decisions at first instance take place within administrative proceedings also increases chances that the knowledge of the correct application of international criminal law, including its defences, amongst decision makers is lower than that of judges of international criminal tribunals.[119] Decision-makers may consequently fail to satisfactorily consider both the substantive elements of crimes and the individual liability required for a decision to exclude under Article 1F(a).[120]

2.2.7. Other Procedural Elements

Other procedural guarantees applicable to both criminal proceedings and exclusion proceedings include the right to be heard, right to an interpreter and right to be informed of the nature of

[113] Bond, 2013, pp. 25–26.
[114] *Ibid.*
[115] EASO, Practical Guide: Exclusion, 2017, p. 9.
[116] *Ibid.*
[117] See Chapter 2.2.3.
[118] Bond, 2013, p. 49.
[119] Article 1F(a) has been applied with great inconsistencies both within and between different jurisdictions. See Bond, 2013, pp. 8–9; Holvoet, 2014, pp. 1041–1049.
[120] Holvoet, 2014, p. 1048.

proceedings.[121] Further divergencies, such as the absence of privilege against self-incrimination in exclusion proceedings, can also be identified.[122] These elements, however, will not be further discussed, as they are not decisive in relation to the applicability of the right to legal aid to exclusion proceedings, and some of the divergencies precisely exist as all procedural guarantees of Article 6 ECHR and Articles 47 and 48 CFREU are not applicable to exclusion proceedings. Next, the possible applicability of these Articles to exclusion proceedings will examined.

[121] Article 6(3), ECHR, 1951; Bliss, 2000, pp. 99–100.
[122] ECtHR, Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial (criminal limb), 2021 ("Guide on Article 6 (criminal limb)"), paras. 193–195; UNHCR, Guidelines, para. 35; Bliss, 2000, pp. 113–115.

3. The Right to Legal Assistance and Legal Aid in the European Context

3.1. Protection under ECHR and CFREU

As earlier discussed, both the ECHR and the CFREU bind EU Member States and address the issue of free legal assistance in Article 6 ECHR and Articles 47 and 48 CFREU respectively. This subchapter will review the right to legal assistance and legal aid in the ECHR and the CFREU before moving on to their possible applicability to exclusion proceedings. The main difference between the instruments – in addition to their *ratione loci* – is that the CFREU is only applicable towards Member States when they operate in areas regulated by EU law, whereas the ECHR is applicable in all acts and omissions conducted by Member States within their jurisdiction.[123] Thus, a sufficient nexus with EU law is required for the CFREU rights to become applicable in relation to Member States' acts. As the determination of qualification as a refugee – including exclusion considerations, when relevant – are regulated by EU law, more specifically the Qualification Directive, EU Member States are under obligation to observe the CFREU in their national RSD procedures.

Article 6 ECHR guarantees the right to a fair hearing to everyone in the "determination of his civil rights and obligations or of any criminal charge against him".[124] The overarching right to a fair trial is a core democratic principle, and the rights set out in Article 6 are considered core rights of the Convention which safeguard the fundamental principle of the rule of law.[125] While Article 6(1) guarantees the overall right to a fair hearing which is applicable in both criminal proceedings and in the determination of civil rights and obligations, Articles 6(2) and (3) concern specific procedural safeguards only afforded to those "charged with a criminal offence". "Criminal charges", for the purposes of Article 6, is an autonomous concept determined by the Strasbourg Court. The right to legal assistance and legal aid are laid out in Article 6(3)(c), which guarantees those charged with a criminal offence the right "[…] to defend himself in person or through legal assistance of his choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require."[126] While the right to legal assistance and legal aid is explicit in Article 6(3)(c), a breach of Article 6(3) obligations may also constitute a breach of the right to a fair hearing under Article 6(1).[127]

[123] Article 51(1), CFREU, 2012; Article 1, ECHR, 1950; Peers, 2012, pp. 444–445.
[124] Article 6(1), ECHR, 1950.
[125] ECtHR, *Golder v. the UK* (Appl. no. 4451/70), Judgement (Plenary) of 21 February 1975, para. 35.
[126] Article 6(3)(c), ECHR, 1950.
[127] Sayers, 2014a, p. 1310.

According to the ECtHR, "the right of every accused to be effectively defended by a lawyer […] is among the basic elements of a fair trial."[128] Access to legal assistance is central to the defendants' ability to prepare an effective defence, and consequently the right does not merely concern the time during which a trial takes place, but expands to the preparation of a defence prior to it. The complexity of the case at hand is decisive for the amount of time needed for the preparation.[129] The ECtHR recognised in its landmark case of *Salduz v. Turkey* (2008) that effective access to legal assistance should be guaranteed from the initial stages of criminal proceedings, namely the first police interrogations, as national laws may attach consequences to the defendant's attitude during this questioning.[130] The ECtHR has also recognised the special vulnerability of accused persons during initial interrogations.[131]

According to the ECtHR, the objectives of the right of access to legal assistance are multiple, including preventing the miscarriage of justice as well as supporting the fulfilment of aims of Article 6, such as equality of arms, privilege against self-incrimination and safeguarding suspects' rights in police custody. The aim of defendants and accused persons having early access to a lawyer is also to ensure their knowledge of other procedural rights, which can prevent procedural unfairness from taking place.[132] These aims were summarized in the Court's Grand Chamber judgement *Beuze v. Belgium* (2018), where the Court also distinguished the minimum requirements for the content of the right of access to a lawyer consisting of two parts: Firstly, the right to contact and get consultation from a lawyer prior to being interviewed, and secondly, the right to have a lawyer present during all interviews and questionings in pre-trial proceedings, including the initial police interview.[133] The right to physical presence of a lawyer covers the entirety of the interview including the reading out and signing of statements, and it also entails that the lawyer be entitled to assist the defendant during questioning and to intervene in order to ensure the defendant's rights.[134] While the CoE Member States are responsible for ensuring that national measures satisfy the requirements of Article 6 effectively, they enjoy a wide margin of appreciation in relation to the means applied to comply with them.[135] Legal aid, being an ancillary right to the right to legal assistance, must be provided for impecunious applicants when the latter

[128] ECtHR, *Dayanan v. Turkey* (Appl. no. 7377/03), Judgement (Chamber) of 13 October 2009, para. 30.
[129] Kälin et al., 2019, pp. 478–479; HRC, *Little v. Jamaica,* Communication no. 283/1988, UN doc. CCPR/C/43/D/283/1988, 10 January 1991, para. 8.3.
[130] ECtHR, *Salduz v. Turkey* (Appl. no. 36391/02), Judgement (GC) of 27 November 2008, para. 52.
[131] ECtHR, *Dvorski v. Croatia* (Appl. no. 25703/11), Judgement (GC) of 20 October 2015*,* para. 77.
[132] ECtHR, *Beuze v. Belgium* (Appl. no. 71409/10), Judgement (GC) of 9 November 2018*,* paras. 125–130.
[133] *Ibid.,* paras. 133–134.
[134] ECtHR, *Soytemiz v. Turkey* (Appl. no. 57837/09), Judgement (Chamber) of 27 November 2018*,* paras. 44–46, 27.
[135] ECtHR, *Quaranta v. Switzerland* (Appl. no. 12744/87), Judgement (Chamber) of 24 May 1991, para. 30.

applies, and, simultaneously, "the interests of justice so require". The conditions relevant for the obligation to provide legal aid to suspects and accused persons under Article 6(3)(c) will be examined in detail in Chapter 3.5.

While the ECHR makes no explicit reference to legal aid in civil proceedings, the ECtHR has developed an impressive amount of case law concerning the subject.[136] According to the Strasbourg Court, states are not obliged to offer free legal assistance in all proceedings concerning civil rights and obligations, but in order to comply with Article 6 obligations, states must ensure legal aid in circumstances where such aid is essential for effective access to court.[137] The necessity of legal assistance in civil proceedings is dependent on the subject matter of the case, the possible implications of the proceedings for the individual in question, the complexity of relevant law and procedure and, ultimately, the individual's ability to represent him/herself effectively without access to legal assistance.[138] While asylum decisions may seriously affect an individual's economic and personal welfare, the ECtHR has consistently held that RSD, alongside other immigration issues, do not constitute proceedings qualifying as determination of civil rights and obligations, and consequently do not fall within the scope of the civil limb of Article 6.[139]

In the CFREU, the right to legal assistance and legal aid are covered under Articles 47 and 48, where they form a part of defence rights. Article 47, titled "Right to an effective remedy and to a fair trial" consists of three paragraphs and reads as follows:

> Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
>
> Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
>
> Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.[140]

[136] Holopainen, 2014, p. 1269.
[137] ECtHR, *Del Sol v. France*, (Appl. no. 46800/99), Judgement (Chamber) of 26 February 2002, para. 20; ECtHR, *P., C. and S. v. The United Kingdom* (Appl. no. 56547/00), Judgement (Chamber) of 16 July 2002, paras. 88–91.
[138] ECtHR, *Airey v. Ireland* (Appl. no. 6289/73), Judgement (Chamber) of 9 October 1979, para. 26; ECtHR, *McVicar v. the United Kingdom* (Appl. no. 46311/99), Judgement (Chamber) of 7 May 2002, paras. 48–49; ECtHR, *P., C. and S. v. The United Kingdom* (Appl. no. 56547/00), Judgement (Chamber) of 16 July 2002, para. 91; CJEU, C-279/09 *DEB v. Germany,* Judgement of 22 Decembet 2010, para. 46.
[139] ECtHR, Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial (civil limb), 2021, para. 72; Jacobs et al., 2010, p. 251.
[140] Article 47, CFREU, 2012.

The first paragraph, which ensures an effective remedy, covers all rights and freedoms guaranteed by Union law, under which the right to asylum also falls.[141] Examining the right to legal aid in procedures ensuring the right to an effective remedy under Article 47 in cases of exclusion is unnecessary – as earlier stated, Article 20(1) of the Procedures Directive obligates Member States to ensure access to legal assistance for asylum applicants in appeals procedure, consequently implementing the obligation to offer legal aid in connection with the right to an effective remedy in respect of asylum procedure.[142] Its applicability in procedures at first instance, on the other hand, is of interest to this research.

The second paragraph of Article 47 corresponds to Article 6(1) ECHR, ensuring the overall right to a fair hearing. According to Explanations Relating to the Charter, all guarantees afforded by Article 6(1) ECHR are applicable in the same way to Article 47, but unlike Article 6(1) ECHR, Article 47 is not confined in its scope to "civil rights and obligations".[143] While the ECtHR has ruled immigration and asylum issues to fall outside the scope of Article 6, they fall within the scope of Article 47 CFREU.[144] Despite their differing scope, the corresponding substance of the second paragraph of Article 47 CFREU and 6(1) ECHR renders ECtHR jurisprudence under Article 6(1) applicable in areas regulated by EU law, regardless of whether they would fall under Article 6 before the ECtHR.[145] Finally, the third paragraph of Article 47 explicitly covers the right to legal aid in criminal and civil proceedings.[146] In its clarification of the paragraph, Explanations Relating to the Charter refer to ECtHR case law in civil proceedings under Article 6(1), citing the infamous *Airey v. Ireland* (1979) case and stating that "provision should be made for legal aid where the absence of such aid would make it impossible to ensure an effective remedy".[147] Reference to *Airey* confirms the object for the right to apply in civil proceedings also.

According to the Explanations Relating to the Charter*,* Article 48 CFREU, titled "Presumption of innocence and right of defence", has the same meaning and scope as Article 6(2) and (3) of the ECHR.[148] Article 48(1) CFREU and the corresponding Article 6(2) ECHR cover presumption of innocence and fall outside the scope of this thesis. Article 48(2), which corresponds to Article

[141] Articles 47, 18, CFREU, 2012.
[142] Article 20(1), Procedures Directive.
[143] Explanations relating to the Charter, Article 47; Giangiuseppe, 2011, p. 164.
[144] ECRE, The application of the EU Charter of Fundamental Rights to asylum procedural law, 2014, p. 65.
[145] Preamble, CFREU, 2012; ECRE, The application of the EU Charter of Fundamental Rights to asylum procedural law, 2014, p. 63; Peers, 2012, pp. 458, 467.
[146] The applicability of the right to legal aid under Article 47 in criminal proceedings is articulated in e.g. Recital 3 of the Legal Aid Directive.
[147] Explanations relating to the Charter, Article 47.
[148] *Ibid.,* Article 48.

6(3), guarantees "[r]espect for the rights of the defence of anyone who has been charged", and covers all individual guarantees under Article 6(3) ECHR, including the right to legal assistance and legal aid when the interests of justice so require.[149] Like with Article 47, the correspondence of the Articles means the case law of the ECtHR under Article 6 ECHR becomes applicable in the sphere of EU law.[150] In a manner which specific guarantees under Article 6(3) ECHR may also constitute a violation of the general right to a fair hearing under Article 6(1), a violation of defence rights under Article 48(2) CFREU may also constitute a violation of Article 47, as in order for a trial to be fair overall, several individual defence rights must be complied with.[151] What is more, Article 48(2) directly overlaps with Article 47 in the sphere of the right to access legal representation and the right to be defended.[152] Member States enjoy wide discretionary powers over the organisation and content of legal aid under the CFREU, so long as it complies with the level of protection offered by the Charter.[153]

3.2. Legal Aid Directive

Within the EU, the right to legal assistance and legal aid are additionally regulated in two distinct directives, namely Directive 2013/48/EU of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty ("Access to Lawyer Directive")[154] and the Legal Aid Directive, which form a part of the Union's roadmap to strengthening procedural rights of suspected or accused persons in criminal proceedings.[155] Directives under the roadmap are intended to bring concreteness to the rights enshrined in the ECHR and the CFREU, make them real and effective and to establish a minimum level of procedural guarantees in criminal proceedings. Through these minimum guarantees, the Directives aim to increase mutual trust between Member States' criminal procedures and decisions. EU Member States are under legal obligation to modify their legislation to comply with

[149] Article 48, CFREU, 2012; Explanations relating to the Charter, Article 48.
[150] Preamble, CFREU, 2012; Peers, 2012, pp. 458, 467.
[151] Sayers, 2014a, pp. 1309–1310.
[152] Sayers, 2014a, p. 1313.
[153] Holopainen, 2014, p. 1270.
[154] Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, O.J. L 294/1, 6 November 2013 ("Access to a Lawyer Directive").
[155] Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, O.J. C 295/1, 4 November 2009.

the Directives, and individuals can bring cases against Member States in cases of non-compliance. In comparison with the ECHR and the CFREU, the Directives are more detailed in their outcome.[156]

As the standards of the right to legal assistance and legal aid in ECHR and CFREU are legally binding to all member states, they also set the minimum level of protection to be followed throughout the Directives. However, both the Access to a Lawyer Directive and the Legal Aid Directive have been received with criticism and concerns over their compatibility with the ECHR; while the protection level of the Directives cannot fall short of the Convention, they contain Articles which could be perceived as doing so.[157] The criticism has concerned both the scope and substance of rights therein, but the substance of rights within the Directives will not be further discussed, as it is not relevant to the question of applicability in exclusion proceedings. Instead, the scope of application of the Directives will be closer examined to determine whether they offer protection wider than that under the ECHR and the CFREU. As asylum applicants already have the entitlement to consult legal assistance at their own cost at all stages of the asylum procedure, the Access to a Lawyer Directive is of less relevance to the research question at hand and only the Legal Aid Directive will be further scrutinised.[158] However, the applicability of the Access to a Lawyer Directive forms a precondition for the applicability of the Legal Aid Directive, and its scope must consequently be briefly addressed.[159] The Access to a Lawyer Directive confines its application to:

> […] suspects or accused persons in criminal proceedings from the time when they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence, and irrespective of whether they are deprived of liberty. […][160]

This determined scope follows ECtHR jurisprudence concerning the existence of "criminal charges", as the Court has determined criminal charges to exist from the official notification by competent authorities to an individual of an allegation of criminal activity on their part.[161] In some instances, the notification may take the form of "other measures which carry the implication of

[156] Sayers, 2014a, pp. 1312, 1321–1324; Anagnostopoulos, 2014, pp. 6–7.
[157] Anagnostopoulos, 2014, pp. 8–12, 15–17; Symeonidou-Kastanidou, 2015, pp. 71, 73–75, 79.
[158] Article 22(1), Procedures Directive.
[159] Article 2(1) of the Legal Aid Directive states the Directive to apply "to suspects and accused persons in criminal proceedings who have a right of access to a lawyer pursuant to Directive 2013/48/EU […]".
[160] Article 2(1), Access to a Lawyer Directive.
[161] ECtHR, *Eckle v. Germany* (Appl. no. 8130/78), Judgement (Chamber) of 15 July 1982, para. 73.

such an allegation and which likewise substantially affect the situation of the suspect".[162] In this respect, the Access to a Lawyer Directive does not seem to offer protection wider than that of the ECHR. The Access to a Lawyer Directive contains a number of additional paragraphs relating to its scope, but they are identical to those of the Legal Aid Directive and thus require no separate attention. The Access to a Lawyer Directive also makes reference to legal aid in Article 11, stating that it should "apply in accordance with the Charter and the ECHR."[163]

The object of the Legal Aid Directive, on the other hand, is to ensure access to a lawyer as determined under the Access to a Lawyer Directive.[164] The scope of the Legal Aid Directive makes several references which seem to confine its applicability specifically to criminal proceedings. The first of four paragraphs under Article 2 titled "Scope" read as follows:

> This Directive applies to suspects and accused persons *in criminal proceedings* who have a right of access to a lawyer pursuant to Directive 2013/48/EU and who are:
>
> (a) deprived of liberty;
>
> (b) required to be assisted by a lawyer in accordance with Union or national law; or
>
> (c) required or permitted to attend an investigative or evidence-gathering act, including as a minimum the following: (i) identity parades; (ii) confrontations; (iii) reconstructions of the scene of a crime.[165]

In addition to the confinement of the Directive to criminal proceedings in the Article above, Article 4(6) of the same Directive further emphasises that "[l]egal aid shall be granted *only* for the purposes of the criminal proceedings in which the person concerned is suspected or accused of having committed a criminal offence."[166] Of special interest to possible applicability on exclusion, however, is Article 2(3) of the Directive, which reads as follows:

> This Directive also applies, under the same conditions as provided for in paragraph 1, to persons who were not initially suspects or accused persons but become suspects or accused persons in the course of questioning by the police or *by another law enforcement authority*.[167]

While Article 2(3) initially seems to offer the possibility of extending the scope of the Directive to noncriminal settings where an individual is suspected of having committed a crime, recital 10 of the Directive includes a further explanation which seems to suggest that such questioning by another law enforcement authority is also limited to the context of criminal proceedings:

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[162] ECtHR, *Foti and Others v. Italy* (Appl. nos. 7604/76; 7719/76; 7781/77; 7913/77), Judgement (Chamber) of 10 December 1982, para. 52.
[163] Article 11, Access to a Lawyer Directive.
[164] Fair Trials, Practitioner's Tools on EU Law: Legal Aid Directive, 2020, p. 16.
[165] Article 2(1), Legal Aid Directive, emphasis added.
[166] Article 4(6), Legal Aid Directive, emphasis added.
[167] Article 2(3), Legal Aid Directive, emphasis added.

