

Refugee Adjudication under the UNHCR's Mandate and the Exclusion Dilemma

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I. INTRODUCTION

THE UNITED NATIONS High Commissioner's Office for Refugees (UNHCR) plays a very prominent and highly influential role in refugee status adjudication on a global scale. For instance, the UNHCR decides far more individual refugee applications than any State, including the States with the largest number of refugee applicants¹ Refugee status determination (RSD) comprises a very important operational role for the UNHCR, particularly for the resettlement of refugees from abroad to host countries, and continues to draw an ever-growing portion of its resources. However, the information publicly available on RSD is rudimentary at best, and seems to be lacking entirely in some vitally important areas. For instance, one of the most critical areas of RSD is the exclusion of those persons who have committed war crimes and crimes against humanity, or who have committed serious non-political crimes prior to entering the country where they are seeking refuge or asylum, or who are guilty of acts contrary to the purposes and principles of the United Nations.² In fact, there is extensive literature

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¹ UN High Commissioner for Refugees (UNHCR), 'UNHCR Statistical Yearbook 2014' (2015) 52–54 <<http://www.unhcr.org/56655f4cb.html>> accessed 10 January 2016. Katia Bianchini states that the UNHCR is the largest refugee decision maker in the world. See 'The Mandate Refugee Program: a Critical Discussion' (2010) 3 International Journal of Refugee Law 368.

² Office of the High Commissioner for Refugees, 'Annex: Statute of the Office of the High

that provides a critique of the UNHCR's RSD procedures and systems, along with a number of international non-governmental organisations that are active in this area.³ What is noticeably absent and very much required, however, is greater transparency in the UNHCR's RSD determinations with respect to the exclusion of asylum-seekers due to serious criminality and, indeed, to the fate of these persons thereafter. How are these persons dealt with subsequently? Are they prosecuted? Are they no longer under the protection of the UNHCR, and, if they are residing in a refugee camp are they expelled? Too little is known about what happens to those asylum applicants who are excluded from mandate refugee protection by the UNHCR. For just as States are faced with refugee claimants who are excluded from refugee protection and cannot be refouled, so too is the UNHCR faced with the same so-called "exclusion dilemma", persons who are excluded from mandate refugee status but because of a well-founded fear of persecution cannot be returned to their country of nationality or former habitual residence.

Given the state of the world today and the number of protracted armed conflicts and wars, whether inter-state, intra-state, or internationalised intra-state armed conflicts,⁴ it is evident that the single most important cause of forced displacement

Commissioner for Refugees, Chapter II, Section 7 (d)' (2010) <<http://www.unhcr.org/cgi-bin/texis/vtx/home/opedocPDFViewer.html?docid=3b66c39e1&query=1950%20Statute%20of%20the%20UNHCR>> accessed 17 January 2016. See also 'Article 1F, Convention relating to the Status of Refugees' (1989 UNTS 137, 1951, in force 22 April 1954) and the 'Protocol relating to the Status of Refugees (19 UNTS 6223 6257, 1967, in force 4 October 1967).

³ Michael Alexander, 'Refugee Status Determination Conducted by UNHCR' (1999) 11(2) *International Journal of Refugee Law* 251. Michael Kagan, 'The Beleaguered Gatekeeper: Protection Challenges Posed by the UNHCR Refugee Status Determination' (2006) 18(1) *International Journal of Refugee Law* 1–29; Katia Bianchini, 'The Mandate Refugee Program: a Critical Discussion' (2010) 22(3) *International Journal of Refugee Law* 367–378. See RSD Watch at <<http://rsdwatch.com/about-us/>> which is a website set up by Michael Kagan to help promote the reform of the way that the UNHCR conducts its refugee status determination. There are a number of other websites that should be consulted regarding the UNHCR RSD activities and they include: Asylum Access <<http://asylumaccess.org/about/story/>>; International Refugee Rights Initiative: Rights in Exile Programme, <<http://www.refugeelegalaidinformation.org/#RSDWatch.org>>.

⁴ Wars in the World, Daily News on Wars in the World and on New States, List of ongoing conflicts, <<http://www.warsintheworld.com/?page=static1258254223>> accessed 7 January 2016. This website lists some 66 countries in the world that are engaged in various forms of ongoing conflicts with some 680 different militias-guerrillas, separatist groups, anarchic groups, and drug cartels. The breakdown according to regions is as follows: Africa: 28 countries and 199 militias-guerrillas, separatist groups and anarchic groups; Asia: 16 countries with 151 militias-guerrillas, separatist groups and anarchic groups; Europe: 9 countries with 75 militias-guerrillas, separatist groups and anarchic groups; Middle East: 8 countries with 228 militias-guerrillas, separatist groups and anarchic groups; Americas: 5 countries with 25 drug cartels, militias-guerrillas, separatist groups and anarchic groups. These are astonishing figures that give an insight into the extent of the degree of armed conflict in the world today. Uppsala University, Depart-

in the world today is war, armed conflict, or both.⁵ Accordingly, the exclusion of refugee and asylum applicants for these types of international crimes is not only likely to continue, but is most probably on the rise.⁶ Those who are excluded from refugee status may, in fact, have a well-founded fear of persecution on one of the five grounds listed in the *1951 Convention relating to the Status of Refugees*. In short, they would have been recognized as a refugee by the UNHCR or a State save for the fact that they fell within the provisions of Chapter II, Section 7(d) of the Annex to the *Statute of the Office of the High Commissioner for Refugees* or Article 1F of the *1951 Convention*. Consequently, they cannot be refouled on the grounds that they have a well-founded fear of persecution should they return to their country of nationality

