CHAPTER 7

Exclusion is Not Just about Saying ‘No’
Taking Exclusion Seriously in Complex Conflicts

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The ‘fragmentation’ versus ‘regime interaction’ debate in international law is one that has been well and truly thrashed out.¹ That does not mean, however, that the academic commentators are fully conversant with all parts of international law and that they are aware of all the instances of regime interaction. And those commentators who do straddle several branches of international law run the risk of missing some particular obscure judgment that deals with one specific aspect of a very complicated issue because it is impossible to keep abreast of every development in international law in this ‘fragmented’ age of domestic, regional and international courts and tribunals. This article addresses the interaction of international refugee law, the international law of armed conflict, international criminal law, and international human rights law as regards so-called complex conflicts and exclusion from refugee status, an area that is increasingly recognised as still being in need of complete resolution.

There is a common misconception that conflicts became complex in the 1990s: conflicts have always been complex. The Bayeux Tapestry, depicting the defeat of the English by William the Conqueror, includes a picture of a family fleeing their home as it is torched by soldiers – internally displaced persons. Walzer refers to wars in Renaissance Italy being fought by mercenary armies raised on both sides, ‘partly as a business venture, partly as a political speculation’ – the blood diamonds of Sierra Leone, the ColTan of Ituri province in the Democratic Republic of Congo.² Walzer goes on to cite Machiavelli’s report of the Battle of Zagonara where the Florentine army was defeated and only three knights died – all after the battle had ended because they fell from

their horses and drowned in the mud. Given that mercenary armies cost so much, it was too expensive for too many fighters to die – the same was not necessarily the case for ‘civilians’. The *Fugger Newsletters* at the end of the sixteenth century equally tell of ‘crimes against humanity’ committed by a government against its own people and cross-border conflicts that compare with anything seen in the former Yugoslavia or the Great Lakes region.\(^3\) To be sure, modern international law has added multiple layers of complexity to analysing state responsibility and individual accountability,\(^4\) but the conflicts are not that different in nature or consequence. The principal question for this analysis is what behaviour during a conflict ought to lead to exclusion from refugee status – given that Article 1 F(a) of the Convention relating to the Status of Refugees (Refugee Convention), refers to both war crimes and crimes against humanity, it is a conscious decision to refer to complex conflicts, not complex ‘armed’ conflicts.

If conflict is no more complex now than it was in the past, it must be the pertinent international law that has grown more complicated than it was when the Refugee Convention was promulgated in terms of attributing individual responsibility to those for whom there are serious reasons for considering that they have committed a war crime, crimes against humanity, crimes against peace, a serious non-political crime, or are guilty of acts contrary to the purposes and principles of the United Nations.\(^5\)

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\(^3\) *The Fugger News-Letters 1568–1605* (V. von Klarwill (ed), translated by P. de Chary (Putnam 1924) is a collection of letters to the Fuggers of Augsburg, probably the richest trading family of the time, who financed the Habsburgs and relied on accurate information from across the globe. A news-letter of 1572 reads as follows:

#14... [The] Muscovite himself ravages and despoils his own land and nation. The folk are pitilessly and cruelly killed in their thousands in all towns and many villages.

Given that the concept of the state as it is understood today is still incipient at the time, it provides greater clarity to refer to cross-border conflicts. Another letter, of 30 August 1577, speaks of the invasion of the Duchy of Livonia by the Russians:

#22... In the month of July the enemy passed through the breadth and length of the country, with eleven thousand men, ravaging, burning and taking all prisoners. Those who were aged or offered opposition were slain and in this wise three thousand people are said to have perished. It is reported that nine thousand young men have been made prisoners.

\(^4\) And the temptation must be avoided at all times to attributing modern distinctions and concerns to conflicts from over 400 years ago.

\(^5\) Art 1 F reads:

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