> This Directive therefore makes express reference to the practical situation where such a person becomes a suspect or an accused person during questioning by the police or by another law enforcement authority *in the context of criminal proceedings.*[168]

As exclusion does not systematically take place in the context of criminal proceedings, the wording of the recital may impose further restriction in its possible applicability in relation to exclusion proceedings. However, the recognition of the need to ensure procedural rights of persons not initially suspected of crimes, which has been underscored as important by the ECtHR also, is significant.[169] In exclusion proceedings law enforcement authority other than the police, namely immigration authorities, may begin to suspect an asylum seeker of criminal activity in the course of an asylum interview due to incriminating evidence arising therein. This scenario offers a possibility of interpreting exclusion proceedings to fall within the scope of Article 2(3) of the Directive. The applicability of the Article nevertheless requires for a person to *become* a suspect or an accused person in the course of the questioning, a threshold which corresponds to that established by the ECtHR.[170] It therefore seems that in this respect, also, the Legal Aid Directive does not offer additional protection in relation to the ECHR and CFREU.

To the contrary, under Article 2(4), which concerns 'minor offences', the Directive seems to fall short of the protection provided in the ECHR and CFREU. Article 2(4) restricts the Directive's applicability in relation to minor offences, provided that (a) national legislation has delegated the imposition of a sanction to an authority that is not a court, and that such sanction may be appealed or referred to a court, *or* (b) deprivation of liberty is not a possible sanction.[171] While not all minor offences are considered criminal law sanctions which demand criminal proceedings according to the ECtHR, and some of them may arguably fall outside the scope of Article 6 ECHR, the restrictions established in the Directive have not been endorsed by the ECtHR.[172] They consequently raise questions as to whether the protection level articulated in the Directive is sufficiently compatible with that of the ECHR, which is particularly alarming as the object of the Directive is to clarify and make minimum guarantees in criminal proceedings more effective.[173]

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[168] Recital (10), Legal Aid Directive, emphasis added.
[169] ECtHR, *Ibrahim and Others v. the United Kingdom,* (Appl. nos. 50541/08, 50571/08, 50573/08 and 40351/09), Judgement (GC) of 13 September 2016, paras. 139–140, 296.
[170] See e.g. ECtHR, *Ibrahim and Others v. the United Kingdom,* (Appl. nos. 50541/08, 50571/08, 50573/08 and 40351/09), Judgement (GC) of 13 September 2016, para. 296, and ECtHR, *Shabelnik v. Ukraine,* (Appl. no. 16404/03), Judgement (Chamber) of 19 February 2009, para. 57, in both cases the applicants were initially questioned in the position of a witness, and the ECtHR considered that "criminal charges" against them existed from the moment in which suspicion of their involvement in a criminal offence arouse.
[171] Article 2(4), Access to a Lawyer Directive; Article 2(4), Legal Aid Directive.
[172] ECtHR, Guide on Article 6 (criminal limb), 2021, paras. 3–4; Sayers, 2014a, pp. 1336–1337.
[173] Sayers, 2014a, pp. 1336–1337.

Furthermore, it seems the Directive aims to rule certain minor offences, such as minor traffic offences, outside the scope of the Directive categorically.[174] Such category restriction appears contrary to Article 6 ECHR, as the ECtHR has not placed any pre-determined restrictions on the types of offences considered to fall within its scope. The existence of "criminal charges", which is an autonomous concept, determines the applicability of the Article in the specific context of each case, and the Directive has consequently been criticised of incompatibility with Member State obligations under the ECHR.[175] Nevertheless, Article 14 of the Directive states that "[t]he scope of application of this Directive in respect of certain minor offences should not affect the obligations of Member States under the ECHR to ensure the right to a fair trial including obtaining legal assistance from a lawyer."[176] How this statement is to be interpreted in practice is unclear, since the Directive seems to rule certain offences outside the scope of the Directive without an individual review of the existence of "criminal charges".[177] While exclusion procedure could technically be considered to fall within the scope of the abovementioned restrictive Article 2(4)(a) and (b) – given that exclusion be considered a sanction, which is also debatable – the scope of the restriction is nevertheless confined to *minor offences.* As demonstrated in Chapter 2.1., all substantive criminal acts described in Article 1F of the Refugee Convention are of serious nature. Thus, it can hardly be argued that excludable acts could be described as minor offences as required by Article 2(4) for its application, consequently precluding its applicability in relation to exclusion.

With regard to the timely access to legal aid, the Legal Aid Directive follows ECtHR jurisprudence in recognising that legal aid should be provided without undue delay and at the latest before questioning by the police or another law-enforcement authority.[178] Furthermore, the Directive follows ECtHR and CJEU jurisprudence in respect of the interests of justice test as well as the elements to be assessed therein, establishing concrete measures to transpose the ECHR and CFREU obligations into national legislation.[179] While the Directive is relevant and useful for the practical implementation of the rights guaranteed in the CFREU and the ECHR, it does not seem to have added value in respect of the scope of the right to legal aid and the discussion of its

[174] Recital 17, Access to a Lawyer Directive; Recital 12, Legal Aid Directive; Recital 13, Access to a Lawyer Directive.
[175] Sayers, 2014a, p. 1337.
[176] Recital 18, Access to a Lawyer Directive; Recital 14, Legal Aid Directive.
[177] Sayers, 2014a, p. 1337.
[178] Article 4(5), Legal Aid Directive; ECtHR, *Salduz v. Turkey* (Appl. no. 36391/02), Judgement (GC) of 27 November 2008, para. 55; but see Symeonidou-Kastanidou, 2015, pp. 73–75.
[179] Article 4, Legal Aid Directive.

possible applicability to exclusion proceedings. As the scope of the Directive does not extend the right to legal aid, but occasionally even appears to fall short of the standards set by the CFREU and the ECHR, these treaties remain the main source of rights for the purposes of this research.

3.3. Scope of Article 6 ECHR – The "Criminal Charges" Requirement and Exclusion

3.3.1. Article 6 and Exclusion

The exclusion of asylum procedure from the scope of Article 6 by the Strasbourg Court has been determined under the civil limb of the Article, and no indication of consideration of exclusion proceedings in this respect can be found.[180] However, exclusion proceedings are a peculiarity in asylum procedure and share many characteristics with criminal proceedings as demonstrated in Chapter 2.2., and their possible inclusion within the criminal limb of Article 6 must thus be examined. Two distinct aspects of the scope of Article 6 ECHR are relevant to the right to legal aid in exclusion proceedings at first instance. Firstly, of relevance is to examine *the moment from which* Article 6 becomes applicable. This is usually determined by the moment from which "criminal charges" for the purposes of the Article exist, and which, again generally, is indicated by the moment when an individual becomes a suspect or an accused person and is consequently entitled to receive legal aid. This aspect of Article 6 is not only relevant if exclusion proceedings are capable of amounting to "criminal charges" for the purposes of Article 6, but also in cases where they are followed by criminal proceedings. Secondly, it is relevant to assess whether exclusion procedure, on its own, could amount to "criminal charges" in the autonomous meaning of Article 6. This examination will be conducted through an application of the ECtHR's principles and jurisprudence, namely the *Engel* criteria, on exclusion proceedings.

3.3.2. The Temporal Existence of a Criminal Charge

The criminal limb of Article 6 ECHR becomes applicable from the moment in which an individual is charged with a criminal offence. The determination of this moment, however, is not dependent on formal domestic procedure of bringing criminal charges, but on the autonomous concept of "criminal charges" determined by the Strasbourg Court.[181] As articulated in *Deweer v. Belgium* (1980), the Court assesses "the realities of the procedure in question" to determine whether it constitutes criminal charges regardless of domestic classification.[182] According to the Court, a

[180] ECtHR, Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial (civil limb), 2021, para. 68.
[181] Jacobs et al., 2010, p. 246; ECtHR, Guide on Article 6 (criminal limb), 2021, para. 16.
[182] ECtHR, *Deweer v. Belgium* (Appl. no. 6903/75), Judgement (Chamber) of 27 February 1980, para. 44.

"charge" can be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence"[183], which can also be tested through an examination of the moment from which "his situation has been substantially affected by actions taken by the authorities as a result of a suspicion against him".[184] The latter test has been applied in *Foti and Others v. Italy* (1982), where the Court held that the official notification may also "take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect."[185] What is of relevance to the existence of a criminal charge is whether an individual is treated as a suspect by authorities; in addition to formal criminal charges, this may take the form of an arrest, questioning by the police as a suspect *or,* in some instances, as a witness, as well as collecting forensic evidence from an individual in suspicion of committing a crime.[186] Relevant parallels of the "substantially affected" doctrine with exclusion can be found specifically in ECtHR cases where an individual has been interviewed in a position other than a suspect, but in the course of an interview information raising suspicion against him or her has surfaced, amounting to him or her having been substantially affected and the safeguards of Article 6 consequently being triggered.[187] Similar situations are prone to arise in asylum interviews, where incriminating statements made in the course of an interview may result in suspicion of criminal conduct and initiate the consideration of exclusion by immigration authorities. This is a significant congruence between ECtHR jurisprudence under the criminal limb of Article 6 and exclusion procedure.

Another point of interest in the temporal existence of criminal charges in relation to exclusion is the determination of "competent authority" and whether immigration authorities investigating exclusion could be considered as such. The ECtHR has not explicitly determined which authorities fall under this category. In *Funke v. France* (1993) the Court found a violation of Article 6, which was applicable owing to actions taken by *custom authorities* – who are clearly not police or prosecuting authorities.[188] In *Saunders v. the UK* (1996), on the other hand, Judge

[183] ECtHR, *Deweer v. Belgium* (Appl. no. 6903/75), Judgement (Chamber) of 27 February 1980, para. 46.
[184] *Ibid.;* ECtHR, *Ibrahim and Others v. the United Kingdom,* (Appl. nos. 50541/08, 50571/08, 50573/08 and 40351/09), Judgement (GC) of 13 September 2016, para. 249; ECtHR, *Eckle v. Germany* (Appl. no. 8130/78), Judgement (Chamber) of 15 July 1982, para. 73.
[185] ECtHR, *Foti and Others v. Italy* (1982), para. 52; see also e.g. ECtHR, *Öztürk v. Germany* (Appl. no. 8544/79), Judgement (Plenary) of 21 February 1984, para. 55 and ECtHR, *Mikolajova v. Slovakia* (Appl. no. 4479/03), Judgement (Chamber) of 28 January 2011, para. 40.
[186] ECtHR, Guide on Article 6 (criminal limb), 2021, paras. 17–19.
[187] See e.g. ECtHR, *Ibrahim and Others v. the United Kingdom,* (Appl. nos. 50541/08, 50571/08, 50573/08 and 40351/09), Judgement (GC) of 13 September 2016, para. 296; ECtHR, *Shabelnik v. Ukraine,* (Appl. no. 16404/03), Judgement (Chamber) of 19 February 2009, paras. 57–60.
[188] ECtHR, *Funke v. France* (Appl. no. 10828/84), Judgement (Chamber) of 25 February 1993, para. 44.

Martens expressed in his dissenting opinion joined by Judge Kuris that competent authorities – who must be the actor conducting the official notification or other measures indicative of criminal charges – specifically refer to prosecuting authorities.[189] It seems that while it certainly appears possible that authorities other than those capable of initiating criminal prosecution could act as "competent authority" for the purposes of Article 6, like in *Funke*, the issue is not entirely settled within the Court.

When an exclusion decision under Article 1F is taken, an individual is clearly suspected of having committed a crime, as there must be serious reasons to consider that in order to apply the exclusion clause. The evidential threshold of *serious reasons to consider* is not of further relevance to the thesis; once this threshold is reached and an individual is excluded, they receive a negative asylum decision and are generally entitled to legal aid in accordance with the Procedures Directive.[190] Of relevance is whether an individual can be said to be a suspect in the meaning of Article 6 prior to the decision to exclude, and if so, at which point. This determination may be a challenging task. Although exclusion is continuously referred to as the *exclusion procedure*, it generally takes place within RSD, and its consideration does not require an initiation of a separate process. Consequently, it can be difficult to determine the moment in which exclusion procedure actually begins, as well as whether an individual becomes a suspect within the procedure. As instructed by EASO in its *Practical Guide: Exclusion*, information which may indicate to exclusion considerations being relevant may arise from a myriad of sources in addition to a personal interview: EASO refers to identity and travel documents, crime records and arrest warrants, information from official databases, statements of other people, and open sources including social media as possible pieces of evidence that might trigger exclusion considerations.[191] While some of these sources, such as official databases, may be able to trigger suspicion relatively strong and specific in relation to the applicant in question, some level of suspicion may also arise from profiles, such as membership to an organisation, government, military or the police; or indicative of exclusion may be information as general as a geographical and temporal link to a an event in which excludable acts have taken place.[192] These examples demonstrate that the level and source of suspicion in exclusion considerations varies significantly between applicants: for one applicant exclusion might be considered because of an explicit confession of committing an excludable act,

[189] ECtHR, *Saunders v. the United Kindom* (Appl. no. 19187/92), Judgement (GC) of 17 December 1996, Dissenting opinion of Judge Martens joined by Judge Kuris, para. 15.
[190] Article 20 (1), Procedures Directive.
[191] EASO, Practical Guide: Exclusion, 2017, p.10.
[192] *Ibid.*, p.11.

whereas another might have been in a specific country during a specific violent event, but no specified information of him or her exists when the consideration of exclusion first arises. The wide spectrum of "suspicion" in exclusion cases also leads to varying levels of effect for different applicants' situations – for one applicant exclusion may be briefly considered owing to a travel route or country of origin but also rapidly proved wrong, whereas for another individual suspicion may lead to a thorough investigation which shares many parallels with criminal procedure. Consequently, exclusion procedures cannot be considered a homogenous group of situations where same procedural safeguards apply categorically, but attention must be paid to the level and specificity of suspicion against an applicant when considering the applicability of the right to legal aid. The conditions under which an individual could be considered a suspect for the purposes of Article 6 will be further examined in Chapter 4.2.

What is more, the ECtHR has not been unanimous in its application of the suspicion-based approach in the determination of the temporal existence of "criminal charges". In his concurring opinion to *Ibrahim and Others v. the United Kingdom* (2016), Judge Mahoney expresses that in his view the course taken by the Court to equate being suspect to the existence of criminal charges for the purposes of Article 6 is incorrect. In his view, this interpretation undermines the realities of different stages of criminal procedure, stating that being a suspect and being charged with a criminal offence are two "separate, successive stages of a criminal process in its wider sense."[193] However, the Judge explains that whether an individual is "charged" within the meaning of Article 6 during initial interviews as a suspect is irrelevant for fair trial guarantees: he instead argues, that once an individual has indeed been charged with a criminal offence (which, in his view, is not the case on the basis of mere suspicion), the safeguards of Article 6 may expand beyond the moment in which the charge occurred, so long "as those factors are capable of influencing the fairness of the trial".[194] Consequently Judge Mahoney finds, with reference to the *Salduz* decision, that the use of incriminating statements made during police interviews without access to legal assistance most certainly renders a procedure unfair, but this does not require that the individual has been "charged" within the meaning of Article 6 when those statements were made.[195] In this line of arguing, it would be possible that exclusion proceedings do not, on their own, amount to "criminal charges" for the purposes of Article 6 – meaning they do not fulfil the criteria of the "substantially affected" doctrine or the *Engel* criteria covered in Chapter 3.3.3. – but if an individual was later

[193] ECtHR, *Ibrahim and Others v. the United Kingdom,* (Appl. nos. 50541/08, 50571/08, 50573/08 and 40351/09), Judgement (GC) of 13 September 2016, Concurring Opinion of Judge Mahoney, para. 8.
[194] *Ibid.*, para. 5.
[195] *Ibid.,* paras. 5–6.

charged with a criminal offence, the safeguards of Article 6 in this respect would expand to exclusion interviews, were those interviews capable of affecting the fairness of the procedure e.g. through incriminating statements made in the absence of a lawyer.

This line of argumentation finds support in the ECtHR's case law. The ECtHR has taken a handful of admissibility decisions concerning complaints over breaches of Article 6 in relation to exclusion proceedings which have not been followed by criminal proceedings, and its common practice is to briefly state "proceedings and decisions concerning the entry, stay and removal of aliens" to fall outside the scope of Article 6, consequently rendering such complaints incompatible *ratione materiae* with the ECHR.[196] In the case of *H. and J. v. the Netherlands* (2014), however, the ECtHR elaborated on the substance of exclusion proceedings in relation to Article 6, as exclusion had been followed by criminal proceedings. The applicants in the case were excluded under Article 1F of the Refugee Convention, and following the asylum procedure, statements made by the applicants therein were submitted to prosecuting authorities. Both applicants were then prosecuted and sentenced to 12 and 9 years imprisonment respectively in the Netherlands. The applicants complained to the ECtHR claiming a breach of privilege against self-incrimination in the asylum procedure, but the Court found the cases inadmissible due to lack of compulsion, which forms a precondition for such a breach, in the procedure. This differs from the regular procedure of the court to simply declare Article 6 inapplicable *ratione materiae* in exclusion proceedings, as earlier stated. Instead, the Court examined whether compulsion for the purposes of privilege against self-incrimination under Article 6 had taken place in the exclusion procedure prior to the pressing of criminal charges.[197] While the complaints were found inadmissible, the fact that the ECtHR found it relevant to examine the existence of compulsion indicates that had compulsion taken place, the procedure would have indeed had the capability of breaching Article 6, in effect displaying a possibility of Article 6 safeguards extending to exclusion proceedings in such a context. This approach taken by the ECtHR can be interpreted in line with the argumentation put forward by Judge Mahoney: were exclusion proceedings capable of affecting the fairness of succeeding criminal proceedings, Article 6 safeguards could have extended to the preceding exclusion proceedings. Furthermore, in 2017, the ECtHR took three decisions concerning complaints of breaches of Article 6 in relation to exclusion proceedings, in which no succeeding criminal proceedings had taken place. In these decisions, the ECtHR continued its line

[196] ECtHR, *Naibzay v. the Netherlands* (Appl. no. 68564/12), Decision (Committee) of 4 June 2013, para. 25.
[197] ECtHR, *H. and J. v. the Netherlands* (Appl. nos. 978/09 and 992/09), Decision (Chamber) of 13 November 2014.

of briefly finding Article 6 inapplicable *vis-à-vis* exclusion proceedings.[198] It consequently seems that at present, the Strasbourg Court considers exclusion proceedings on their own firmly outside the scope of Article 6, but criminal proceedings which have in fact taken place following exclusion procedure could extend the – or some – safeguards of Article 6 applicable in exclusion proceedings.