ment of Peace and Conflict Research, Uppsala Data Conflict Program, indicates that there is one interstate, 26 intrastate ongoing armed conflicts and 13 internationalized intrastate ongoing armed conflicts in the world in 2014. <<http://www.pcr.uu.se/research/ucdp/>> accessed 7 January 2016. See also, Uppsala Conflict Data Program (UCDP) UCDPGED, 'Global Instances of Political Violence, 1989–2013' which lists 21,860 events and 751,151 fatalities over this 24-year period. It is important to note that this is only an estimate as the dataset is still not complete. <[http://www.ucdp.uu.se/ged/#_utma=1.1970331471.1390365762.1417227057.1427213715.6&_utmb=1.4.10.1427213715&_utmc=1&_utmz=1.1427213715.6.5.utmcsr=google|utmccn=\(organic\)|utmcmd=organic|utmctr=\(not%20provided\)&_utmfv=-&_utmk=203496464](http://www.ucdp.uu.se/ged/#_utma=1.1970331471.1390365762.1417227057.1427213715.6&_utmb=1.4.10.1427213715&_utmc=1&_utmz=1.1427213715.6.5.utmcsr=google|utmccn=(organic)|utmcmd=organic|utmctr=(not%20provided)&_utmfv=-&_utmk=203496464)> accessed 24 March 2015. In addition, see J. S. Goldstein, 'Wars in Progress' <<http://www.internationalrelations.net/wars-in-progress/>> accessed 13 June 2016.

- ⁵ UNHCR, 'Global Trends, Forced Displacement in 2014' in UNHCR (ed), *World at War* (2015) <<http://www.unhcr.org/556725e69.html>> accessed 7 January 2016. This report states that global forced displacement was accelerated in 2014 reaching unprecedented levels and that the principal cause of the displacement was due to conflict or persecution. See also UNHCR, 'World displacement hits all-time high as war and persecution increase' 18 June 2015 <<http://www.unhcr.org/558193896.html>> accessed 7 January 2016. The 'UNHCR Statistical Yearbook 2014', 14th edition at page 27, states:

Escalating wars and continuous conflict around the world contributed to the mass displacement of people in 2014. As a result of these unprecedented events, global forced displacement grew to a staggering 59.5 million individuals at the end of the year, up from 51.2 million a year earlier. A continuation of armed conflicts in the Middle East and North Africa and in combination with conflicts in the sub-Saharan Africa has impacted negatively on recent dynamics and trends. As such the inter-linked crisis in both Iraq and Syrian Arab Republic contributed significantly to the rise seen in displacement trends.

See <<http://www.unhcr.org/56655f4b19.html>> accessed 10 January 2016. See also UNHCR, 'Global Trends 2013, "War's Human Costs"' United Nations High Commissioner for Refugees (2014) <<http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=5399a14f9&query=Global%20Trends%202013>> accessed 23 January 2016; UNHCR, 'Solutions needed to stem the global refugee crisis, says Grandi' (7 January 2016) <<http://www.unhcr.org/568e82ff6.html>> accessed 10 January 2016.

- ⁶ For an in-depth examination of these issues and the efforts of the United Nations and the UNHCR to address forced displacement as a consequence of war and armed conflict see Tom Clark and James C. Simeon, 'War, Armed Conflict and Refugees: The United Nation's Endless Battle for Peace' (2016) 35(3) *Refugee Survey Quarterly* 35–70.

or former habitual residence. Depending on the grounds of their exclusion—that is, whether it has been determined that they have committed a war crime or a crime against humanity, or they are guilty of actions contrary to the purposes and principles of the United Nations, or both—they may be subject to prosecution either by their host State, or an UN International Criminal Tribunal or Special Court, or the International Criminal Court (ICC). However, if the grounds for exclusion are the commission of a serious non-political crime outside the country of refuge prior to their admission in the country in which the person is seeking refugee status, then it is entirely dependent on the circumstances of the individual case. Is there an outstanding warrant against the individual or was the person convicted, sentenced and have they, in fact, served their term of imprisonment? Again, depending on the circumstances, the person could be returned to their country of nationality to be prosecuted, or they could be deported to some other country that is willing to accept them. Alternatively, there may be no option but to allow the person to remain in the host State as “undesirable,” yet not “returnable,” to their country of nationality or former habitual residence. This is one aspect of the exclusion dilemma. Refugee claimants who are excluded from refugee protection, but who cannot be returned to their country of nationality or former habitual residence, must remain largely unwanted and in limbo in their host States and/or by the UNHCR, for example, in a refugee camp or urban setting. What becomes of those persons who are no longer eligible for international protection by the UNHCR? This article seeks to explore this question from the perspective of the UNHCR’s RSD mandate and its broader legal and public policy implications.