3.3.3. Proceedings Amounting to Criminal Charges – Applying the Engel-criteria to Exclusion

3.3.3.1. Overview of the Criteria

As procedural guarantees differ on the basis of whether proceedings fulfil a certain threshold of severity, constituting criminal charges, the status of exclusion proceedings in this respect must be determined. First applied in *Engel and Others v. Netherlands* (1976), the ECtHR uses the so called *Engel*-criteria to determine whether national proceedings constitute "criminal charges" for the purposes of Article 6. When applying the *Engel*-criteria, the Court uses national classification of the proceedings as a starting point of the assessment; considers secondly the nature of the offence, and finally, the nature and degree of severity of the penalty that may follow the proceedings in question.[199] The second and third criteria do not need to be fulfilled cumulatively, but either one may be sufficient to demonstrate the existence of "criminal charges". Cumulative approach may however be applied if neither criteria offers sufficient clarity on the nature of the proceedings.[200] While the ECtHR has clearly expressed it does not, at present, consider exclusion proceedings on their own to constitute "criminal charges" for the purposes of Article 6, it has not conducted a thorough analysis on the nature of exclusion in relation to the *Engel*-criteria.[201] The criteria will next be examined with a view on their possible applicability to exclusion proceedings.

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[198] ECtHR, *E.P. and A.R. v. the Netherlands*, (Appl. nos. 43538/11 and 63104/11), Decision (Committee) of 11 July 2017, paras. 84–85; ECtHR, *S.M.A. v. the Netherlands*, (Appl. no. 46051/13), Decision (Committee) of 11 July 2017, paras. 61–62; ECtHR, *M. M. and Others v. the Netherlands* (Appl. no. 15993/09), Decision (Chamber) of 16 May 2017, paras. 124–125.

[199] ECtHR, *Engel and Others v. Netherlands* (Appl. nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72), Judgement (Plenary) of 8 June 1976, paras. 82–83; Jacobs et al., 2010, p. 244.

[200] ECtHR, *Ezeh and Connorts v. the United Kingdom* (Appl. nos. 39665/98 and 40086/98), Judgement (GC) of 9 October 2003, para. 86.

[201] See e.g. *ECtHR, E. P. and A. R. v. the Netherlands*, (Appl. nos. 43538/11 and 63104/11), Decision (Committee) of 11 July 2017, paras. 84–85; paras. 84–85; ECtHR, *S.M.A. v. the Netherlands*, (Appl. no. 46051/13), Decision (Committee) of 11 July 2017, paras. 61–62; ECtHR, *M. M. and Others v. the Netherlands* (Appl. no. 15993/09), Decision (Chamber) of 16 May 2017, paras. 124–125.

3.3.3.2. Classification Under National Law

Exclusion considerations take place within the general asylum procedure and are thus generally classified as administrative proceedings.[202] In the Court's view, the national classification is only the starting point of the determination of the nature of the charge – "criminal charge" is an autonomous concept subject to determination by the Court, as relying on national determinations would leave states with excessive leverage to escape the object and purpose of Article 6.[203] Consequently, the national classification of exclusion as noncriminal only means that the procedure does not automatically come within the scope of Article 6, but the *Engel* criteria must be further applied to determine the nature of the proceedings.[204] Examples of procedures classified as administrative nationally but which nevertheless satisfied the ECtHR's autonomous concept of "criminal charges" under Article 6 can be found from the Court's jurisprudence.[205] Consequently, the administrative classification of exclusion does not itself render its inclusion within the scope of Article 6 impossible.

3.3.3.3. Nature of the Act

When assessing the second *Engel* criteria, the nature of the act, the Court has considered several factors. First, the Court has assessed the nature of the acts in relation to criminal law – namely, whether the purpose of the rule is to protect societal interests usually protected by criminal law, and whether its purpose is punitive or deterrent.[206] As demonstrated in Chapter 2.1., excludable offences under Article 1F, especially those under Articles 1F(a) and (b), are drawn from and have specific counterparts in criminal law, and most of them could be the subject of mainstream criminal proceedings outside the scope of exclusion in CoE Member States. As found in Chapter 2.2.2., exclusion proceedings seem to carry a punitive function, at least to a degree, but their preventative and deterrent characteristics are limited in comparison with those of criminal sanctions. The ECtHR has considered in *Benham v. the United Kingdom* (1996) that the finding of "some punitive elements" in the procedure counts towards considering the procedure as constituting "criminal charges".[207] In the same judgement, the Court also pointed of relevance to

[202] Bliss, 2000, p. 99.
[203] ECtHR, *Engel and Others v. Netherlands* (Appl. nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72), Judgement (Plenary) of 8 June 1976, para. 81.
[204] Jacobs et al., 2010, p. 244.
[205] In *Saunders v. the United Kingdom,* the Court explicitly stated that administrative proceedings are capable of constituting "criminal charges" in the autonomous meaning of the concept, see para. 67. See also e.g. See e.g. ECtHR, *Janosevic v. Sweden* (Appl. no. 34619/97), Judgement (Chamber) of 23 July 2002.
[206] ECtHR, Guide on Article 6 (criminal limb), 2021, para. 24.
[207] ECtHR, *Benham v. the United Kingdom* (Appl. no. 19380/92), Judgement (GC) of 10 June 1996, para. 56.

be that the proceedings were conducted by public authorities who had statutory powers of enforcement, a characteristic that also applies to exclusion.[208] Excluding the limitations of the preventative and deterrent characteristics of exclusion in comparison with those of criminal proceedings, the abovementioned similarities between excludable acts and criminal offences support the applicability of Article 6 to exclusion proceedings.

However, the Court has also considered whether the finding of guilt is demanded to impose a sanction as a relevant factor in the determination of "criminal charges".[209] As earlier stated, the standard of proof in exclusion proceedings differs from criminal proceedings, and the finding of guilt is not required for a decision to exclude. The burden of proof in exclusion procedure, however, rests with the state and is in that respect similar to criminal proceedings.[210] Furthermore, the Court considers the classification of proceedings in other CoE Member States relevant in the determination of the nature of the act, and exclusion proceedings are generally classified as administrative.[211] The Court has also considered the group of persons to whom the legal rule applies an indicator of the nature of the act: a small, distinctly identified group as only possible offenders have weighed against considering the act as criminal.[212] Although in the case of exclusion the only people to whom the rule applies are asylum seekers, the Court has also found that this consideration is only one of many, and has in several cases found e.g. sanctions only applicable to prisoners to constitute "criminal charges".[213] Nevertheless, these factors would support the determination of exclusion proceedings as noncriminal.

3.3.3.4. Severity of Punishment

Finally, the Court considers the nature and severity of the penalty which the individual risks receiving in the proceedings in question. The nature and severity of a penalty are determined based on the maximum potential penalty for the act in question.[214] From a legal perspective, the outcome of exclusion proceedings is binary; either serious reasons to consider are found, in which case the applicant is excluded from receiving international protection, or they are not, in which case the

[208] ECtHR, *Benham v. the United Kingdom* (Appl. no. 19380/92), Judgement (GC) of 10 June 1996, para. 56.
[209] ECtHR, Guide on Article 6 (criminal limb), 2021, para. 24.
[210] See Chapters 2.2.4.–2.2.5.
[211] ECtHR, Guide on Article 6 (criminal limb), 2021, para. 24; Bliss, 2000, p. 99.
[212] Jacobs et al., 2010, p. 244.
[213] ECtHR, *Campbell and Fell v. UK* (Appl. nos. 7819/77 and 7878/77), Judgement (Chamber) of 28 June 1984, para. 71; see also e.g. ECtHR, *Ezeh and Connorts v. the United Kingdom* (Appl. nos. 39665/98 and 40086/98), Judgement (GC) of 9 October 2003.
[214] ECtHR, *Ezeh and Connorts v. the United Kingdom* (Appl. nos. 39665/98 and 40086/98), Judgement (GC) of 9 October 2003, para. 120.

applicant is considered a refugee (given that well-founded fear of persecution exists). Consequently, exclusion from international protection is the maximum and only penalty to be examined.

The ECtHR has used loss of liberty and its duration as an indicator of severity of the punishment in a number of cases[215], but this has not been a precondition for a classification as "criminal charges".[216] While exclusion proceedings may in some cases result to a loss of liberty, this is not characteristic for exclusion. However, as demonstrated in Chapter 2.2.2., the consequences of exclusion proceedings are of severe nature, as they may result in a forced return to possible persecution and loss of access to UNHCR assistance closely attached to human dignity, amongst other consequences.[217] As also noted earlier, the Court has confirmed the absolute nature of Article 3 of the ECHR and consequently, even if excluded under Article 1F, applicants cannot be returned to a country in which they risk being subjected to treatment contrary to Article 3.[218] Nevertheless, the consequences of exclusion seem "appreciably detrimental", as demanded by the Court, to demonstrate their gravity to individuals subject to the process.[219] Accompanying such grave consequences with the procedural safeguards afforded by Article 6 would seem compatible with the object and purpose of the Article.

Finally, it should be noted that while the Court has applied the *Engel* criteria in a number of cases, they have been accompanied by several dissenting and concurring opinions, e.g. questioning the applicability of the criteria to cases of different natures.[220] The majority of the Court, however, has been in favour of the application of the criteria, and it thus seems reasonable to consider exclusion proceedings in their light.

[215] See e.g. *Ibid.;* ECtHR, *Engel and Others v. Netherlands* (Appl. nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72), Judgement (Plenary) of 8 June 1976, *Campbell and Fell v. UK* (Appl. nos. 7819/77 and 7878/77), Judgement (Chamber) of 28 June 1984.
[216] See e.g. ECtHR, *Matyjek v. Poland* (Appl. no 38184/03), Judgement (Chamber) of 24 April 2007*,* where disqualification from public office for 10 years was considered to constitute criminal charges. See also ECtHR, *Janosevic v. Sweden*, where there were only financial consequences that could not be converted into a prison sentence in case of non-payment.
[217] Holvoet, 2014, pp. 1040–1041.
[218] ECtHR, *Saadi v. Italy*, (Appl. No. 37201/06), Judgement (GC) of 28 February 2008, para. 138.
[219] ECtHR, *Engel and Others v. Netherlands* (Appl. nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72), Judgement (Plenary) of 8 June 1976, para. 82.
[220] See e.g. ECtHR, *Ezeh and Connorts v. the United Kingdom* (Appl. nos. 39665/98 and 40086/98), Judgement (GC) of 9 October 2003, Dissenting opinion of Judges Zupančič and Maruste, para. 4.

3.3.3.5. Diversity in Exclusion Proceedings

Despite mainly dealing with asylum procedure under the civil limb of Article 6, the ECtHR has also addressed deportation cases under the criminal limb of the Article. In *Maaouia v. France,* the Court held that expulsion orders from a state do not constitute "criminal charges" in the meaning of Article 6(1), even if they are imposed in the context of criminal proceedings.[221] The nature of the case, however, is decisively different to exclusion proceedings. In *Maaouia*, the basis of the applicant's deportation order, namely his criminal activities, had been determined in a criminal proceeding against him; and thus, the criminality of his actions was not examined or determined by the authorities issuing the deportation order. In exclusion procedure, administrative authorities within the asylum procedure can be the only ones determining the allegedly criminal actions of an applicant when applying Article 1F; in which case they, precisely, act as the authorities determining the substance of the applicant's actions, and their analysis is not limited to any previous charge against the applicant.[222] Acknowledging the diversity of exclusion proceedings when considering the applicability of Article 6 is consequently of fundamental importance. Situations comparable to *Maaouia,* in which immigration authorities are not responsible for the substantive determination of criminal actions of an applicant, can arise in exclusion proceedings where the applicant has been convicted in an international tribunal of an excludable crime; or where the applicant has been convicted of one in fair criminal proceedings in his or her country of origin.[223] In many cases, however, exclusion proceedings are the first (fair) review by authorities of the substance of allegedly criminal actions by an applicant, a situation which significantly differs from *Maaouia*.

While many elements of exclusion proceedings can be identified as supporting its consideration as "criminal charges" for the purposes of Article 6, elements pointing to the contrary also exist. As the Court's determination of "criminal charges" is based on a holistic analysis and not on any strict number of elements that must be present or absent, it cannot be definitely concluded whether exclusion proceedings should be considered to fall within the scope of Article 6. Despite elements both in support of and against the consideration of exclusion proceedings as "criminal charges" when assessing the nature of the act, the undisputed severity of the consequences of exclusion suggests that they can, indeed, be capable of attracting the applicability of Article 6 ECHR and

[221] ECtHR, *Maaouia v. France* (Appl. no. 39652/98), Judgement (GC) of 5 October 2000, para. 39.
[222] For further thought on the difference between separate deportation orders and the consideration of merits of an alleged criminal act, see the concurring opinion of Sir Nicolas Bratza in ECtHR, *Maaouia v. France*.
[223] Bliss, 2000, p. 118–120.

the safeguards therein. This view is shared by Gilbert, who considers that Article 6 safeguards should apply in exclusion proceedings, as they are capable of independently, without a further criminal trial, resulting in severe consequences for an applicant.[224] ECRE also considers that exclusion procedure should be considered to fall within the scope of Article 6 owing to its similarities with criminal proceedings.[225]

3.4. Scope of Applicability of Defence Rights under Articles 47 and 48 CFREU

The scope of protection of the right to access lawyer and to legal aid offered by the ECHR and CFREU is not identical. The scope differs first of all owing to differing approaches to the right to a fair hearing by the respective Courts. The ECtHR has generally approached breaches under Article 6 with an assessment of "overall fairness", meaning that individual breaches of procedural rights under Article 6 do not necessarily amount to a violation of the Article, but that criminal procedure is assessed holistically to see whether alleged breaches of rights have been remedied in the course of the procedure and that it has been fair overall.[226] This assessment includes appellate procedures.[227] Generally, this means that a criminal procedure, in the autonomous meaning of the word, must have taken place nationally in order for the ECtHR to review its fairness. In absence of proceedings, the Court can only review compliance with the right of access to a court under Article 6.[228]

However, the ECtHR's overall fairness –approach does not exclude the possibility that early breaches in procedures, e.g. in initial interrogations, may ultimately undermine the fairness of the entire procedure. While still exercising the overall assessment of a fair hearing, the ECtHR has recognised the right of access to a lawyer in criminal proceedings as an essential procedural guarantee, the lack of which may be beyond repair in later stages of the procedure. In its 2008 Grand Chamber judgement *Salduz v. Turkey,* the Strasbourg Court held that as a general rule, "access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right"[229] in order to fulfil the practical and effective protection of Article 6. Even where compelling reasons exist to justify the restriction, it "must not unduly

[224] Gilbert, 2005, p. 166–167.
[225] ECRE, Position on Exclusion from Refugee Status, 2004, doc. no. PP1/03/2004/Ext/CA, p. 22.
[226] Fair Trials, Practitioner's tools on EU law: EU Charter of Fundamental Rights, 2020, p. 24; ECtHR, *Pishchalnikov v. Russia* (Appl. no. 7025/04), Judgement (Chamber) of 24 September 2009, para. 64.
[227] Sayers, 2014b, p. 1260.
[228] Jacobs et al., 2010, pp. 258–259.
[229] ECtHR, *Salduz v. Turkey* (Appl. no. 36391/02), Judgement (GC) of 27 November 2008, para. 55.

prejudice the rights of the accused under Article 6"[230]. Finally, the Court concluded in *Salduz* that "[t]he rights of the defence will in principle be *irretrievably prejudiced* when incriminating statements made during police interrogation without access to a lawyer are used for a conviction."[231]

Defence rights under Articles 47 and 48 of the CFREU, on the other hand, form individual rights under EU law, and individual breaches of these rights can constitute a breach of the CFREU regardless of the overall procedure. Under the CFREU, all individual rights must also be accompanied by effective remedies.[232] The CFREU must, in accordance with Article 52(3) of the Charter, offer at minimum the protection level of the ECHR in relation to corresponding rights between CFREU and ECHR. However, Article 52(3) "shall not prevent Union law providing more extensive protection."[233] It is thus relevant to assess whether the scope of defence rights under Articles 47 and 48(2) CFREU extends beyond that of their ECHR counterpart, and whether exclusion could consequently fall therein, attracting the applicability of the right to legal aid regardless of the scope of Article 6 ECHR. The Explanations Relating to the Charter in relation to Article 48 reads as follows: "In accordance with Article 52(3), this right has the same meaning and scope as the right guaranteed by the ECHR."[234] Reference to Article 52(3) CFREU seems to clarify that the minimum guarantees of the Article must abide by those of the ECHR. Despite the word choice "*same* […] scope", the fact that the explanations in this context refer to Article 52(3), which explicitly permits more extensive protection under EU law, suggests that the meaning and scope of Article 48(2) could exceed the protection level set in the ECHR.[235] What is more, Article 48(2) guarantees rights of the defence to "anyone who has been charged" as opposed to "anyone charged with a criminal offence" in Article 6(3) ECHR, which also suggests a wide scope of applicability in comparison with the ECHR.[236] As explained in Chapter 3.1., Article 48(2) covers the specific right to legal aid, but it also overlaps with the overall right to a fair hearing and to legal aid under Article 47, and a breach of the former may also constitute a breach of the latter.

[230] *Ibid.*
[231] *Ibid.*, emphasis added.
[232] Fair Trials, Practitioner's tools on EU law: EU Charter of Fundamental Rights, 2020, p. 24.
[233] Article 52(3), CFREU, 2012; Peers, 2012, pp. 459–460.
[234] Explanations relating to the Charter, Article 48, emphasis added.
[235] Article 52(3), CFREU, 2012.
[236] Peers, 2012, p. 467.

The CJEU routinely refers to and assesses the applicability of the rights of the defence under Articles 47 and 48 jointly, and the scope of the Articles will also be examined jointly here.[237]

As opposed to the ECtHR, the CJEU has clearly expressed that defence rights under Articles 47 and 48 CFREU are not merely applicable in criminal proceedings, but also in other proceedings where the rights and interests of individuals may be significantly affected, suggesting a wider scope of application in comparison with that of Article 6(3) ECHR. In CJEU case of *PI v. Landespolizeidirektion Tirol* (2019), Austrian authorities had issued an administrative measure to close a massage salon owing to suspicion of unauthorised brothel activities. Upon closing the business establishment, no reasons for the decision were submitted to the owner of the salon, who was furthermore not permitted access to the police file of the case on the basis of the administrative nature of the proceedings and as "no criminal proceedings had been initiated against her."[238] When considering the applicability of defence rights in the case, the CJEU found that

> When the authorities of the Member State take measures which come within the scope of EU law, they are, as a rule, subject to the obligation to observe the rights of defence of addressees of decisions which significantly affect their interests.[239]

Furthermore, the CJEU found that the national legislation applied to close the salon "[…] does not make it possible to ensure […] the respect for the rights of the defence, guaranteed by Articles 47 and 48 of the Charter and the general principles of EU law", which were found applicable to the case.[240] Several parallels can be drawn from *PI v. Landespolizeidirektion* to exclusion proceedings. Firstly, the case concerned administrative measures which adversely affected an individual's rights under EU law. Secondly, the measures taken included the use of coercive power by state authorities. However, these factors do not significantly part from stances taken by the ECtHR; as earlier stated, the Strasbourg Court has also established that administrative proceedings are capable of attracting the applicability of Article 6(3) ECHR.[241] What is significant about *PI v. Landespolizeidirektion* is that the administrative measure in question, which triggered the rights of defence of PI, was taken "[…] on the basis of *suspicion* of infringements of [national

[237] See e.g. CJEU cases C-230/18, *PI v. Landespolizeidirektion Tirol*, Judgement of 18 May 2019, para. 85, C-166/13, *Sophie Mukarubega v. Préfet de police, Préfet de la Seine-Saint-Denis,* Judgement of 5 November 2014, para. 43 and C-282/20, *ZX (Régularisation de l'acte d'accusation)*, Judgement of 21 October 2021, para. 26.
[238] CJEU, C-230/18, *PI v. Landespolizeidirektion Tirol*, Judgement of 18 May 2019, para. 25.
[239] *Ibid.,* para. 80; see also CJEU, C-166/13, *Sophie Mukarubega v. Préfet de police, Préfet de la Seine-Saint-Denis,* Judgement of 5 November 2014, para. 50.
[240] CJEU, C-230/18, *PI v. Landespolizeidirektion Tirol*, Judgement of 18 May 2019, para. 85.
[241] See Chapter 3.3.3.2. and footnote 205 therein.

law]."[242] The coercive measure taken by authorities required no judicial decision or *finding of guilt*, which is a relevant consideration of whether proceedings taken place have constituted "criminal charges" for the purposes of Article 6 ECHR.[243] When comparing the findings of the case to exclusion proceedings, it can be observed that exclusion decision 1) is a proceeding of administrative nature; 2) significantly affects the interests of its subject, as demonstrated under Chapter 2.2.2.; 3) is implemented by state authorities with coercive power, and; 4) is based on suspicion of commitment of criminal acts, yet does not require the finding of guilt. These prominent parallels between the proceedings indicate that exclusion proceedings indeed attract the applicability of defence rights, including the right to legal aid when the interests of justice so require, under Articles 47 and 48 CFREU. Furthermore, the CJEU stated in *Texdata Software GmbH* (2013) that rights of defence "must be observed in all proceedings in which sanctions, especially fines or penalty payments, may be applied."[244] While monetary sanctions are not applicable in exclusion proceedings, several factors, including the UNHCR's characterisation of exclusion as a "sanction", support the consideration of exclusion as a sanction inflicted on an applicant, as described in Chapter 2.2.2.

CJEU case of *Dokter and Others* (2006) further underlines the broader approach taken by CJEU towards defence rights in comparison with the ECtHR. The case did not concern any suspected crime or wrongdoing by the claimants in question, but State authorities' decision to slaughter their animals in effort to prevent the spreading of foot-and-mouth virus. Nevertheless, rights of the defence were recognised as applicable rights of the claimants, who were adversely affected by the decision taken by State authorities. Although no infringement of the rights of the defence in the case was found, this was due to the public health considerations which justified prompt and effective measures by Member State authorities to prevent the spreading of the disease amongst cattle; rights of the defence were considered relevant to the case, but they had been justifiably restricted in time due to the aforementioned public health risks concerned.[245] The unequivocally noncriminal nature of the proceedings in question underlines the CJEU's wide interpretation of the scope of defence rights under Union law: they are not confined to criminal proceedings, or even to proceedings closely resembling criminal proceedings. Instead, the CJEU has held time and again as settled case law of the Union that defence rights are a fundamental principle of EU law which must be respected in all proceedings "initiated against a person which may well

[242] CJEU, C-230/18, *PI v. Landespolizeidirektion Tirol*, Judgement of 18 May 2019, para. 23, emphasis added.
[243] See Chapter 3.3.3.3., p. 40.
[244] CJEU, C-418/11, *Texdata Software,* Judgement of 26 September 2013, para. 79.
[245] CJEU, C-28/05, *Dokter and Others,* Judgement of 15 June 2006, paras. 73–77.

culminate in a measure adversely affecting that person".[246] Given the clearly adverse and serious impacts of exclusion procedure as well as its many parallel characteristics with those of criminal procedure, it is difficult to see why defence rights under Articles 47 and 48(2) CFREU would not be applicable therein. In light of the CJEU jurisprudence described above, the Court has clearly placed emphasis on the adverse effects of a decision when considering the applicability of defence rights; whereas the ECtHR has placed more emphasis on the "criminal" and "punitive" nature of proceedings to determine its inclusion within the scope of Article 6(2) ECHR, resulting in narrower interpretation of the scope of defence rights. While many of the cases brought before the CJEU have concerned defence rights other than the right to legal aid, e.g. the right to be heard, the Court has been clear in referring to defence rights generally when articulating on the scope of their applicability.[247] On the face of it, this scope set by CJEU in respect of legal aid may seem rather excessive. Surely Member States cannot be obliged to offer legal aid in *all* proceedings, the outcome of which may adversely affect the interests of an individual? That statement is indeed correct – because the applicability of defence rights itself does not yet guarantee that legal aid must be offered in all proceedings falling within their scope. The provision of legal aid, in accordance with Article 6(3)(c) ECHR and its CFREU counterparts, is conditional upon whether "the interests of justice so require", a test which will next be examined in detail in relation to exclusion proceedings.[248]

3.5. "When the interests of justice so require"

3.5.1. Overview of the Test

The right to legal aid is considered both within the entitlement to a fair hearing in Article 6(1) ECHR and Article 47 CFREU as well as the explicit right to legal assistance in Article 6(3)(c) ECHR and its counterpart Article 48(2) CFREU. As mentioned earlier, the latter lays down two conditions for the provision of legal aid: the means test determines that legal assistance must be provided for free if a defendant does not have sufficient means to acquire legal assistance, and the merits test establishes that this must be done "when the interests of justice so require" – meaning that not all impecunious applicants are entitled to legal aid.[249] Leaving aside the means test, the

[246] CJEU, C-418/11, *Texdata Software,* Judgement of 26 September 2013, para. 83; see also e.g. CJEU, C-358/16, *UBS Europe SE and Alain Hondequin and Others v. DV and Others*, Judgement of 13 September 2018, para. 60 and CJEU, C-28/05, *Dokter and Others,* Judgement of 15 June 2006, para. 74.
[247] See e.g. CJEU, C-230/18, *PI v. Landespolizeidirektion Tirol*, Judgement of 18 May 2019, para. 80; CJEU, C-418/11, *Texdata Software,* Judgement of 26 September 2013, para. 79.
[248] Article 6(3)(c), ECHR, 1950.
[249] *Ibid.*

interests of justice test will next be examined. According to the ECtHR, whether the interests of justice require for free legal assistance to be given to an applicant must be assessed in light of the whole case, not just the circumstances of the moment in which a decision on legal aid was taken.[250] The test does not require proving that the defence has suffered actual damage due to lack of legal assistance, as this would be, in the Strasbourg Court's words, "asking for the impossible", but rather the object is to assess whether such damage in the form of prejudice "appears plausible in the particular circumstances" of the case.[251] The ECtHR applies a special test when considering the need of legal aid in appeals procedures,[252] which is not of relevance when examining the right to legal aid in procedures at first instance, and will thus not be examined.

The ECtHR has considered three main factors of importance when assessing whether interests of justice require for legal aid to be granted. Firstly, the seriousness of the offence and the severity of potential sentence; secondly, the complexity of the case, which relates to the defendant's ability to effectively defend him/herself; and finally, the social and personal situation of the defendant, including but not limited to cognitive abilities, education and mental state, which also affect the individual's ability to meaningfully participate in the proceedings and defend him/herself.[253] While all three factors are to be considered within the test, any one of the elements may be enough justification for the requirement to provide legal aid.[254] Next, the individual factors of the test will be examined with a view to potential relevance to exclusion proceedings. As the ECtHR has considered the interests of justice test individually in light of the context of each case before it, no conclusive remarks can be made with reference to all exclusion proceedings. However, certain features present in many, if not all, exclusion cases will be used to demonstrate the possible applicability of the right to legal aid in exclusion proceedings.

3.5.2. Seriousness of the Offence and the Severity of the Potential Sentence

The ECtHR has considered the seriousness of the offence and the severity of the potential sentence as the first indication as to whether the interests of justice require for legal aid to be provided. When it comes to the seriousness of the offence in exclusion cases, as demonstrated in Chapter

[250] ECtHR, *Granger v. the United Kingdom* (Appl. no. 11932/86), Judgement (Chamber) of 28 March 1990, para. 46.
[251] ECtHR, *Artico v. Italy* (Appl. no. 6694/74), Judgement (Chamber) of 15 July 1982, para. 35.
[252] ECtHR, Guide on Article 6 (criminal limb), 2021, para. 478.
[253] See e.g. ECtHR, *Quaranta v. Switzerland* (Appl. no. 12744/87), Judgement (Chamber) of 24 May 1991, paras. 35–36; ECtHR, *Granger v. the United Kingdom* (Appl. no. 11932/86), Judgement (Chamber) of 28 March 1990, paras. 15, 47.
[254] European Union Agency for Fundamental Rights and Council of Europe, 2016, Handbook on European Law relating to access to justice, p. 69.

2.1., all offences which fall under Article 1F of the Refugee Convention are of serious nature, and thus, this aspect of the test requires no further examination. The severity of the potential sentence is to be considered on the basis of maximum potential consequences, not the ones likely. The ECtHR has held that the mere threshold of what is at stake for the applicant may mean that free legal assistance should be afforded.[255] The ECtHR has particularly emphasised that whenever liberty is at stake, in principle the interests of justice require ensuring legal representation for the defendant.[256] However, the potential deprivation of liberty is not a prerequisite to consider the consequences upon an individual serious; in the case of *Pham Hoang v. France* (1992), the ECtHR considered the applicant's sentence according to which he was to pay "large sums" to the French customs authorities sufficed in demonstrating that "the proceedings were clearly fraught with consequences for the applicant". This observation, amongst other factors, lead the Court to consider that interests of justice would have required for the applicant to be afforded legal aid, although no deprivation of liberty was at stake in the case.[257] Similarly, in *Zdravko Stanev v. Bulgaria* (2012), deprivation of liberty was not at stake, but the Court found in any case that the potential financial consequences for the unemployed applicant, a combined fine and damages sum of over 8000 euros, was significant given his financial situation. Combining these serious consequences with the complexity of the case and the fact that the applicant had no legal training, although he obtained university level education, lead to the Court finding a violation of Article 6(3)(c).[258]

As regards what is at stake for an individual in exclusion proceedings, as covered in Chapter 2.2.2., the consequences of exclusion for an asylum seeker are of extremely serious nature, varying from return to a country in which s/he may be in danger of persecution to possible remaining in a state without an official status and being denied access to other rights, as well as being excluded from receiving essential services fundamental to human dignity such as such as food, shelter, healthcare and education from the UNHCR.[259] However, deprivation of liberty or financial sanctions, both of which are features typically embedded with consequences of serious criminal activities, are not ordinary or expected outcomes of exclusion proceedings. Furthermore,

[255] ECtHR, *Quaranta v. Switzerland* (Appl. no. 12744/87), Judgement (Chamber) of 24 May 1991, para. 33.
[256] ECtHR, *Benham v. the United Kingdom* (Appl. no. 19380/92), Judgement (GC) of 10 June 1996, para. 61; ECtHR, *Quaranta v. Switzerland* (Appl. no. 12744/87), Judgement (Chamber) of 24 May 1991, para. 33; ECtHR, *Zdravko Stanev v. Bulgaria* (Appl. no. 32238/04), Judgement (Chamber) of 6 November 2012, para. 38.
[257] ECtHR, *Pham Hoang v. France* (Appl. no. 13191/87), Judgement (Chamber) of 25 September 1992, paras. 40–41.
[258] ECtHR, *Zdravko Stanev v. Bulgaria* (Appl. no. 32238/04), Judgement (Chamber) of 6 November 2012, paras. 39–41.
[259] Bond, 2012, p. 56.

despite the seriousness of its consequences, exclusion is not and cannot be classified a criminal sanction as such, and no definite evidence or consensus that it should be considered one exists.[260] If actual criminal sanctions are to be imposed on an individual excluded from the scope of the Refugee Convention, such sanctions must be imposed through criminal procedure during or after exclusion; findings in exclusion proceedings may contribute to potential criminal charges and a criminal sanction, but this is an indirect consequence. Exclusion nevertheless results in adverse consequences implemented by state authorities exercising authority over the applicant. These elements are well comparable to negative coercive consequences of criminal sanctions, even if deprivation of liberty is off the table.[261] The potential "punishable" nature of exclusion has also been covered in Chapter 2.2.2., where it was concluded that the seriousness of consequences as well as the intention expressed in the *travaux préparatoires* of the relevant Articles of the Refugee Convention to exclude non-deserving asylum seekers from the scope of the Refugee Convention suggests exclusion to include a punitive function, amongst other objectives. On the basis of these observations, it can be argued that what is at stake for the applicant in exclusion proceedings could and would meet the threshold of severity required in the test of "when the interests of justice so require". In the view of the author, it can hardly be argued that exclusion proceedings would not be "clearly fraught with consequences", as put by the ECtHR, was the applicant excluded from the scope of the Refugee Convention.[262]

3.5.3. Complexity of the Case

In addition to the seriousness of an alleged offence and its consequences, the ECtHR considers the complexity of the case in question as indication of whether a defendant would be able to effectively defend him/herself in the course of the proceedings without legal assistance, and consequently, whether interests of justice require for legal aid to be provided. When considering the complexity of the case, the Strasbourg Court has considered both the complexity of the procedure at hand as well as the complexity of the legal questions related. The ECtHR has not required for the case to be of highest complexity in order to conclude that a defendant could not have effectively defended him/herself without access to a lawyer; even where legal issues are not of particular complexity, but they require "legal skill and experience" to effectively present the case, as many legal issues do, the Court has counted this in favour of the defendant so that legal

[260] Li, 2017, p. 80.
[261] *Ibid.*
[262] ECtHR, *Pham Hoang v. France* (Appl. no. 13191/87), Judgement (Chamber) of 25 September 1992, paras. 40–41.

aid should have been provided.[263] In *Boner v. the United Kingdom* (1994) and *Maxwell v. the United Kingdom* (1994), the ECtHR observed that the legal issues were not particularly complex, but nevertheless held that in order to competently address them and thus be able to effectively defend themselves, the applicants should have been afforded legal aid, especially given the serious consequences of the proceedings.[264] In *Zdravko Stanev,* the Court considered that the legal issue of the meaning of intent, amongst others, demonstrated the case to be complex enough so that the defendant should have been afforded legal aid.[265] This is a meaningful parallel to exclusion cases, where, amongst other factors, the *actus reus* and *mens rea*[266] of an applicant are assessed when considering whether there are serious reasons to consider they have committed an excludable act.[267]

Asylum applications where exclusion is considered are often of high complexity. They require the investigation and determination – up to a certain threshold, albeit lower than that of criminal liability – of individual criminal liability in an international crime, a serious non-political crime or an act against the principles and purposes of the UN. This examination requires both the determination of the crime in question as well as the applicant's level of participation in it. At the same time, the existence and nature of persecution at hand is also to be considered. Particular complexity arises where proportionality evaluation between the two is to be conducted, although no international consensus as to whether proportionality considerations are appropriate in exclusion proceedings exists.[268] The UNHCR's stand, however, is that proportionality considerations must be conducted when considering exclusion on the basis of crimes under Article 1F(b), and in certain instances also under Article 1F(a).[269]

In practice, this may, depending on the circumstances of the case, require legal skill and experience in the field of the refugee law, but also in international criminal law and the relevant

[263] ECtHR, *Twalib v. Greece* (Appl. no. 42/1997/826/1032), Judgement (Chamber) of 9 June 1998, para. 53; ECtHR, *Boner v. the United Kingdom* (Appl. no. 18711/91), Judgement (Chamber) of 28 October 1994, para. 41; ECtHR, *Maxwell v. the United Kingdom* (Appl. no. 18949/91), Judgement (Chamber) of 28 October 1994, para. 38.
[264] ECtHR, *Boner v. the United Kingdom* (Appl. no. 18711/91), Judgement (Chamber) of 28 October 1994, para. 41; ECtHR, *Maxwell v. the United Kingdom* (Appl. no. 18949/91), Judgement (Chamber) of 28 October 1994, para. 38.
[265] ECtHR, *Zdravko Stanev v. Bulgaria* (Appl. no. 32238/04), Judgement (Chamber) of 6 November 2012, para. 40.
[266] Individual criminal liability in principle requires a criminal act to have been committed with intent and knowledge, which amounts to *mens rea.* See Chapter 2.2.3., p. 18.
[267] UNCHR, Guidelines, paras. 21–23.
[268] UNHCR, Background Note, para. 99; While the UNHCR has promoted for the weighing of proportionality in exclusion proceedings, many leading courts, including the CJEU, and scholars consider proportionality tests in exclusion vague in logic and unfair. See e.g. CJEU, C-57/09 and C-101/09, *Bundesrepublik Deutschland v. B and D*, Judgement (GC) of 9 November 2010, paras. 109–111, Hathaway and Foster, 2014, pp. 562–567, UNHCR, Statement on Article 1F of the 1951 Convention, 2009, p. 35.
[269] UNHCR, Guidelines, para. 24.

treaties therein. Effective defence may require the ability to evaluate substantive elements of a crime, *actus reus* and *mens rea* of an individual allegedly having participated in these crimes, as well as defences available in international criminal law.[270] Alternatively, effective defence may require legal skill and experience in the field of serious non-political crimes, and the evaluation of their international standards[271]; or, finally, knowledge and skills to consider which acts may constitute acts contrary to the purposes and principles of the UN. It can hardly be argued an applicant without in-depth legal training could be expected to master these fields of law to a degree satisfactory enough to be able to present an effective defence without access to legal assistance.