The article begins by reviewing the legal basis for the UNHCR’s role in RSD. The legal authority of the UNHCR is based on a number of key UN resolutions and the *1950 Statute* as well as other international instruments, but, most importantly, the *1951 Convention* and its *1967 Protocol*. The article then considers the UNHCR’s statutory and mandate refugee status structures and procedures and assesses the extent of its contribution to RSD in the international refugee protection system. The next section of the article examines how the UNHCR handles those cases that are determined to fall under Article 1F, under the so-called Exclusion Clauses. The administrative structures and procedures, including the internal appeal process, are described and considered. The article concludes by providing a broad overview and assessment of UNHCR’s methods for excluding statutory or mandate refugee applicants. It argues for greater transparency in UNHCR’s RSD procedures and, in particular, those that involve persons who are excluded from the UNHCR’s statutory or mandate refugee status. Providing basic information and statistics on the numbers who are excluded by UNHCR from statutory or mandate refugee status would be a positive step towards strengthening policy relevant research

on this important matter. At the same time, it could potentially contribute to advancing the international community's principal aim of ending impunity for perpetrators of the most serious international crimes.⁷ At the very least, it would be a check against those who might seek to use refugee status or asylum as a cover for their criminality, or immunity from prosecution, or both. Otherwise, it could potentially undermine the legitimacy of the international refugee protection regime and bring it into disrepute. Indeed, it can be argued that the prosecution of those who are responsible for the most serious breaches of international criminal and humanitarian law is not only a matter of justice, but is absolutely essential for ensuring that all human rights and human dignity, including those of persons who are considered to be among the most vulnerable—refugees—are truly protected and advanced under the rule of law.⁸

Many of those who are excluded from statutory or mandate refugee status can never be prosecuted. Unlike States, the UNHCR is not in the position to prosecute anyone, nor, for confidentiality and privacy reasons, will it identify anyone who has been excluded from statutory or mandate refugee status, unless obligated to do so under extraordinary circumstances, such as high-profile war criminals who have been indicted by the ICC.

What then becomes of those who are excluded from statutory or mandate refugee status? This remains an open question, as there appears to be little or no information available from public sources on this question. Nonetheless, an important and relevant issue for both the UNHCR and for States to address is how to deal with the growing number of those who are presumably left in limbo

⁷ International Criminal Court, 'About the Court', <http://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx> accessed 7 January 2016 states,

The International Criminal Court (ICC), governed by the Rome Statute, is the first permanent, treaty based, international criminal court *established to help end impunity for the perpetrators of the most serious crimes* of concern to the international community. [Emphasis added]

Refugee status and asylum should never be used, of course, to harbor those who are responsible for serious criminality at either the municipal or international levels. Excluding perpetrators of serious criminality, or those who are responsible for severe breaches of international criminal and humanitarian law, from refugee status or asylum or both is not, in the first instance, intended to advance the international community's noble objective of ending impunity. Nonetheless, it does play a crucial role in maintaining the integrity of the international refugee protection regime and the enforcement of international law and it does have the potential to be used for the purpose of ending impunity for the perpetrators of the most serious international crimes in the appropriate situations and circumstances.

⁸ James C. Simeon, 'Ethics and the exclusion of those who are "not deserving" of Convention Refugee Status' in Satvinder Singh Juss and Colin Harvey (eds), *Contemporary Issues in Refugee Law* (Edward Elgar Publishing Limited 2013) 258–288.

as a result of being excluded from statutory or mandate refugee status. The article concludes by calling on the UNHCR and States to develop guidelines and “best practices” for how to deal with the exclusion dilemma or the “post-exclusion conundrum predicament,” where those who are determined to have a well-founded fear of persecution and, therefore, cannot be refouled, but, at the same time, cannot receive international protection because they have been excluded under Chapter II, Section 7(d), or for that matter by States under Article 1F.⁹ Sometimes some of the more high-profile persons in this situation become the subject of media reports and become part of the political discourse of a State, thus degenerating into a highly politicised debate over the failure of the RSD system, or the courts and legal system, to properly address the situation of the “undesirable” refugee who is also “non-returnable.”¹⁰

⁹ Joke Reijven and Joris van Wijk consider this to be a ‘fundamental systems error in international law.’ See their article, ‘Caught in Limbo: How Alleged Perpetrators of International Crimes who Applied for Asylum in the Netherlands are Affected by a Fundamental Systems Error in International Law’ (2014) 26(2) *International Journal of Refugee Law* 248–271. See also by the same authors, ‘Alleged Perpetrators of Serious Crime Applying for Asylum in the Netherlands: Confidentiality and the Interests of Justice and Security’ (2015) 15(4) *Criminology and Criminal Justice* 484–501.