The UNHCR recommendation to establish specialised exclusion units also manifests the special nature of exclusion cases in the sphere of asylum law, not to overlook the fact that asylum cases that do not consider exclusion may themselves be of great complexity.[272] In addition to the UNHCR, the view that the merits of exclusion cases are often of complex nature is shared by ECRE. In its *Position on Exclusion from Refugee Status,* ECRE calls for specialised units for exclusion cases in national RSD due to the fact that the application of exclusion clauses requires "high degree of legal and factual expertise and specialised knowledge" from decision making authorities.[273] Furthermore, ECRE considers that "highly complex issues of facts and law" are likely to arise in *any* examination of exclusion clauses.[274] Owing to this inherently complex nature of exclusion cases as well as the potentially severe consequences it imposes on individuals, ECRE considers exclusion cases should not be subject to mere admissibility or accelerated procedures.[275]

3.5.4. Defendant's Social and Personal Situation

Finally, the ECtHR considers the defendant's social and personal situation a factor to be considered when assessing his/her ability to present an effective defence without access to a lawyer. In *Quaranta v. Switzerland* (1991)*,* the Strasbourg Court referred to the applicants underprivileged background, his foreign origin, lack of occupational training, criminal record, consumption of drugs and economic vulnerability when demonstrating that he should indeed have been provided legal aid.[276] However, the Court has not required such a broad cumulative list of

[270] *Ibid.*, paras. 18, 21–22.
[271] *Ibid.*, para. 14.
[272] *Ibid.*, para. 32; UNHCR, Addressing Security Concerns without Undermining Refugee Protection - UNHCR's Perspective, Rev.2, 2015, para. 13.
[273] ECRE, Position on Exclusion from Refugee Status, 2004, doc. no. PP1/03/2004/Ext/CA, para. 10.
[274] *Ibid.,* para. 44.
[275] *Ibid.*, paras. 9, 47.
[276] ECtHR, *Quaranta v. Switzerland* (Appl. no. 12744/87), Judgement (Chamber) of 24 May 1991, para. 35.

elements to consider the social and personal situation to speak in favour of provision of legal aid; in *Zdravko Stanev,* the defendant, albeit unemployed, held a university degree, but the Court nevertheless considered it was of little relevance to his ability to present an effective defence without legal representation since the applicant lacked legal training.[277] The case of *Perks and Others v. the United Kingdom* (1999) concerned multiple individuals living on income support with little or no income, some suffering from mental and/or physical illness and obtaining severely limited writing and reading abilities as well as poor memory. The applicants had failed to pay a community charge and consequently faced imprisonment for up to 90 days, but were nevertheless not legally represented in the proceedings.[278] Although only referring to the severity of consequences and complexity of the cases, the Court found a violation of Article 6(3)(c) with regard to each applicant.[279]

The ECtHR has further given weight to the applicant's comprehension of language and written material in its case law. In *Granger v. the United Kingdom* (1990)*,* the Court highlighted when finding a violation of Article 6(3)(c) that the applicant, who was described to be of modest intelligence and obtain poor command of English and poor comprehension of written material, had been unable to comprehend the pre-written legal statement he presented before appellate proceedings. It was thus clear to the Court that the applicant would also have been unable to effectively reply to legal arguments presented by the prosecutor's side without access to legal assistance.[280] In the case of *Twalib v. Greece* (1998) the Court took into account that the applicant was of foreign origin and was unfamiliar with Greek language and legal system, which weighed in the assessment of whether the interests of justice would have required for legal aid to be granted.[281]

While a generalization of the personal situation of individual asylum seekers considered for exclusion is not possible, some remarks of the situation in which asylum seekers often find themselves during RSD, and especially during procedure at first instance, can be made. In many cases, the procedure at first instance takes place shortly after arrival to a host state. Consequently, asylum seekers often operate within an entirely new environment and are unfamiliar with the

[277] ECtHR, *Zdravko Stanev v. Bulgaria* (Appl. no. 32238/04), Judgement (Chamber) of 6 November 2012, para. 40.
[278] ECtHR, *Perks and Others v. the United Kingdom* (Appl. nos. 25277/94, 25279/94, 25280/94, 25282/94, 25285/94, 28048/94, 28192/95 and 28456/95), Judgement (Chamber) of 12 October 1999.
[279] *Ibid*., para. 76.
[280] ECtHR, *Granger v. the United Kingdom* (Appl. no. 11932/86), Judgement (Chamber) of 28 March 1990, paras. 15, 20, 47.
[281] ECtHR, *Twalib v. Greece* (Appl. no. 42/1997/826/1032)*,* Judgement (Chamber) of 9 June 1998, paras. 53–54.

judicial system and language of the host state, which are, in accordance with *Twalib,* relevant factors when considering their ability to present an effective defence without legal assistance. Even though applicants are to be provided with an interpreter during asylum interviews, that right does not extend to the preparation for an interview, but covers the interview only.[282] These factors could be considered to touch upon the majority of applicants and have considerable legal relevance. Other relevant factors which may be shared amongst asylum seekers, while clearly not applicable to all of them, are lack of or little social safety net in the host country, as well as experienced persecution, trauma, violence or even torture which render such applicants particularly vulnerable. Many asylum seekers also find themselves in a particularly vulnerable economic situation, having left everything behind when displaced. Member States may also impose special conditions to their right to work, which can complicate or prevent legal employment.[283] While nothing general can be said of the level of education of applicants, which varies widely, a relatively low percentage of applicants is likely to possess legal training applicable in their cases, which is what the Strasbourg Court has expressed to be of relevance when considering the ability to effectively defend oneself.[284]

It can be concluded from the analysis above that the ECtHR has taken a broad interpretation of the interests of justice test and considered with a relatively low threshold that interests of justice require for legal aid to be provided to defendants in criminal proceedings. As articulated by Judge De Meyer in his concurring opinion, which he repeated in both *Boner* and *Maxwell,*

> The 'interests of justice' normally require that a person 'charged with a criminal offence' be assisted by a lawyer. Without such assistance very few people are able 'to present' their 'case in an adequate manner' and 'to make an effective contribution to the proceedings'.[285]

In line with this statement and in order for the rights under Article 6 ECHR and Articles 47 and 48(2) CFREU to be practical and effective, and not theoretical, agreeing with the ECtHR's reasoning is easy. On the basis of the analysis presented above, any one of the elements of the

[282] Article 15(3)(c), Recital (25), Procedures Directive.
[283] E.g. in Finland, an asylum seeker's right to work starts 3 or 6 months after lodging an application for international protection, depending on whether the applicant has presented a valid passport to the authorities. More information can be found at https://migri.fi/en/asylum-seeker-s-right-to-work (last visited 9 August 2022). In Malta, asylum seekers have the right to access labour market 9 months after the lodging of an application, unless they have an employer willing to apply for an "employment licence" for the asylum seeker to be able to perform a specific job for them. More information can be found at https://www.unhcr.org/mt/asylum-seekers-in-malta (last visited 9 August 2022).
[284] ECtHR, *Zdravko Stanev v. Bulgaria* (Appl. no. 32238/04), Judgement (Chamber) of 6 November 2012, para. 40.
[285] ECtHR, *Boner v. the United Kingdom* (Appl. no. 18711/91), Judgement (Chamber) of 28 October 1994, Concurring opinion of Judge De Meyer; ECtHR, *Maxwell v. the United Kingdom* (Appl. no. 18949/91), Judgement (Chamber) of 28 October 1994, Concurring opinion of Judge De Meyer.

"interests of justice" test would likely be sufficient on their own in case of exclusion proceedings to find that interests of justice require for legal aid to be granted, were defence rights considered applicable to exclusion proceedings.

3.6. Limitations

The right to legal assistance and legal aid may be restricted under certain conditions. Article 52(1) CFREU sets out general requirements for limitations under the Charter and confines them to circumstances in which they are "provided for by law and respect the essence of those rights and freedoms". Limitations must be proportional and necessary, as well "genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others."[286] In accordance with Article 52(3) CFREU, any limitations under the CFREU must comply with the standards set out by the ECHR, meaning that Charter rights may be limited only to an extent which is consistent with the ECHR and not all rights may be limited.[287] The ECHR, on the other hand, does not contain general limitations. Neither Articles 47 or 48 CFREU nor Article 6 ECHR contain explicit limitations, but implicit limitations to the Articles' rights have been articulated by the respective Courts in relation to defence rights and the right to legal assistance.

Firstly, Article 6 rights are not absolute and may be limited under certain circumstances.[288] Restrictions on the access to a lawyer, however, require exceptional circumstances, as they may seriously adversely affect the fairness of the proceedings for the defendant.[289] When interpreting implied restrictions of the right to legal assistance under Article 6, the Strasbourg Court has established a two-fold test to determine whether a restriction has been legitimate. The Court first looks into whether compelling reasons for the restriction can be found, as well as whether it is strictly limited in time, applied on a case-by-case basis and based on clearly defined national legislation. The Court has expressed that compelling reasons in this context could be circumstances where the object of the restrictions is to avert serious adverse consequences for life, liberty or physical integrity. General risk of leaks is not sufficient to justify restriction on access to a lawyer.[290] In *Ibrahim and Others,* the Court found that there were compelling reasons to

[286] Article 52(1), CFREU, 2012.
[287] Peers, 2012, pp. 453–455.
[288] Sayers, 2014a, p. 1344–1345; Jacobs et al., 2010, p. 292.
[289] ECtHR, Guide on Article 6 (criminal limb), 2021, paras. 453–455.
[290] ECtHR, *Ibrahim and Others v. the United Kingdom,* (Appl. nos. 50541/08, 50571/08, 50573/08 and 40351/09), Judgement (GC) of 13 September 2016, paras. 258–259.

restrict the applicants' access to a lawyer in a situation where the applicants were detained in connection with terrorist attacks that had killed 52 people and injured countless others. Due to a threat of further attacks that were likely to danger the life and physical integrity of the public, the police were under urgent need of information from the applicants, and the delaying of interviews due to lack of legal representation would have delayed the police's ability to prevent further violence from taking place.[291] The second part of the Court's test calls for weighing of the said restriction in relation to the prejudice caused to the defendant, and requires an assessment of whether the restriction's impact jeopardizes the overall fairness of the procedure.[292] The mere existence of compelling reasons does not suffice that the restriction complies with Article 6(3)(c), and at the same time, lack of compelling reasons to restrict the right does not automatically amount to a violation of the Article, but the procedure must still be assessed overall.[293]

However, the need for an overall fairness assessment in cases were a restriction has not been justified by compelling reasons has divided the ECtHR in the recent years. Initially, the Strasbourg Court seemed to establish in *Salduz* and following jurisprudence that an overall assessment of the fairness of proceedings was only needed if compelling reasons to restrict access to a lawyer existed. In such cases, it was relevant to assess whether the restriction, despite compelling reasons, unduly prejudiced rights of the defendant in the process.[294] However, this rationale seems to have been overruled in later cases such as *Simeonovi v. Bulgaria* (2017) and *Beuze v. Belgium,* where an overall fairness assessment took place *despite* lack of compelling reasons and in the case of *Beuze*, despite a statutory restriction of a general and mandatory nature, establishing that a restriction without compelling reasons does not automatically constitute a violation of Article 6(3)(c).[295] Instead, the Court held that lack of compelling reasons results in strict scrutiny in the overall fairness assessment and in such case the Government must convincingly prove that the procedure was, despite the restriction of access to a lawyer without compelling reasons, fair.[296]

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[291] *Ibid.,* para. 276.
[292] *Ibid.,* para. 257.
[293] *Ibid.,* paras. 277, 262.
[294] ECtHR, *Salduz v. Turkey* (Appl. no. 36391/02), Judgement (GC) of 27 November 2008, paras. 52, 55–56; see also e.g. ECtHR, *Pishchalnikov v. Russia*, para. 81, where the Court explicitly stated that no overall fairness assessment was required in the case as no justification to the restriction existed, which in itself was enough to constitute a breach of Article 6(3)(c) and 6(1), and; ECtHR, *Dayanan v. Turkey* (Appl. no. 7377/03), Judgement (Chamber) of 13 October 2009, paras. 31–34, where the Court found a systematic statutory restriction in itself to amount to a breach of Article 6(3)(c) and 6(1).
[295] ECtHR, *Simeonovi v. Bulgaria* (Appl. no. 21980/04), Judgement (GC) of 12 May 2017, paras. 116–118, 129–130, 132; ECtHR, *Beuze v. Belgium* (Appl. no. 71409/10), Judgement (GC) of 9 November 2018, paras. 144–145, 161–164. See also ECtHR, *Ibrahim and Others v. the United Kingdom,* (Appl. nos. 50541/08, 50571/08, 50573/08 and 40351/09), Judgement (GC) of 13 September 2016, paras. 262–264.
[296] ECtHR, Guide on Article 6 (criminal limb), 2021, para. 459.

This development in jurisprudence is arguably retrogression to the right to legal assistance as first established in *Salduz* and following judgements, and it has been criticised by judges of the Court and scholars alike.[297]

When it comes to limitations to the right of access to a lawyer under Articles 47 and 48 CFREU, the CJEU has held its judgements in relation to defence rights that

> […] fundamental rights, such as respect for the rights of the defence, do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not constitute, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed.[298]

In CJEU case law, rights of the defence have been found subject to legitimate restrictions e.g. on the basis of public health considerations and in order to protect confidentiality or professional secrecy.[299] The Access to a Lawyer Directive further lays down specific circumstances under which temporary derogations[300] from the right to legal assistance are permitted, namely

> (a) where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person;
> (b) where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings.[301]

Article 8 of the Access to a Lawyer Directive further specifies the conditions for applying a temporary derogation, which appears to follow the earlier *Salduz* jurisprudence of the ECtHR and offer stronger protection in relation to the recent line taken by the Strasbourg Court in *Beuze*. The Directive follows ECtHR jurisprudence in that any restrictions must "be strictly limited in time"[302]

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[297] ECtHR, *Simeonovi v. Bulgaria* (Appl. no. 21980/04), Judgement (GC) of 12 May 2017, Partly Dissenting Opinion of Judges Sajó, Lazarova-Trajkovska and Vučinić joined by Judge Turković and Partly Dissenting Opinion of Judge Serghides; ECtHR, *Beuze v. Belgium* (Appl. no. 71409/10), Judgement (GC) of 9 November 2018, Joint Concurring Opinion of Judges Yudkivska, Vučinić, Turković and Hüseynov; Celiksoy, 2019.
[298] CJEU, C-28/05, *Dokter and Others,* Judgement of 15 June 2006, para. 75. See also e.g. CJEU, C-418/11, C-418/11, *Texdata Software,* Judgement of 26 September 2013, para. 84; CJEU, C-358/16, *UBS Europe SE and Alain Hondequin and Others v. DV and Others*, Judgement of 13 September 2018, para. 62.
[299] CJEU, C-28/05, *Dokter and Others,* Judgement of 15 June 2006, paras. 73–77; CJEU, C-358/16, *UBS Europe SE and Alain Hondequin and Others v. DV and Others*, Judgement of 13 September 2018, para. 63.
[300] Although the Directive remains silent over the definition of "a temporary derogation", it is in this context understood as synonymous to "a limitation". The Article does not contain any components characteristic of derogations in human rights law, such as a mention of time of emergency or the obligation to report of the derogation and its justification. Furthermore, the alignment of the temporary derogations in the Directive with the limitations established by the ECtHR supports this view. Similar approach can also be found in academia, see e.g. Celiksoy, 2019, pp. 360–362. For the characteristics of derogations, see Hafner-Burton et al., 2011.
[301] Article 3(6), Access to a Lawyer Directive.
[302] Article 8(1)(b), Access to a Lawyer Directive.

and "not prejudice the overall fairness of the proceedings."[303] However, contrary to the ECtHR's *Beuze* judgement, the Directive explicitly holds that "[t]emporary derogations […] may be authorised *only on a case-by-case basis*, either by a judicial authority, or by another competent authority on condition that the decision can be submitted to judicial review."[304] As the ECtHR held in *Beuze* that a statutory restriction on access to a lawyer of a general and mandatory nature was in itself not sufficient to constitute a violation of Article 6[305], it inevitably appears that the protection afforded by the Access to a Lawyer Directive, which *only* permits temporary derogations on a case-by-case basis, exceeds that of the ECHR.[306] The Legal Aid Directive also ceases to apply for the time of the above described restrictions; as the right to legal aid is an ancillary right to the right to legal assistance, restrictions in the right to legal assistance naturally restrict the right to legal aid during the time of such restriction.[307]

It cannot be definitely concluded that under no circumstances could the conditions required for a legitimate limitation of the right to legal assistance and legal aid as established by the ECtHR, CJEU and the Access to a Lawyer Directive, be fulfilled in exclusion proceedings. However, was the right to legal aid to apply in exclusion proceedings at first instance, a situation in which the applicant considered for exclusion was *only* subject to exclusion procedure and the required circumstances for limitations would exist is unlikely; in a situation of such urgency and severity the individual in question would likely be arrested and under detention. Article 1F(b) only concerns crimes that have taken place outside the country where refuge is being sought, and while paragraphs (a) and (c) make no reference as to where the crimes have taken place, the majority of exclusion procedures do not concern events that are immediately taking place in the host country[308], a situation most natural to the existence of an urgent need to restrict the applicant's access to a lawyer. Thus, was the right to legal aid applicable in exclusion proceedings at first instance, it is likely that restrictions described above could rarely be justified.