¹⁰ Sarah Singer, ‘Undesirable and Unreturnable in the United Kingdom’, ‘Undesirable and Unreturnable? Policy Challenges around Excluded Asylum Seekers and Other Migrants Suspected of Serious Criminality but who cannot be Removed’, 25–26 January 2016, University of London; Jennifer Bond, ‘Country Specific Report: Canada’, ‘Undesirable and Unreturnable – An International Consultation re: Policy Challenges around Excluded Asylum Seekers and Other Migrants Suspected of Serious Criminality but cannot be Removed’, 10 March 2015, VU University Amsterdam; Maarten Bolhuis, ‘The Issue of Non-Removable Migrants Suspected or Convicted of Serious Crimes in the Netherlands’, 10 March 2015, VU University Amsterdam; Mi Christiansen, Terje Einarsen, ‘The Situation in Norway’, 10 March 2015, VU University Amsterdam. See the ‘Undesirable and Unreturnable? Policy Challenges around Excluded Asylum-Seekers and Migrants Suspected of Serious Criminality but who cannot be removed’ on the Centre for International Criminal Justice, VU University Amsterdam website at <https://cijj.org/events/undesirable-and-unreturnable/> accessed 20 August 2017; Joris van Wijk, David James Cantor, Sarah Singer, Maarten Pieter Bolhuis; ‘Foreword’ (2017) 15(1) *Journal of International Criminal Justice* 51–54, and the four accompanying articles under ‘Symposium’ in this edition of this journal; See also the Refugee Law Initiative and Centre for International Criminal Justice, ‘Undesirable and Unreturnable? Policy challenges around excluded asylum seekers and other migrants suspected of criminality who cannot be removed’ undated, [http://oldsite.sas.ac.uk/sites/default/files/files/RLI/ubufull%20\(1\).pdf](http://oldsite.sas.ac.uk/sites/default/files/files/RLI/ubufull%20(1).pdf). accessed 18 July 2017. Joris van Wijk, David James Cantor, Sarah Singer, Maarten Pieter Bolhuis, ‘The Emperor’s New Clothing: National Responses to “Undesirable and Unreturnable” Aliens Under Asylum and Immigration Law’ (2017) 36(1) *Refugee Survey Quarterly*, Special Issue: ‘Undesirable and Unreturnable’ Aliens in Asylum and Immigration Law 1–8, and the eight articles that make up this special issue of this journal.

II. INTERNATIONAL PROTECTION AND THE COMPETENCE OF THE UNHCR

The UNHCR was established by the United Nations General Assembly through resolution 319 A (IV) of 3 December 1949 and came into effect 1 January 1951.¹¹ The *Statute of the Office of the High Commissioner for Refugees (1950 Statute)* was passed by the United Nations General Assembly as an Annex to resolution 428 (V), December 14th, 1950.¹² A year later, on July 28th, the *Convention relating to the Status of Refugees* (1951 Convention) was adopted. The *1951 Convention* and, subsequently, its *1967 Protocol*, are the legal foundations for determining who is a Convention refugee in international law as well as the legal international instruments for guiding the UNHCR's work.¹³ The United Nations General Assembly *1967 Declaration on Territorial Asylum* also articulates clearly the principles on which Convention refugee status determination is intended to operate.¹⁴ This includes a number of provisions that reinforce the sovereign right of States to grant asylum to those who are seeking to invoke Article 14 of the *Universal Declaration of Human Rights*.¹⁵ It also invokes,

¹¹ UNHCR, 'Introductory Note, Statute of the Office of the High Commissioner for Refugees' (2010) 2 <<http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=3b66c39e1&query=1950%20Statute%20of%20the%20UNHCR>> accessed 13 March 2015.

¹² UNHCR, 'History of UNHCR, A Global Humanitarian Organization of Humble Origins' <<http://www.unhcr.org/pages/49c3646cbc.html>> accessed 7 March 2015; Statute of the Office of the High Commissioner for Refugees, General Assembly Resolution 428(V) (14 December 1950) <<http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=3b66c39e1&query=1950%20Statute%20of%20the%20UNHCR>> accessed 7 March 2015.

¹³ *ibid.* 'Convention relating to the Status of Refugees' (28 July 1951, in force 22 April 1954) 1989 UNTS 137 and the 'Protocol relating to the Status of Refugees' (31 January 1967, in force 4 October 1967) 19 UNTS 6223, 6257.

¹⁴ UN General Assembly, 'Declaration on Territorial Asylum' (14 December 1967) A/RES/2312(XXII) <<http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=3b00f05a2c&skip=0&query=Declaration%20on%20Territorial%20Asylum>> accessed 7 March 2015, Wherein it states:

Recognizing that the grant of asylum by a State to persons entitled to invoke article 14 of the *Universal Declaration of Human Rights* is a peaceful and humanitarian act and that, as such, it cannot be regarded as unfriendly by any other State,

Recommends that, without prejudice to existing instruments dealing with asylum and the status of refugees and stateless persons, States should base themselves in their practices relating to territorial asylum on the following principles...

It is important to note that there is also an Organization of American States (OAS) 'Convention on Territorial Asylum' (29 December 1954) OAS Treaty Series, No. 19, UN Registration: 03/20/89, No. 24378 <<http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=3ae6b36614&skip=0&query=Convention%20on%20Territorial%20Asylum>> accessed 7 March 2015.

¹⁵ UN General Assembly, 'Universal Declaration of Human Rights' (10 December 1948) 217 A (III). <http://www.un.org/en/universal-declaration-human-rights/index.html>. accessed 18 July

however, a number of important principles with respect to the exclusion of persons from territorial asylum. For example, at the very outset it states, “Everyone has the right to seek and to enjoy in other countries asylum from persecution.”¹⁶ However, it then immediately qualifies this right by noting that:

This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations,¹⁷

Article 1(2) of the *Declaration on Territorial Asylum* further qualifies this by stating that:

The right to seek and to enjoy asylum may not be invoked by any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes.¹⁸

Finally, it concludes by stating in Article 4 that:

States granting asylum shall not permit persons who have received asylum to engage in activities contrary to the purposes and principles of the United Nations.¹⁹

All of this indicates that the *1967 Declaration of Territorial Asylum* evokes fully the now well-established and entrenched principles of excluding those persons who have committed, or who are complicit in or guilty of, serious breaches in international human rights, humanitarian, and criminal law, from Convention refugee status or territorial asylum.