[303] Article 8(1)(d), Access to a Lawyer Directive.
[304] Article 8(3), Access to a Lawyer Directive, emphasis added.
[305] ECtHR, *Beuze v. Belgium* (Appl. no. 71409/10), Judgement (GC) of 9 November 2018, paras. 116, 164–165.
[306] Celiksoy, 2019, pp. 360–362. However, the temporary derogations of the Directive, especially that under Article 3(6)(b), have also been criticized as "overly broad and open to abuse", see e.g. Anagnostopoulos, 2014, pp. 12–13.
[307] Recital (9), Legal Aid Directive.
[308] Rikhof, 2017, p. 97.

4. The Necessity of Legal Aid in Procedures at First Instance – Why and When?

4.1. "Irretrievably prejudiced"? Implications of Lack of Legal Assistance During Procedures at First Instance

4.1.1. Credibility Assessment

As earlier discussed, while providing legal aid in the asylum procedures at first instance is voluntary under EU law, the Procedures Directive obliges EU Member States to ensure legal aid to asylum applicants in appeals procedure. Furthermore, Article 46(3) of the Procedures Directive provides that in appeals procedures,

> […] Member States shall ensure that an effective remedy provides for a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection needs […] at least in appeals procedures before a court or tribunal of first instance.[309]

The fact that Member States are obliged to ensure an *ex nunc* examination of protection needs in appeals procedures begs the question as to whether ensuring access to free legal assistance therein is enough to fulfil the requirement of Article 47 CFREU, according to which "[l]egal aid shall be made available […] in so far as such aid is necessary to ensure effective access to justice"[310]. In this chapter, implications of lack of legal assistance in procedures at first instance will be examined with a view of whether they can adversely affect applicants in an irretrievable manner which may be difficult or impossible to overcome in appeals procedures when the right to legal aid in accordance with the Procedures Directive becomes applicable. First, the implications of lack of legal aid to credibility assessment will be examined.

Lack of free legal assistance in procedures at first instance may have significance to credibility considerations in appeals procedures, specifically in affecting the perceived consistency and coherence of an applicant's story. RSD procedure invariably takes place outside the state, the events and circumstances of which are being evaluated with the intention of establishing whether an applicant has well-founded fear of persecution. Consequently, the practical possibilities of authorities to gather evidence and reach certainty of the claims presented is diminished in comparison with national investigations such as criminal cases or civil claims, and this is reflected in asylum procedure through the standard of proof within it. An applicant needs not prove their well-founded fear beyond reasonable doubt, and the decision maker needs not be "fully convinced

[309] Article 46(3), Procedures Directive.
[310] Article 47, CFREU, 2012.

of the truth"[311]. It suffices that "based on the evidence provided as well as the veracity of the applicant's statements, it is likely that the claim of that applicant is *credible*."[312] Indeed, while the burden of proof in RSD is shared between the applicant and authorities, the latter of which may rely on e.g. country of origin information to examine the need for international protection, the evidence provided by an applicant and its credibility is ordinarily at the heart of asylum procedure.[313] Applicants may present evidence such as official documentation, witness testimonies or expert reports, but personal testimony often plays a crucial part in the process, as many asylum seekers have fled their country of origin without personal documents.[314] It should also be noted that in fear of persecution, asylum seekers may have spent a significant amount of time aiming to hide any documentation of a persecution ground, which is suddenly of high significance in the asylum procedure. Thus, presenting documentary evidence in support of personal testimony is not necessary in obtaining a refugee status, so long as oral statements "are consistent with known facts and the general credibility of the applicant is good."[315]

The overall credibility assessment of an applicant's claims consequently plays a significant part in asylum procedure, especially in absence of corroborating evidence in the form of documentation. According to the UNHCR, credibility assessment should consider

> […] such factors as the reasonableness of the facts alleged, *the overall consistency and coherence of the applicant's story*, corroborative evidence adduced by the applicant in support of his/her statements, consistency with common knowledge or generally known facts, and the known situation in the country of origin.[316]

The general credibility of an applicant is also specifically called for under the Qualification Directive in situations where an applicant's testimony is not supported by documentation or other evidence. According to Article 4(5) of the Qualification Directive,

> […] where aspects of the applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation when the following conditions are met:
>
> […]
>
> (c) the applicant's statements are found to be *coherent* and plausible […]
>
> (e) the *general credibility* of the applicant has been established.[317]

[311] UNCHR, Note on Burden and Standard of Proof in Refugee Claims, 1998, para. 8.
[312] *Ibid.,* emphasis added.
[313] Hathaway and Foster, 2014, p. 136.
[314] *Ibid.*; UNHCR, Note on Burden and Standard of Proof in Refugee Claims, 1998, para. 10.
[315] UNHCR, Note on Burden and Standard of Proof in Refugee Claims, 1998, para. 10.
[316] *Ibid.,* para. 11, emphasis added.
[317] Article 4(5), Qualification Directive, emphases added.

As can be observed, the consistency and coherence of statements in different stages of asylum procedure forms an important element of credibility assessment, and applicants whose story does not change or "escalate"[318] over time are generally perceived as more truthful than those whose testimony changes. Evidence submitted upon arrival or when first applying for asylum may also be considered more reliable in comparison with statements provided for later in the process. While reasonable on the basis of common sense, this approach is nevertheless problematic in the context of asylum procedure. Asylum seekers may have a number of reasons for not disclosing evidence in early stages of procedure, such as distrust in authorities, embarrassment or shame, or trauma and consequent attempt to forget memories which may be of significance to the asylum claim.[319] Some inconsistency over time and in different hearings and possibly several procedures is also inevitable due to simple humane reasons as well as external factors such as changing interpreters.[320] The UNHCR recognises that not all inaccuracy refers to discredit, but may stem from e.g. passage of time or trauma, and holds that "dates or minor details, as well as minor inconsistencies, insubstantial vagueness or incorrect statements which are not material" may affect the assessment of credibility but shall not form decisive factors within it.[321]

However, non-disclosement of evidence may also stem from ignorance of the importance of certain evidence in absence of legal assistance. As demonstrated in Chapter 3.5.3., exclusion cases come in great complexity and in absence of legal assistance applicants are unlikely to understand all legal parameters of their case, including possible defences to individual criminal liability. Consequently, the obtaining of legal assistance in appeals procedures may result in submission of new evidence, the significance of which has not occurred to the applicant in procedures at first instance. In light of ECtHR jurisprudence, this may hamper the credibility of the applicant's claims. In an admissibility decision of *A. A. v. Sweden* (2008), the applicant had submitted additional evidence in appeals procedure of persecution by a group other than that brought up in the procedures at first instance. The national appeals board in the case found the applicant's account to lack credibility owing to the fact that he had not mentioned this extended persecution ground in the procedures at first instance.[322] The Court endorsed this view, giving weight to the

[318] In the admissibility decision of *A. A. v. Sweden* (Appl. no. 8594/04), Decision as to the Admissibility of 2 September 2008, the ECtHR accepted the Government's reasoning that the applicant's escalating story during the course of asylum procedure "contributed to undermining his general credibility." See para. 56.
[319] Hathaway and Foster, pp. 144–146.
[320] *Ibid.,* pp. 146–147.
[321] UNHCR, Note on Burden and Standard of Proof in Refugee Claims, 1998, para. 9.
[322] ECtHR, *A. A. v. Sweden* (Appl. no. 8594/04), Decision as to the Admissibility of 2 September 2008, paras. 8–10, 24.

fact that the applicant had not mentioned the grounds presented in appeals procedure until receiving his first negative asylum decision.[323] Likewise in the case of *Y v. Russia* (2008), the Court found no "sufficient grounds for believing that the […] applicant faced a real risk of treatment contrary to Article 3 of the Convention upon his return to China"[324], as the applicant had only disclosed crucial information concerning a police search as well as issues in obtaining a passport in country of origin in appeals procedure, which hindered the credibility of the claims in question.[325] The same logic lead to the Strasbourg Court questioning an applicant's credibility in *D. N. W. v. Sweden* (2012), as he only claimed having been suspected of being a spy in his country of origin in appeals procedure rather than in proceedings at first instance. The ECtHR specifically questioned withholding such information as "if it were true, it would be very relevant to his asylum application."[326] This statement demonstrates the underlying assumption that evidence only submitted in appeals procedure is untrue, as well as that an applicant should have detailed knowledge of the relevance of his or her experiences to the asylum decision early in the process – despite the fact that not all asylum seekers receive legal assistance in procedures at first instance. This is especially alarming for cases of exclusion which do come in great complexity and all parameters of which would be most difficult to understand without legal training, as assessed in Chapter 3.5.3. While the Court sided with the Government in *D. N. W.* and found no violation of Articles 2 or 3 despite medical records showing the applicant to have substantial scarring and Post-Traumatic Stress Disorder, both referring to previous torture in his country of origin, two dissenting Judges found the credibility issues in the case minor in comparison with the evidence of previous torture of the applicant.[327]

While the late submission of evidence may call its credibility into question, it does not, however, automatically render it unreliable. In the case of *Hilal v. the United Kingdom* (2001), the applicant had failed to mention torture in his initial asylum interview, which lead to the defendant Government considering his account of events incredible. The ECtHR, however, did not find the late submission of evidence decisive for his credibility, instead finding his account credible. It should, however, be noted of the case that the evidence of torture submitted by the applicant was within the procedure at first instance, rather than in appeals procedure – the defendant Government had questioned its credibility due to the fact that it was given a month after the very

[323] ECtHR, *A. A. v. Sweden* (Appl. no. 8594/04), Decision as to the Admissibility of 2 September 2008, para. 67.
[324] ECtHR, *Y v. Russia* (Appl. no. 20113/07), Judgement (Chamber) of 4 December 2008, para. 91.
[325] *Ibid.*, para. 88.
[326] ECtHR, *D. N. W. v. Sweden* (Appl. no. 29946/10), Judgement (Chamber) of 6 December 2012, para. 43.
[327] *Ibid.,* Dissenting Opinion of Judge Power-Forde joined by Judge Zupančič.

first asylum interview, which was conducted on the day the applicant claimed asylum. Furthermore, the applicant's testimony was supported by medical records demonstrating his injuries.[328] As already stated, not all applicants submitting evidence later in the process will have such credible evidence corroborating their claims, meaning additional testimonies at later stages of procedure is likely to call an applicants' credibility into question. Moreover, in *Hilal,* the further testimony was given a month after the initiation of the procedure, while appeals procedures – in which all applicants are entitled to legal aid – may take place months or even years after initial interviews, further increasing the risk of their accounts being determined as unreliable.[329] The impact of passage of time to applicants' ability to recall events or details should also not be overlooked, as this may hamper their ability to present their defence in exclusion proceedings. It consequently follows that lack of legal aid, which leads to lack of legal assistance for impecunious applicants, may have significance in the outcome of proceedings even when legal aid is offered in appeals procedures. While this may apply to many asylum cases, not just those concerning exclusion, the heightened complexity of exclusion cases combined with the seriousness of their outcome places applicants in exclusion proceedings at heightened vulnerability.[330] This applies especially if authorities at first instance do not take initiative in thoroughly considering all aspects in relation to criminal law and reflecting these considerations in questions presented to an applicant. The risk in question seems relevant considering the documented inconsistency in the application of the exclusion clause as well as the EASO instructions that defences against individual criminal liability would normally be brought up by applicants themselves.[331] ECRE has also highlighted the significant value national authorities often place on hearings in procedures at first instance to the applicant's credibility, and how this approach has analogy to the early need for legal assistance in criminal proceedings where national authorities may place significance in the initial attitude and statements of the defendant, as articulated by the ECtHR.[332]

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[328] ECtHR, *Hilal v. the United Kingdom* (Appl. no. 45276/99), Judgement (Chamber) of 6 March 2001, paras. 64, 13–14.

[329] According to the recast Procedures Directive Article 31(3), examination procedure at first instance is to be conducted within 6 months of the lodging of an application, however allowing for a further 9 months under certain circumstances, such as "complex issues of fact and/or law" or high influx of applicants, and an additional 3 months if necessary to "ensure an adequate and complete examination of the application". Paragraph 5 of the same Article sets the maximum limit for the examination procedure at 21 months, but paragraph 9 further declares that the limits under paragraphs 3 and 5 may be exceeded "where necessary in order to ensure an adequate and complete examination of the application […]". Consequently, the Directive does not, in reality, set a maximum time frame for the examination of an application in procedures at first instance.

[330] ECRE, Position on Exclusion from Refugee Status, 2004, doc. no. PP1/03/2004/Ext/CA, paras. 9, 44, 47; see also Chapters 2.2.2. and 3.5.3.

[331] EASO, Practical Guide: Exclusion, 2017, p. 9, see also Chapter 2.2.6.; Bond, 2013, pp. 8–9.

[332] ECRE, The application of the EU Charter of Fundamental Rights to asylum procedural law, 2014, pp. 65–66; ECtHR, *Salduz v. Turkey* (Appl. no. 36391/02), Judgement (GC) of 27 November 2008, para. 52.

4.1.2. Possibility of Succeeding Criminal Proceedings

Lack of legal aid in procedures at first instance may also have an impact in possible criminal proceedings succeeding exclusion proceedings, and this prospect will next be examined. Crimes being investigated during exclusion proceedings have ordinarily taken place outside the criminal jurisdiction of a receiving state, and exercising criminal jurisdiction generally requires a sufficient link from a state to the criminal conduct in question, meaning in effect that a criminal act takes place within the state's territory; that it is committed by a national of that state or against a national of that state, or; it threatens a key interest of that state.[333] In absence of these links, however, the principles of universal jurisdiction and obligation to prosecute or extradite enable or, in certain cases, oblige states to conduct criminal proceedings on the basis of findings in exclusion proceedings, if they will not or cannot extradite an alleged perpetrator. States may exercise universal jurisdiction over certain grave crimes, such as war crimes, crimes against humanity and crime of aggression, which are also excludable crimes under Article 1F(a) of the Refugee Convention. In addition to the permission of states to exercise criminal jurisdiction on the basis of universal jurisdiction, certain treaties oblige states to take action when a suspected perpetrator is found within State territory. The principle of *aut dedere aut judicare* obliges states to extradite an alleged perpetrator of a crime to another state to face trial, or alternatively pass on the case to competent authorities for the purposes of criminal prosecution.[334] While the extradition of an alleged perpetrator may be possible in some cases of exclusion, extradition to a country of origin where an individual is in risk of being subjected to treatment contrary to Article 3 ECHR is not possible within EU Member States.[335] As certain crimes to which the principle of *aut dedere aut judicare* applies *vis-à-vis* EU Member States fall within the scope of the exclusion clause, and some perpetrators may not be extradited due to risk of treatment contrary to Article 3 ECHR, such cases entail an increased probability of succeeding criminal proceedings.

While the establishment of universal jurisdiction over different crimes varies between EU Member States[336], all Member States are under obligation to establish universal jurisdiction and fulfil the obligation *aut dedere aut judicare* in relation to grave breaches of international humanitarian law, crimes of torture as well as certain terrorist offences as established in the four

[333] Lowe and Staker, 2010, pp. 318–326; Council of the European Union, The AU-EU Expert Report on the Principle of Universal Jurisdiction, 2009, para. 12.
[334] Lowe and Staker, 2010, pp. 326–328.
[335] ECtHR, *Saadi v. Italy*, (Appl. No. 37201/06), Judgement (GC) of 28 February 2008, para. 138; Article 19(2), CFREU, 2012.
[336] Rikhof, 2017, p. 101.

Geneva Conventions, CAT and several treaties relating to terrorism to which all EU Member States are parties.[337] War crimes fall within the scope of Article 1F(a), and terrorist offences may fall either under Article 1F(b) or (c); both the UNHCR and United Nations Security Council ("UNSC") have disapproved of acceptance of political motives in relation to terrorist offences falling under serious common crimes, and the UNSC has declared in its resolution 1373 (2001) "acts, methods, and practices of terrorism" as contrary to the purposes and principles of the UN.[338] UNSC Resolution 1373 alongside a more recent Resolution 2178 (2014), which are legally binding on all UN Member States, oblige Member States to bring persons participating in terrorist acts to justice as well as to establish terrorist offences as serious crimes in domestic legislation, creating a legal obligation independent of conventions relating to terrorist acts.[339] Acts of torture conducted in the context of an armed conflict amount to grave breaches of international humanitarian law[340] falling under Article 1F(a), whereas acts of torture in peace time, if not amounting to crimes against humanity[341], may also be considered to fall under Article 1F(c) as the UN General Assembly has declared that "any act of torture […] shall be condemned as a denial of the purposes of the Charter of the United Nations […]"[342].[343] The International Law Commission ("ILC") found in its 2014 Report on the obligation *aut dedere aut judicare* that the obligation's status in customary international law remains unclear.[344] As EU Member States are

[337] Articles 49–50, Geneva Convention I, 1949; Articles 50–51, Geneva Convention II, 1949; Articles 129–130, Geneva Convention III, 1949; Articles 146–147, Geneva Convention IV, 1949; Article 7(1), CAT, 1984; In relation to terrorist crimes, see e.g. Article 7, European Convention on the Suppression of Terrorism, 1977; Article 8, International Convention for the Suppression of Terrorist Bombings, 1997; Article 18, Council of Europe Convention on the Prevention of Terrorism, 2005, the last of which has been ratified by all EU Member States with the exception of Greece and Ireland, both signatories to the Convention. For treaty ratifications, see CoE, "Chart of signatures and ratifications of Treaty 090", available at https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=090, (last visited 25 May 2022); United Nations Treaty Collection, "Status of Treaties: International Convention on the Suppression of Terrorist Bombings", available at https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-9&chapter=18&clang=_en (last visited 24 May 2022); CoE, 2022, "Chart of signatures and ratifications of Treaty 196", available at https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=196 (last visited 24 May 2022); International Committee of the Red Cross, "Treaties, State Parties and Commentaries: By State", available at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountry.xsp (last visited 24 May 2022); United Nations Human Rights: Office of the High Commissioner, 2022, "Ratification of 18 Human Rights Treaties", available at https://indicators.ohchr.org/ (last visited 25 May 2022).
[338] UNHCR, Guidelines, para. 15; UNSC Resolution 1373, UN doc. S/RES/1737 (2001), paras. 3(f)–(g), 5.
[339] UNSC Resolution 1373, UN doc. S/RES/1737 (2001), para. 2(e); UNSC Resolution 2178, UN doc. S/RES/2178 (2014), para. 6.
[340] Article 50, Geneva Convention I, 1949; Article 51, Geneva Convention II, 1949; Article 130, Geneva Convention III, 1949; Article 147, Geneva Convention IV,1949.
[341] According to Article 7(1)(f) of the Rome Statute, torture amounts to a crime against humanity when "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack".
[342] UN General Assembly, Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN doc. A/RES/3452(XXX), 1975, Article 2.
[343] See also Larsaeus, 2004, p. 92.
[344] ILC, The obligation to extradite or prosecute, 2014, paras. 49–55.

nevertheless bound by the principle through several treaty obligations, the determination of the obligation's customary status is not necessary for the purposes of this research.