The *Statute of the Office of the High Commissioner for Refugees* outlines in clear terms the roles and responsibilities of the United Nations High Commissioner for Refugees. For instance, paragraph two of the UN General Assembly resolution 428

2017 as quoted in the ‘Declaration of Territorial Asylum’ (14 December 1967).

¹⁶ *ibid.*

¹⁷ *ibid.*

¹⁸ UN General Assembly, ‘Declaration on Territorial Asylum’ (14 December 1967) A/RES/2312(XXII); ‘Statute of the Office of the High Commissioner for Refugees’ General Assembly Resolution 428(V) (14 December 1950) <<http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=3b00f05a2c&skip=0&query=Declaration%20on%20Territorial%20Asylum>> accessed 18 July 2017.

¹⁹ *ibid.*

(V) calls upon governments “to co-operate with United Nations High Commissioner for Refugees in the performance of his functions concerning refugees falling under the competence of his Office.”²⁰ Eight specific tasks are outlined for governments under Resolution 428 (V). Two are worth highlighting:

2(b) Entering into special agreements with the High Commissioner for the execution of measures calculated to improve the situation of refugees and to reduce the number requiring protection;

2(c) Admitting refugees to their territories, not excluding those in the most destitute categories.²¹

Paragraph 2(c) definitively underscores the necessity of governments to allow all refugees access to their territories for the purposes of seeking protection, and paragraph 2(b) specifies that governments shall enter into bilateral or multilateral special agreements with the High Commissioner for Refugees for the purposes of improving the situation of refugees and reducing their numbers. Both are essential for realising the most basic of international refugee law principles, *non-refoulement*.²²

Sir Elihu Lauterpacht and Daniel Bethlehem define *non-refoulement* in the following manner:

Non-refoulement is a concept which prohibits States from returning a refugee or asylum seeker to territories where there is a risk that his or her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion.²³

Indeed, they note the pronouncements on *non-refoulement* in the 1984 Cartagena

²⁰ ‘Statute of the Office of the High Commissioner for Refugees’ General Assembly Resolution 428(V) (14 December 1950) 6 <<http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=3b00f05a2c&skip=0&query=Declaration%20on%20Territorial%20Asylum>> accessed 18 July 2017.

²¹ *ibid.*

²² ‘The international legal status of the refugee necessarily imports certain legal consequences, the most important of which is the obligation of States to respect *the principle of non-refoulement through time*. In practice, the (legal) obligation to respect this principle, independent and compelling as it is, may be difficult to isolate from the (political) options which govern the availability of solutions.’ Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Third Edition Oxford University Press 2007) 1. [Emphasis added].

²³ Sir Elihu Lauterpacht and Daniel Bethlehem, ‘The scope and content of the principle of *non-refoulement*: Opinion,’ in Erika Feller, Volker Turk, Frances Nicholson (eds), *Refugee Protection in International Law: Global Consultations* (Cambridge University Press 2003) 89.

Declaration, Section III, paragraph five:

The importance and meaning of the principle of non-refoulement (including the prohibition of rejection at the frontier) as a corner-stone of the international protection of refugees. This principle is imperative in regard to refugees and the state of international refugee law should be acknowledged and observed as a rule of *jus cogens*.²⁴

In addition, this legal principle is found in the *1951 Convention relating to the Status of Refugees*, at Article 33. The *1951 Convention* has been also called the “cornerstone of today’s international refugee protection.”²⁵

The *1950 Statute of the Office of the High Commissioner for Refugees* provides the legal authority for the UNHCR to determine whether a person is a statutory or mandate refugee. The *1951 Convention* and its *1967 Protocol* are treaties that provide States with the legal bases for determining whether a person is a Convention or a territorial refugee.²⁶ It is also worth emphasising that, even though the *1950 Statute* does not include the ground of “membership in a particular social group”,²⁷ the UNHCR under its operational standards applies the definition of who is a refugee under the *1951 Convention* and *1967 Protocol*. For refugee status determination

²⁴ *ibid* 92. Jean-Francois Durieux and Jane McAdam have argued that ‘... *non-refoulement through time* is construed as a dynamic concept, allowing for a general evolution of the basic duty to admit refugees into a more complete set of solution-oriented obligations, which are no less real for being shared with the international community at large. The challenge, it seems, lies in regulating the manner in which the passing of *time* affects the accrual of States’ obligations under the Convention, beyond the *non-refoulement* standard which is both peremptory and immediate.’ Anne F. Bayefsky (ed) *Human Rights and Refugees, Internally Displaced Persons and Migrant Workers: Essays in Memory of Joan Fitzpatrick and Arthur Helton* (Martinus Nijhoff Publishers 2006) 221.

²⁵ UNHCR, ‘Conventions, Key Legal Documents,’ <<http://www.unhcr.org/ceu/251-en-resourcesconventions-html.html>> accessed 11 March 2015. ‘The “1951 Convention Relating to the Status of Refugees”, together with its “1967 Protocol”, is the cornerstone of today’s international refugee protection. Indeed, the Convention is the only international agreement that covers the most important aspects of the life of a refugee.’

²⁶ James C. Simeon, ‘A Comparative Analysis of the Response of the UNHCR and Industrialized States to Rapidly Fluctuating Refugee Status and Asylum Applications: Lessons and Best Practices for RSD Systems Design and Administration’ (2010) 44(1) *International Journal of Refugee Law* 76–78. It is further worth noting that in dualist systems such as in common law jurisdictions the provisions of treaties do not have the force of law unless they have been incorporated in domestic legislation.

²⁷ ‘Statute of the Office of the High Commissioner for Refugees’ General Assembly Resolution 428(V) (14 December 1950) 6 <<http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=3b00f05a2c&skip=0&query=Declaration%20on%20Territorial%20Asylum>> accessed 18 July 2017.

purposes, the UNHCR applies the *1951 Convention* and *1967 Protocol*.²⁸

It is also worth noting that there are three basic forms of asylum in international law: territorial, extraterritorial, and, neutral.²⁹ “Territorial asylum is granted within the territorial bounds of the state offering the asylum and is the exception to the practice of extradition.”³⁰ “Extraterritorial asylum is the asylum granted in embassies, legations, consulates, warships, and merchant vessels in foreign territories”³¹ and is thus granted within the territory of the state where protection is sought. This is also referred to as “diplomatic asylum.” Neutral asylum is exercised by states that are neutral in a war and offer asylum to the troops of belligerent States, “provided that the troops submit to internment for the duration of the war.”³² The UNHCR has pointed out that “territorial asylum can only be provided by States”³³ and that the “UNHCR may recognize refugees under its mandate, but

²⁸ UNHCR, ‘Procedural Standards for Refugee Status Determination Under UNHCR’s Mandate’ Design and Printing, IMP Alpes, Unit 4.8.2, Procedures for Examining the Application of Article 1F.

<<http://www.unhcr.org/cgi-bin/texis/vtx/home/opedocPDFViewer.html?docid=4317223c9&query=UNHCR%20mandate%20status>> accessed 7 January 2016.

²⁹ George J. Andreopoulos, ‘Asylum Law – Alternate Title: *political asylum*,’ *Encyclopaedia Britannica*. <<http://www.britannica.com/EBchecked/topic/40220/asylum#ref41289>> accessed 14 March 2015. It is also relevant and important to keep in mind that there are important distinctions between the terms migrant, refugee, and asylum-seeker. The UNHCR states that, ‘The terms asylum-seeker and refugee are often confused: an asylum-seeker is someone who says he or she is a refugee, but whose claim has not yet been definitively evaluated.’ UNHCR, ‘Asylum-Seekers’ <<http://www.unhcr.org/pages/49c3646c137.html>> accessed 19 January 2016. Harry Mitchell QC makes a distinction between asylum-seeker, refugee, and economic migrant. He states that, ‘Asylum seeker means a person who has applied for asylum under the 1951 Refugee Convention relating to the Status of Refugees on the ground that if he is returned to his country of origin he has a well-founded fear of persecution on account of race, religion, nationality, political belief or membership of a particular social group. He remains an asylum seeker for so long as his application or an appeal against refusal of his application is pending.’ And, he states that a refugee is ‘an asylum seeker whose application has been successful.’ Economic migrants, he states, are ‘person[s] who has left his own country and seeks by lawful or unlawful means to find employment in another country.’ Harry Mitchell QC, ‘The distinction between asylum seekers and refugees’ (24 January 2006) <<http://www.migrationwatchuk.org/briefing-paper/70>> accessed 19 January 2016. See also Alan Travis, ‘Migrants, refugees and asylum seekers: what’s the difference?’ *The Guardian* (28 August 2015) <<http://www.theguardian.com/world/2015/aug/28/migrants-refugees-and-asylum-seekers-whats-the-difference>> accessed 19 January 2016.

³⁰ *ibid.*

³¹ *ibid.*

³² *ibid.*

³³ UNHCR, ‘Chapter 3, Asylum and Refugee Status Adjudication’ in ‘UNHCR Statistical Yearbook 2003’ (2003) <<http://www.unhcr.org/cgi-bin/texis/vtx/home/opedocPDFViewer.html?docid=42b018454&query=territorial%20asylum>> accessed 14 March 2015.

it cannot provide asylum”.³⁴ Hence, there is a technical distinction between refugee status and asylum. Convention refugee status, on the one hand, can encompass all three basic forms of territorial asylum. On the other hand, by definition, territorial asylum cannot be included in mandate or statutory refugee status.³⁵

Under Chapter II of the *1950 Statute*, the functions of the High Commissioner, it states that the “competence of the High Commissioner shall extend to”³⁶ persons who fall within certain categories as defined in paragraph six of the *Statute of the Office of the High Commissioner for Refugees*. The definition of who is a refugee under the *1950 Statute* is found in paragraph 6A (ii):

Any person who, as a result of events occurring before 1 January 1951 and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality or political opinion, is outside the country of his nationality and is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to return to it.³⁷

³⁴ *ibid.*

³⁵ See, in addition, US Citizenship and Immigration Services, Department of Homeland Security, ‘Refugees & Asylum’ <<https://www.uscis.gov/humanitarian/refugees-asylum>> accessed 27 March 2016; Harry Mitchell, QC, ‘The distinction between asylum seekers and refugees’, Migration Watch UK <<http://www.migrationwatchuk.org/briefingPaper/document/70>> accessed 27 March 2016; UNHCR, Adrian Edwards, ‘UNHCR Viewpoint: “Refugee” or “Migrant” – Which is right?’ (27 August 2015) <http://www.unhcr.org.uk/news-and-views/news-list/news-detail/article/unhcr-viewpoint-refugee-or-migrant-which-is-right.html?j=853600&e=barbara.harrell-bond@qeh.ox.ac.uk&l=462_HTML&u=32158003&mid=6192421&jb=0&utm_source=UK+monthly+E-news+September+2015+-+Prospect&utm_medium=email&utm_term=003D-000001MGGrIAH&utm_content=refugee_migrant_story_ukEnews&utm_campaign=>> accessed 27 March 2016.