This list of treaties binding EU Member States with the principle of *aut dedere aut judicare* is non-exhaustive but demonstrates that several, although not all, excludable crimes give rise to an obligation of EU Member States to submit information obtained during exclusion proceedings forward to competent authorities for possible criminal proceedings.[345] As indicated by EASO in its *Practical Guide: Exclusion,* the permission or requirement for referral of information to relevant authorities may take place whether or not an individual is excluded.[346] The possibility or obligation of a state to forward evidence of crimes to prosecuting authorities following exclusion proceedings has significance on the importance of access to legal assistance in the procedure at first instance, as information obtained therein prior to access to legal assistance may consequently be utilised in criminal proceedings. The forwarding of information from exclusion proceedings was addressed by the ECtHR in the previously discussed case of *H. and J. v. the Netherlands*.[347] The Court concluded in the case that Article 6 did not preclude the immigration authorities from submitting statements of the applicants obtained during asylum procedure to prosecuting authorities; and that in accordance with the obligation *aut dedere aut judicare* it was not only the right, but the duty of the Netherlands to prosecute the applicants on the basis of information obtained.[348] The Court therefore explicitly allowed the transferring of statements from immigration to prosecuting authorities. Whether the applicants had access to legal assistance in their asylum procedure is not disclosed in *H. and J.;* and the absence or presence of a lawyer in the asylum procedure at first instance is not noted by the ECtHR in any manner whatsoever. The Court stated that since the applicants did not confess to any crimes in the course of questioning, such confessions were not used as a ground for their conviction.[349] In this respect, *H. and J.* differs from the key case regarding access to legal assistance, *Salduz*[350]*,* whether or not the applicants had access to legal assistance when making their statements; in *Salduz,* the applicant had indeed confessed to a crime, and the ECtHR held that when incriminating statements made during

[345] This view is also shared by the UNHCR, see UNHCR, Background Note, para. 21.
[346] EASO, Practical Guide: Exclusion, 2017, p. 37.
[347] For a description of the case, see Chapter 3.3.2.
[348] ECtHR, *H. and J. v. the Netherlands* (Appl. nos. 978/09 and 992/09), Decision (Chamber) of 13 November 2014, paras. 74, 78.
[349] *Ibid.*, para. 80.
[350] For key findings of the case, see Chapter 3.1., p. 25 and Chapter 3.4., pp. 43–44.

interrogation in the absence of a lawyer are used for a conviction, the rights of the defence are in principle irretrievably prejudiced.[351]

While the applicants in *H. and J.* did not confess to any of the crimes they were later convicted of, they did make incriminating statements concerning their rank in the Afgan security forces, which was the context in which the crimes in question took place.[352] The ECtHR made it clear in *Ibrahim and Others* that in addition to directly incriminating statements, statements which offer authorities with a narrative and framework for investigation and to which corroborative evidence will be attached may play a central role in the prosecution's case. Consequently, the use of such statements made in the absence of a lawyer for a conviction may be in breach of Article 6.[353] In *H. and J.,* the applicants offered detailed accounts of their responsibilities and ranks in the Afgan security forces, and while not confessing to any crimes, their accounts must have given the investigators a framework of some kind, if you will, to which further evidence in the criminal proceedings was attached. This issue was not, however, addressed by the Court in *H. and J.,* and so it seems implied the Court did not find the statements incriminating in a manner central to the prosecution's case in later criminal proceedings. Furthermore, as already stated, the case did not concern absence of a lawyer. However, it is not unthinkable that directly or indirectly incriminating statements made in an asylum interview with a focus on exclusion would consequently be submitted to prosecuting authorities in accordance with the obligation to prosecute or extradite. Were such statements made in the absence of a lawyer and used for a conviction following exclusion proceedings, it is the view of the author that in consistency with *Salduz* and *Ibrahim and Others,* this could amount to a breach of Article 6. As discussed in Chapter 3.3.2., the ECtHR's decision to examine the existence of compulsion in asylum procedure in *H. and J.* implies the possibility Article 6 safeguards extending to exclusion proceedings when criminal charges have indeed succeeded them. With crimes covered by the obligation *aut dedere aut judicare,* the prospect of succeeding criminal proceedings is, at least in theory, plausible. It is consequently the view of the author that access to legal assistance, through legal aid when necessary, should be ensured by states during exclusion proceedings relating to such crimes in order for them to comply with their obligations under Article 6.

[351] ECtHR, *Salduz v. Turkey* (Appl. no. 36391/02), Judgement (GC) of 27 November 2008, paras. 14, 55.
[352] *Ibid.*, paras. 34, 41.
[353] ECtHR, *Ibrahim and Others v. the United Kingdom,* (Appl. nos. 50541/08, 50571/08, 50573/08 and 40351/09), Judgement (GC) of 13 September 2016, paras. 268, 309.

Despite the above described permission and obligation of EU Member States to exercise criminal jurisdiction on individuals subject to and in connection with information extracted from exclusion proceedings, states have practical problems relating to the prosecution of alleged perpetrators identified in exclusion proceedings.[354] This is, amongst other matters, due to the strict rules of admissibility of evidence in criminal proceedings and the inabilities of authorities to conduct on-site investigations, as well as the high standard of proof in criminal proceedings in comparison with exclusion proceedings. Lack of reliable witnesses has, according to the Commission of the EU, proved an especially difficult obstacle in sustaining convictions for excluded individuals.[355] In practice, an extremely low number of excluded individuals has faced criminal charges in EU Member States, which lowers the significance of the prospect of succeeding criminal proceedings.[356] Nevertheless, the possibility of the initiation of criminal proceedings on the basis of information discovered in exclusion proceedings at first instance, sometimes in the absence of legal assistance, cannot be ignored when considering the implications of lack of access to legal assistance therein. It can be concluded that when exclusion proceedings touch upon crimes in the sphere of the obligation to extradite or prosecute for a State, there is a heightened possibility of criminal proceedings succeeding exclusion proceedings; and as the submitting of incriminating information from exclusion proceedings is not only permitted by the ECtHR but obligatory under treaties, criminal proceedings are, at least in theory, to be expected. Ensuring legal assistance in accordance with the Procedures Directive in appeals procedure is simply too late with a view to statements obtained in procedures at first instance and submitted to prosecuting authorities.

4.2. Level of Suspicion

Through analysis of the relevant regional instruments, jurisprudence and academia, this thesis has thus far demonstrated the capability of exclusion proceedings to attract the applicability of the right to legal aid in EU Member States. The case of *H. and J.* demonstrates the possible applicability of Article 6 in cases where criminal proceedings have succeeded exclusion considerations, but in absence of actual criminal charges, the ECtHR has continued to rule exclusion proceedings outside the scope of Article 6. In addition to a possibility of a changing interpretation on the matter before the ECtHR, it seems that defence rights under Article 47 and 48 CFREU should already be considered to touch upon exclusion proceedings, should such an

[354] Rikhof, 2017, pp. 110–111.
[355] Commission of the European Communities, The relationship between safeguarding internal security and complying with international obligations and instruments, 2001, p. 13.
[356] Rikhof, 2017, pp. 111–113.

issue be raised before the CJEU; and when it comes to the test of "when the interests of justice so require", it is probable in many exclusion cases that the interests of justice indeed require for provision of legal aid. What is more, the adverse and potentially irretrievable implications of lack of legal aid in procedures at first instance and their effect in appeals procedures has been demonstrated. Yet it remains to be examined under which conditions exclusion proceedings should be considered to attract the applicability of the right to legal aid, as exclusion considerations may take place with varying specificity, depth and consequences for an individual.[357] As underpinned in Chapter 3.3.2., a threshold for sufficient level of suspicion *before* the decision to exclude is of interest when answering this question. In other words, it should be determined whether the level of suspicion required for the applicability of the right to legal aid in relevant instruments of international law and jurisprudence is lower than that of an exclusion decision, and if so, where is this lower threshold located. In relation to defence rights under Articles 47 and 48 CFREU, which are less concerned over the suspected criminal offence and more with whether the decision in question significantly affects an individual's rights and interests, an analysis of the level of suspicion can be used to demonstrate whether the individual's situation can be considered substantially affected from the weight of allegations against them. This is necessary as the determination of whether an individual is subject to an exclusion procedure is not a simple one: the procedure takes place within the general RSD and is never followed by a "negative" exclusion decision, but when exclusion considerations are not affirmed, an individual is granted an asylum, given that well-founded fear of persecution exists. The strength of suspicion during exclusion considerations can therefore be utilised to examine the point from which the rights and interests of an individual are substantially affected due to exclusion considerations in comparison with the general RSD. Whether the threshold of an effect on the rights and interests of an individual under Articles 47 and 48 is in any case reached in the general RSD is, while a highly relevant topic for future research, outside the scope of this thesis.

In order to examine whether the suspicion level of the threshold to afford legal aid in international law is lower than that of a decision to exclude, it is necessary to briefly address the suspicion level related to *serious reasons to consider* under the exclusion clause. The UNHCR has referred to Article 61(5) of the Rome Statute to demonstrate the level of suspicion required for an exclusion decision. In doing so, the UNHCR considered the *serious reasons to consider* –threshold of Article 1F similar to the threshold for the confirmation of charges before the International

[357] See Chapter 3.3.2.

Criminal Court ("ICC"), which requires "substantial grounds to believe" that an individual has committed a crime under the Rome Statute.[358] This equation is in line with earlier statements by the UNHCR, where the agency has expressed that the standard of proof in exclusion decisions should be enough for an indictment as seen through international standards[359]; and that an indictment by an international tribunal is sufficient in itself for a decision to exclude.[360] In addition to the "substantial grounds to believe", the Rome Statute presents a number of thresholds for different procedures under the Statute. While the above mentioned standard is enough to indict an individual, the issuance of a warrant of arrest requires a lower threshold, namely "*reasonable* grounds to believe" that an individual has committed a crime within the Court's jurisdiction.[361] The threshold presented by the Rome Statute for the applicability of the right to legal aid, however, falls below this threshold also, settling simply at "grounds to believe that a person has committed a crime within the jurisdiction of the Court"[362], and applies when an individual is about to be questioned prior to indictment.[363] Reflecting this criteria, when immigration authorities prepare for an asylum interview with a focus on exclusion[364], some grounds for exclusion most likely exist, and that person is about to be questioned of them by immigration authorities. Grounds to believe is arguably a threshold lower than reasonable or substantial grounds to believe – it is simply grounds. Similarly, under the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the Statute of the International Tribunal for Rwanda (ICTR), impecunious suspects are entitled to legal assistance free of charge when being question during the investigation prior to indictment.[365]

However, the view of the equality of the "serious reasons for considering" and "substantial grounds to believe" presented by the UNHCR is not equivocally endorsed in academia. Holvoet argues that the equivalent international criminal law standard of proof for a decision to exclude is "reasonable grounds to believe" from the Rome Statute, as the drafting history of the Statute shows that "serious reasons for considering" used in Article 1F of the Refugee Convention was originally considered to replace the "reasonable grounds to believe" which made it to the Rome

[358] UNHCR, Statement on Article 1F of the 1951 Convention, 2009, p. 10 and footnote 48 therein; Article 61(7), Rome Statute, 1998.
[359] UNHCR, Global Consultations on International Protection, Lisbon Expert Roundtable 3–4 May 2001, Summary Conclusions – Exclusion from Refugee Status, 2001.
[360] UNHCR, Background Note, para. 107.
[361] Article 58(1)(a), Rome Statute, 1998, emphasis added.
[362] Article 55(2) and 55(2)(c), Rome Statute, 1998.
[363] Article 55(2)(c), Rome Statute, 1998. Article 55(2)(c) ensures the provision of legal aid "where the interests of justice so require".
[364] EASO, Practical Guide: Exclusion, 2017, p. 13.
[365] Article 18(3), Statute of the ICTY, 1993; Article 17(3), Statute of the ICTR, 1994.

Statute. Furthermore, Holvoet argues that both thresholds can be met by using "publicly available sources", which is an important practical aspect given the inability of national authorities to conduct a ground investigation in exclusion cases.[366] Even with this view in mind, the threshold for the applicability of the right to legal aid under the Rome Statute still falls below that of a decision to exclude. It can thus be concluded that the level of suspicion required for the applicability of the right to legal aid under international criminal law is lower than that required for an exclusion decision.

While the thresholds of the Rome Statute are useful in situating the suspicion level required for a decision to exclude to an established international framework, the Statute offers little advice on the measuring of the level of suspicion with regard to the applicability of the right to legal aid. The Rome Statute avoids defining the terms "suspect" or "accused", and instead the rights of individuals subject to procedures under the Statute are defined by each stage of the procedure.[367] Additionally, while all EU Member States are parties to the Rome Statute[368] and the threshold for the provision of legal aid therein is a useful indicator from a procedure which shares similarities with exclusion, the Rome Statute regulates a separate procedure from exclusion and its thresholds are neither directly applicable nor binding upon EU Member States in exclusion proceedings. For a closer determination of the conditions under which an applicant being considered for exclusion should be considered entitled to legal aid, examination ECtHR jurisprudence is necessary.

The threshold for the applicability of the right to legal aid falling below indictment under the Rome Statute is *prima facie* not in contrast with the views of the ECtHR, as the Strasbourg Court has continuously considered the safeguards of Article 6 applicable prior to the official pressing of charges.[369] The Court also makes clear in *Salduz* that the right to legal assistance must be ensured during questioning by police officers, which also seems aligned with Article 55(2)(c) of the Rome Statute.[370] In several cases before it, the ECtHR has not seen it necessary to explicitly articulate on the level of suspicion relating to the existence of "criminal charges" for the purposes of Article 6. In the view of the author, this is due to the fact that in such cases, even while often in the absence of formal criminal charges, strong suspicion on behalf of authorities has been obvious enough for the Court to simply state that the relevant authorities suspected the applicant of

[366] Holvoet, 2014, p. 1050.
[367] Friman, 1999, pp. 148–149.
[368] ICC, "The State Parties to the Rome Statute", available at https://asp.icc-cpi.int/states-parties (last visited 20 May 2022).
[369] ECtHR, Guide on Article 6 (criminal limb), 2021, paras. 16–17.
[370] ECtHR, *Salduz v. Turkey* (Appl. no. 36391/02), Judgement (GC) of 27 November 2008, paras. 54–55.

criminal conduct. Such cases include situations where an individual has been arrested on suspicion, questioned in the role of a suspect or formally charged.[371] Instead, the ECtHR has articulated on the level of suspicion by authorities in relation to the existence of "criminal charges" in cases where an individual has been formally treated as a witness. The case of *Serves v. France* (1997) concerned an applicant who had previously been charged with manslaughter and murder in an incident relating to the alleged unlawful killing of a poacher during a time in which the applicant had served as an officer in the French army. The applicant was later summoned as a witness in a second investigation into the same case and punished with fines following his refusal to testify, as he claimed such testimony to infringe his defence rights and privilege against self-incrimination. In determining the applicability of Article 6, the ECtHR considered decisive the specific naming of the applicant as one of the four "soldiers implicated in the case"[372] in evidence of the first investigation into the incident; as well as the fact that a previous inquiry report concerning the case "described the applicant's involvement in detail and concluded that he was 'wholly' responsible" for the killing in question.[373] The fact that authorities in charge of the investigation held such detailed information of the applicant's involvement in the case lead the Strasbourg Court to consider him subject to a "criminal charges" for the purposes of Article 6.[374]

In a more recent case from 2017, *Kalēja v. Latvia,* the applicant had been accused of misappropriation of company funds as an accountant. The applicant had been formally considered a witness for a period of more than seven years and questioned continuously in that role, while in reality authorities had had specific allegations of criminal conduct by her during the entirety of this time. When determining the moment from which "criminal charges" for the purposes of Article 6 ECHR existed, the ECtHR referred to the specificity of suspicion against the applicant. The Court noted that the criminal proceedings initiated "[…] contained a specific allegation that the applicant […] had misappropriated funds […]"[375]. The Court found this allegation to "[indicate] that there was in fact a suspicion against the applicant that she had committed the criminal offence in question."[376] The Court also paid attention to the fact that the applicant had been "questioned in relation to those specific facts"[377], underlining the specificity of the

[371] See e.g. ECtHR, *Heaney and McGuinness v. Ireland* (Appl. no. 34720/97), Judgement (Chamber) of 21 December 2000, paras 9–10, 42; *Grinenko v. Ukraine* (Appl. no. 33627/06), Judgement (Chamber) of 15 November 2012, paras. 92–98; *Pélissier and Sassi v. France* (Appl. no. 225444/94), Judgement (GC) of 25 March 1999, para 66.
[372] ECtHR, *Serves v. France* (Appl. no. 82/1996/671/893), Judgement (Chamber) of 20 October 1997, para. 42.
[373] *Ibid.*
[374] *Ibid.*
[375] ECtHR, *Kalēja v. Latvia* (Appl. no. 22059/08), Judgement (Chamber) of 5 October 2017, para. 37.
[376] *Ibid.*
[377] *Ibid.*

authorities' suspicion. This lead the Court to unanimously conclude that sufficient suspicion against the applicant for the applicability of safeguards under Article 6 ECHR had existed "from the very beginning of the criminal investigation" regardless of the applicant's formal status as a witness.[378] Cases in which the ECtHR has not considered suspicion against an individual strong enough for the existence of criminal charges include *Weh v. Austria* (2004), where the applicant was required to provide information of the driver of his car which had been caught speeding. The Court found in *Weh* that authorities had conducted "proceedings for speeding […] against unknown offenders" and that "authorities did not have any element of suspicion against him", consequently rendering the safeguards of Article 6 inapplicable.[379]

A case in point from which several interesting parallels to exclusion can be drawn, however, is *Beghal v. the United Kingdom* (2019). The case concerned questioning of the applicant under a procedure called Schedule 7 to the Terrorism Act 2000 ("Schedule 7"), according to which police, immigration officers and custom officers may "stop, examine and search passengers at ports, airports and international rail terminals" in order to determine whether an individual appears to have connections to past or future terrorist acts; and where individuals subjected to such examination are obliged by law to answer the questions presented to them. This conduct does not require suspicion of a terrorist act prior to its execution, and in *Beghal* there was no indication of such suspicion against the applicant. The applicant alleged a breach of Article 6 in relation to her privilege against self-incrimination, but the Court found no violation due to lack of any, let alone specific, suspicion of criminal conduct against the applicant when questioned. The Court was unanimous in its decision and articulated specifically that

> As such, the mere fact of her selection for examination could not be understood as an indication that she herself was suspected of involvement in any criminal offence. On the contrary, the applicant was explicitly told by police officers that […] the police did not suspect her of being a terrorist […]. Moreover, the questions put to her were general in nature and did not relate to her involvement in any criminal offence […].[380]

Beghal can thus be distinguished from *Serves* and *Kalēja,* where authorities had specific suspicion of involvement in criminal conduct by the applicants. Moreover, domestic Code of Practice concerning Schedule 7 instructs the selection of individuals to be questioned under the procedure,

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[378] *Ibid.*
[379] ECtHR, *Weh v. Austria* (Appl. no. 38544/97), Judgement (Chamber) of 8 April 2004, para. 53.
[380] ECtHR, *Beghal v. the United Kingdom* (Appl. no. 4755/16), Judgement (Chamber) of 28 February 2019, para. 121.

which, regardless of absence of need for suspicion, should not be conducted arbitrarily.[381] Instead, officers are to base their selection of individuals on numerous factors which may indicate involvement in past or future terrorist acts. Interestingly, these factors share considerable similarities with "potential pieces of evidence" which may indicate need to consider exclusion in EASO's *Practical Guide: Exclusion*.[382] Assessing these similarities enables linking the varying levels of suspicion typically rising in exclusion proceedings to the level of suspicion –case law of the ECtHR and considering their position in relation to it. Below is a compilation of factors instructed to be used in a decision to conduct an examination under Schedule 7 and factors indicative of possible need for further examination of exclusion grounds in an asylum procedure, provided by EASO. Instructions containing similar factors are aligned in the table.

[381] *Ibid.*, para. 42.
[382] EASO, Practical Guide: Exclusion, 2017, p. 10–11.

Table 1. Factors to be considered when exercising Schedule 7 powers and potential pieces of evidence which may indicate need for exclusion considerations.

	Factors under Code of Practice of Schedule 7	**Potential pieces of evidence as listed by EASO**
Factor 1	Individuals or groups whose current or past involvement in acts or threats of terrorism is known or suspected, and supporters or sponsors of such activity who are known or suspected	Membership in a group, organisation, government, militia etc. whose involvement in serious violations of international humanitarian law or grave human rights abuses is known[383]
Factor 2	Any information on the origins and/or location of terrorist groups	Country of origin information
Factor 3	Means of travel (and documentation) that a group or individuals involved in terrorist activity could use	Identity and travel documents
Factor 4	Emerging local trends or patterns of travel through specific ports or in the wider vicinity that may be linked to terrorist activity	Based on the information about the applicant (e.g. place of residence, travel route), he or she may be linked to an event related to potential exclusion considerations
Factor 5	Known or suspected sources of terrorism	• Extradition request, judgement, crime records and arrest warrants • Information from official databases • Indications that the applicant has committed a criminal act

While the ECtHR considered that there is a possibility of Article 6 becoming applicable in the course of exercising powers under Schedule 7, it found that in absence of suspicion of criminal conduct in *Beghal*, the application was incompatible with Article 6 *ratione materiae*.[384] This ruling is an indication that some of the factors listed under Schedule 7 above are of such general nature that questioning of an individual on their basis does not indicate a suspicion level high

[383] This factor is not a direct quote but compiled from the profiles listed by EASO as potentially triggering exclusion proceedings, see EASO, Practical Guide: Exclusion, 2017, p. 11.
[384] ECtHR, *Beghal v. the United Kingdom* (Appl. no. 4755/16), Judgement (Chamber) of 28 February 2019, paras. 121–123.

enough to trigger the safeguards under Article 6. The reason for which the applicant in *Beghal* appeared to be singled out for questioning was her preceding visit to her husband, who was detained in France in relation with terrorist offences.[385] No specific allegations against the applicant existed; she was selected for the questioning on the basis of her profile which indicated a close connection to a suspected terrorist. Factors 2–4 in Table 1 represent general information which implies a possibility of a link to a terrorist or an excludable crime, but no direct suspicion of criminal conduct may be established on their basis. Consequently, it can be argued that the occurrence of such factors is comparable to the situation in *Beghal,* and could not, without more specific information, raise a sufficient suspicion against an applicant to consider Article 6 applicable. Factors 1 and 5, on the other hand, are more specific in nature and actually mention "known or suspected" involvement in terrorism under Schedule 7, demonstrating a more direct suspicion in comparison with factors 2–4. They can be in principle considered as corresponding to specific suspicion comparable to the cases of *Serves* and *Kalēja,* consequently attracting the applicability of safeguards under Article 6.

In addition to the factors listed in the right side column of Table 1, EASO guidelines listed "statements of the applicant including in initial application and in interviews" as well as "statements of others (family members, third parties)" as potential pieces of evidence in exclusion considerations. While the specificity of such statements may vary, it can generally be considered that they would be of more specificity in comparison with factors 2–4 in Table 1 and consequently have a higher chance of fulfilling the level of suspicion required for the applicability of Article 6. The ECtHR held in *Shabelnik v. Ukraine* (2009) that confessing to a murder inevitably lead to the investigator suspecting the applicant of a criminal offence, although he was being questioned in the role of a witness. Article 6 was consequently considered applicable from the moment of the confession.[386] Similarly, it can be considered that confession to an excludable act during an asylum interview would certainly establish a sufficient level of suspicion against an applicant to consider Article 6 guarantees applicable. Finally, EASO listed "open sources and social media" as a potential source of information. As the specificity of open sources and social media may vary widely from directly incriminating material to e.g. information of previous location or a travel route of an applicant, it is difficult to place it under any category on the scale of evidence from general to specific.

[385] *Ibid.*, paras. 6–7.
[386] ECtHR, *Shabelnik v. Ukraine,* (Appl. no. 16404/03), Judgement (Chamber) of 19 February 2009, para. 57.

While the ECtHR case law examined above concerned criminal proceedings and is consequently not directly applicable in exclusion proceedings, indication of allegations capable of demonstrating a sufficient suspicion for the existence of a "charge" can be used analogously when considering the situation of an applicant exclusion proceedings. The cases of *Serves* and *Kalēja* differ from exclusion proceedings in that both cases included several possible perpetrators and the applicants in question had been summoned to testify in the role of a witness in criminal proceedings, in which they were nevertheless already found to be subjected to a "charge" for the purposes of Article 6. In exclusion proceedings, immigration authorities are only concerned over the acts of the applicant, and in this regard, the possibility of an applicant's role as a witness is non-existent; when being questioned about excludable acts, it is the sole purpose of this inquiry to determine whether serious reasons to consider an applicant criminally liable for an excludable act exist. However, the cases of *Serves* and *Kalēja* give important insight which indicates that specific allegations relating to an individual, ones which can be verified from authorities' records, would render an individual subject to a "charge" under Article 6. In both cases, the allegations in question were also backed up by evidence obtained by authorities. A substantial difference which remains in the cases presented above and exclusion proceedings is the fact that while an asylum interview focused on exclusion has the examination of involvement in a crime as one of its objectives, this questioning is not conducted by police or prosecuting authorities. As explained in Chapter 3.3.2., the determination of "competent authority" for the purposes of Article 6 remains an unresolved matter before the ECtHR. However, as stated, the Court's view in *Funke* seems to suggest that authorities other than police or prosecution may qualify as "competent" in notifying an individual of an allegation of criminal conduct, triggering the safeguards under Article 6.[387]

The in-depth examination of the level of suspicion and the point from which an individual's position could be affected in a manner sufficient to consider Article 6 ECHR as well as defence rights under Articles 47 and 48 CFREU applicable would require a broad research into domestic exclusion cases alongside jurisprudence and consequently, the matter cannot be comprehensively settled within the scope of this thesis. What is more, the level of suspicion must be assessed on a case-by-case basis and thus presenting conclusive remarks on the types of evidence which would create a sufficient level of suspicion cannot be made. Nevertheless, mirroring EASO's practical guidance on EU Member States to the ECtHR cases presented offers indication of the level of suspicion that can be considered to trigger the applicability of defence rights under Article 6

[387] See Chapter 3.3.2.

ECHR and 47 and 48 CFREU. It can be identified that in circumstances where authorities are in possession of specific allegations against an applicant's involvement in an excludable act, produced e.g. by means of confession, third party witness, information on official databases, extradition request, judgement, crime record or arrest warrants, such evidence creates a level of suspicion sufficient to attract the applicability of defence rights and consequent right to legal aid for impecunious applicants when the interests of justice so require. While mere membership in a group or government known for committing excludable acts is not in itself sufficient for a decision to exclude, such membership would generally create specific suspicion against an applicant, and in certain cases it may even reverse the burden of proof in the procedure.[388] The CJEU ruled in its very first case concerning exclusion, *B and D*, that membership in a repressive and/or violent entity on its own is not enough for a decision to exclude, but the fact that the question required a preliminary ruling underlines the high level of suspicion arising from membership in such a group.[389] Consequently, it is the view of the author that such personal membership would also fulfil the level of suspicion required for the existence of a "charge" for the purposes of Article 6.

[388] UNHCR, Background Note, para. 58.
[389] CJEU, C-57/09 and C-101/09, *Bundesrepublik Deutschland v. B and D*, Judgement (GC) of 9 November 2010, 2010.

5. Conclusions

This thesis has examined whether, and if so, under which conditions, the right to legal aid should be considered applicable in exclusion proceedings at first instance within EU Member States. In addition to the varying provision of legal aid in asylum procedures at first instance within EU Member States, the inconsistent application of the exclusion clause underlines the importance of the research topic. This thesis has consequently sought to contribute to the understanding of the relevance of legal assistance in exclusion proceedings. Providing legal aid to impecunious applicants could not only enhance individual's procedural rights in a process with serious and life-long consequences, but also prevent the occurrence of miscarriages of justice, which often lead to long and costly appeals procedures which are beneficial neither to an applicant nor the host state.[390]

In order to answer the research question, the considerable similarities which exclusion proceedings share with criminal proceedings were first demonstrated. Most notably, both exclusion procedure and criminal proceedings have potentially severe consequences, are regulated through the rules of substantive criminal law and allocate the burden of proof in the procedures to authorities. However, differences were also identified: the deterrent value of exclusion decisions is limited in comparison with that of criminal proceedings and its imposition does not require finding of guilt in the procedure. While exclusion cannot be classified a genuine criminal sanction, its similarities with criminal procedure and most notably its severe consequences nevertheless call for special procedural safeguards under human rights law.

Next, the current and possible scope of Article 6 ECHR was examined in relation to exclusion proceedings. Currently, exclusion on its own is firmly ruled outside the scope of Article 6, while the ECtHR seems to have implied in *H. and J.* the Article's possible applicability to exclusion proceedings which have been followed by criminal proceedings. However, as examined on the basis of the *Engel*-criteria, exclusion proceedings can be argued to amount to "criminal charges" for the purposes of Article 6 also on their own, especially given their severe consequences for an individual. While this finding is not aligned with the current practice of the ECtHR, the Court always has a possibility of revisiting its interpretation, as the ECHR is to be interpreted as a living instrument and in light of present day conditions in CoE Member States.[391] The fact that asylum matters are not excluded from the scope of the corresponding Article 47 CFREU could have some

[390] ECRE, The application of the EU Charter of Fundamental Rights to asylum procedural law, 2014, p. 57.
[391] ECtHR, *Tyrer v. United Kingdom* (Appl. no. 5856/72), Judgement (Chamber) of 25 April 1978, para. 31.

bearing on the matter, since EU Member States – a total of 27 out of 46 CoE Member States – are already obliged to consider Article 47 CFREU when acting in the area of EU law, a part of which exclusion forms.

With a closer examination of CJEU case law relating to defence rights under Articles 47 and 48(2) CFREU, it was established that defence rights under the Charter have a wider scope in comparison with the ECHR, not only applying in proceedings constituting criminal charges but also in proceedings where the rights and interests of individuals may be significantly affected. The case of *PI* was used to demonstrate that defence rights under Articles 47 and 48(2) are likely to apply in exclusion proceedings, which have considerable parallels to the case. Furthermore, in order to closer determine whether exclusion cases would likely require legal aid were defence rights to apply, the test of *when the interests of justice so require* was examined with a view to characteristics typical for exclusion cases. It was concluded that were defence rights applicable, exclusion cases are likely to require legal aid for impecunious applicants, as they invariably concern serious offences with the possibility of severe coercive consequences for the applicant; they are often complex in their merits; and asylum seekers personal situations, such as limited comprehension of the language and legal system of the host state, are likely to render presenting an effective defence without access to a lawyer particularly difficult. It was furthermore established that the implied restrictions to the right to legal assistance and consequent legal aid under Article 6 ECHR and Articles 47 and 48 CFREU established by the respective Courts are unlikely to apply in exclusion proceedings.

Next, the adverse and irretrievable consequences that lack of legal aid in procedures at first instance may have for an asylum applicant was assessed in order to demonstrate that ensuring legal aid in appeals procedures in accordance with the Procedures Directive is, in many cases, not enough. Most notably, lack of access to legal assistance may impair the applicant's credibility, which plays a crucial role in the asylum procedure and exclusion within it. Furthermore, the prospect of succeeding criminal proceedings, especially in relation to crimes falling within the obligation *aut dedere aut judicare*, corroborates the necessity of legal assistance in asylum interviews with a focus on exclusion taking place in procedures at first instance, as incriminating statements made in the absence of a lawyer may consequently be submitted to prosecuting authorities. While these consequences are arguably serious, it cannot be reasonably argued that any, even minor, level of suspicion relating to exclusion during an asylum procedure would trigger the applicability of the right to legal aid. In order to answer the second part of the research

question, “under which conditions”, the level of suspicion of criminal conduct required from authorities for the individual to be subject to exclusion proceedings for the purposes of Articles 47 and 48(2) CFREU or for the existence of a “charge” for the purposes of Article 6 ECHR was finally examined. The ECtHR jurisprudence demonstrated a requirement of specific allegations against an individual for the existence of a sufficient level of suspicion for the applicability of safeguards under Article 6. Pieces of evidence in exclusion proceedings amounting to specific allegations were identified as confession, third party witness, information on official databases, extradition request, judgement, crime record and arrest warrant. On the other hand, general factors which may cause a minor level of suspicion but not trigger the applicability of the right to legal aid were identified as country of origin information, identity and travel documents, and place of residence or travel route. As the types of evidence arising in asylum process vary widely, both lists of evidence are non-exhaustive.

On the basis of this research, it can be concluded that EU Member States, when acting in the area of EU law – under which exclusion proceedings fall – should consider the right to legal assistance an applicable safeguard when the above mentioned specific suspicion of an excludable crime arises. The test of *when the interests of justice so require* should then be utilised to determine on a case-by-case basis whether provision of legal aid is required. In practice, this could mean suspending an asylum interview when sufficient level of suspicion over an excludable act arises, e.g. if an applicant confesses to a crime within the scope of the exclusion clause, and resuming the interview once access to legal assistance has been ensured.[392] Alternatively, access to legal assistance should be ensured prior to an asylum interview with a focus on exclusion, if the authorities’ suspicion entails specific allegations against an applicant. The access to legal aid in the presence of such evidence is especially crucial when the suspected crimes are subject to the obligation *aut dedere aut judicare.*

The exclusion clause was included in the Refugee Convention with solid intentions: to protect the integrity of the asylum system and prevent its abuse by fugitives of justice. To adhere with the humanitarian object and purpose of the 1951 Convention, it must be applied restrictively and through careful consideration of criminal law elements, including defences. As questions of migration and asylum seekers become increasingly politicised in Europe, it is important to remember what is at stake in exclusion proceedings, what its consequences are and that all EU Member States are committed to the rule of law – procedural fairness being one of its

[392] For comparison, see recital 21, Access to a Lawyer Directive.

cornerstones. Without appropriate safeguards in exclusion proceedings, Member States risk excluding *bona fide* refugees and undermining the equality and credibility of the asylum system. In the future, the applicability of defence rights and the right to legal aid under Articles 47 and 48(2) CFREU in all asylum procedures, not just those concerning exclusion, is an interesting topic for research, as asylum procedure arguably significantly affects individual's rights and interests even in absence of exclusion considerations. Furthermore, thorough research into the level of suspicion required for the applicability of the right to legal aid, including examination of national exclusion decisions, would be relevant to further clarify the conditions upon which access to legal assistance must be ensured.

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