³⁶ Statute of the Office of the High Commissioner for Refugees’ General Assembly Resolution 428(V) (14 December 1950) 6 <<http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=3b00f05a2c&skip=0&query=Declaration%20on%20Territorial%20Asylum>> accessed 13 March 2015.

³⁷ *ibid* 7.

Paragraph 6B then states:

Any other person who is outside the country of his nationality, or if he has no nationality, the country of his former habitual residence, because he has or had a well-founded fear of persecution by reason of his race, religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, to return to the country of his former habitual residence.³⁸

The determination of who is eligible to receive the protection of the UNHCR—that is, the determination of mandate or statutory refugee status, or the determination of those who fall within the competence of the UNHCR—is deemed to be a “core UNHCR protection function.”³⁹ According to the UNHCR, “the purpose of mandate RSD is to permit the UNHCR to determine whether asylum seekers fall within the criteria of international protection.”⁴⁰ It is relevant and important to note that under the “1950 Statute and subsequent resolutions adopted by the United Nations General Assembly and ECOSOC (the United Nations Economic and Social Council), the UNHCR has a mandate to ensure international protection and seek appropriate solutions to refugees within its competence.”⁴¹

To summarise, the competence of the UNHCR to provide international protection extends to those who meet the definition of refugee in the *1951 Convention* and its *1967 Protocol* and those who come “within the extended refugee definition under the UNHCR’s mandate because they are outside their country of nationality or former habitual residence and are unable or unwilling to return to their country of nationality or former habitual residence owing to serious and indiscriminate threats to life, physical integrity or freedom resulting from generalized violence or events seriously disturbing the public order”.⁴² At the heart of the international

³⁸ *ibid* 8.

³⁹ UNHCR, ‘Procedural Standards for Refugee Status Determination Under UNHCR’s Mandate’ Design and Printing, IMP Alpes <<http://www.unhcr.org/cgi-bin/texis/vtx/home/opedocPDFViewer.html?docid=4317223c9&query=UNHCR%20mandate%20status>> accessed 7 January 2016.

⁴⁰ *ibid*.

⁴¹ UNHCR, ‘Refugee Status Determination: Identifying who is a refugee, Self-Study Module 2’ 10-11 <<http://www.unhcr.org/cgi-bin/texis/vtx/home/opedocPDFViewer.html?docid=43144dc52&query=handbook%20on%20determining%20mandate%20refugee%20status>> accessed 7 January 2016.

⁴² *ibid* 8–9.

refugee protection system in the world today is the peremptory norm of *non-refoulement*, which is at the very root of Convention refugee or territorial asylum status and mandate or statutory refugee status. States exercise legal competence over the first and the UNHCR has the legal competence for mandate or statutory refugee status as well as supervisory responsibility for the Convention refugee or territorial asylum status.⁴³

III. MANDATE OR STATUTORY REFUGEE STATUS DETERMINATION

The UNHCR *Statistical Report 2014* states that, out of the 173 countries and territories where information was available, governments were responsible for refugee status determination procedures in 103 countries (60%) and the UNHCR was responsible in 51 countries (29%). In addition, the UNHCR conducted mandate refugee status determination procedures in parallel with governments or joint RSD procedures, or both, in 19 countries or territories (11%).⁴⁴ Hence, the UNHCR in 2014 had conducted RSD under its competence in at least some 70 States in the world today.

The UNHCR undertakes a wide range of varied activities in the fulfilment of its legal obligations under its founding UN resolutions and *1950 Statute* and other international instruments, that include but are not limited to: the provision of advice and guidance with respect to States' RSD systems, including, drafting refugee laws; capacity building for States' RSD systems; the provision of international protection to those persons who fall within its ever expanding mandate; assisting governments in the provision of durable solutions to refugees, including, resettlement; and, research on relevant issues and concerns, monitoring States' parties compliance

⁴³ 'Article 35(1)', 'Convention relating to the Status of Refugees' (28 July 1951, in force 22 April 1954) 1989 UNTS 137 and the 'Protocol relating to the Status of Refugees' (31 January 1967, in force 4 October 1967) 19 UNTS 6223, 6257. Moreover, see the UN General Assembly Resolution 428 (V) of 14 December 1950 that calls upon '... Governments to co-operate with the United Nations High Commissioner for Refugees in the performance of his functions concerning refugees falling under the competence of his Office.' This further lends support to the UNHCR's supervisory function with respect to the provision of international protection for refugees. 'Office of the High Commissioner for Refugees, Annex: Statute of the Office of the High Commissioner for Refugees, Chapter II, Section 7 (d)' (2010) <<http://www.unhcr.org/cgi-bin/texis/vtx/home/opedocPDFViewer.html?docid=3b66c39e1&query=1950%20Statute%20of%20the%20UNHCR>> accessed 17 January 2016 See the 'Annex: Statute of the Office of the High Commissioner of Refugees, Chapter 1, General Provisions, section 1', which further underscores that the UNHCR is acting under the authority of the General Assembly and the auspices of the United Nations in the provision of international protection for refugees. Again, further bolstering the authority of the UNHCR to supervise the provision of international protection to refugees.

⁴⁴ UNHCR, 'UNHCR Statistical Yearbook 2014' 51 <<http://www.unhcr.org/56655f4cb.html>> accessed 10 January 2016

with their obligations under the *1951 Convention*, among many others. Another important function performed by the UNHCR is RSD under its mandate or statute. It does so in a number of different ways, including:

- In countries which are not Party to the *1951 Convention/1967 Protocol*;
- In countries which are Party to the *1951 Convention/1967 Protocol*, but where:
 - ◊ asylum determination procedures have not been established, or
 - ◊ the national asylum process is manifestly inadequate or where determinations are based on erroneous interpretation of the *1951 Convention*; and
- As a precondition for the implementation of durable solutions such as resettlement.⁴⁵

It is important and informative to note the number of asylum and refugee applications received by both States and the UNHCR have increased significantly over that last several years. Table 1 indicates the number of new and appeal asylum and refugee applications that were received by States and the UNHCR from 2011 to 2014.

TABLE 1⁴⁶

New and Appeal Refugee and Asylum Applications Registered from 2011 to 2014				
	2011	2012	2013	2014
States	734,100	781,400	870,700	1,402,800
UNHCR	98,800	125,500	203,200	245,600
Joint	31,700	22,800	5,800	12,900
Totals	864,600	929,700	1,079,700	1,661,300
UNHCR Only	11%	13%	19%	15%

Several points are worth noting from Table 1. First, the total number of new and appeal refugee and asylum applications has been increasing for States and the

⁴⁵ UNHCR, 'Refugee Status Determination: Identifying who is a refugee, Self-Study Module 2' 11 <<http://www.unhcr.org/cgi-bin/texis/vtx/home/opensslPDFViewer.html?docid=43144d-c52&query=handbook%20on%20determining%20mandate%20refugee%20status>> accessed 12 January 2016.

⁴⁶ UN High Commissioner for Refugees (UNHCR), 'UNHCR Statistical Yearbook 2014' (2015) 52 <<http://www.unhcr.org/56655f4cb.html>> accessed 10 January 2016.

UNHCR but the number of Joint, State and UNHCR applications, have been sharply declining, particularly, from 2012 to 2013. There has been a rebound, however, in joint claims (UNHCR and States) in 2014, a nearly 45 per cent increase over the previous year. The most dramatic increase or decrease occurred from 2013 to 2014. There was a 53.8 per cent increase in the number of new and appeal refugee and asylum applications overall. The largest increase was amongst the States, where there was a 61.1 per cent increase in the number of new and appeal refugee applications. There was also a 20.8 per cent increase of new and appeal refugee applications at the UNHCR and a 122.4 per cent increase in the number of Joint applications processed by States and the UNHCR from 2013 to 2014. While the numbers appear to have increased over time, the highest percentage increase in these applications was clearly with the UNHCR. The number of new and appeal applications processed by the UNHCR increased by 148 per cent over this three-year period. The percentage increase for States in the same period was only 91 percent. The UNHCR now accounts for about fifteen percent, a drop from nearly one-fifth (19 per cent) from the previous year, of all of the new and appeal refugee and asylum applications in the world today. Nonetheless, this accounts for an enormous number of refugee cases, some 245,600 cases in 2014 alone.⁴⁷ Table 2 presents the number of new asylum applications that were received by States and the UNHCR in 2014.

⁴⁷ Michael Kagan noted in 2005 that,

The number of individual RSD applications received by UNHCR offices world-wide nearly doubled from 1997 to 2001. UNHCR performed RSD in at least 60 countries in 2001, nearly all in the developing world and received approximately 66 000 individual refugee claims, more than the United States, five times more than Australia, and about as many as Austria, Belgium, Denmark, Greece and Spain combined. UNHCR RSD predominantly affects urban refugee populations, and is particularly common in the Middle East.

Michael Kagan, 'The Beleaguered Gatekeeper: Protection Challenges Posed by the UNHCR Refugee Status Determination' (2006) 18(1) *International Journal of Refugee Law* 3. Since 2001, then, there appears to have been close to a 180,000 increase in the number of registered refugee applications that are being processed by the UNHCR. This is nearly a three-fold increase in the numbers of refugee applications being processed by the UNHCR in just over a dozen years.

TABLE 2⁴⁸

New Asylum Applications Received by States and the UNHCR in 2014	
UNHCR	245,600
Russian Federation	274,700
Germany	173,100
United States	121,200
Turkey	87,800
Sweden	75,100
South Africa	71,700
Italy	63,700
France	59,000
Hungary	41,100
Uganda	32,400
Canada	13,500 ⁴⁹

The 2014 new asylum applications statistics received by States and the UNHCR reveal that the single largest recipient among States was the Russian Federation. It is important, however, to note that the figures for the Russian Federation breakout as follows: 7,000 applications for refugee status and 267,800 applications for temporary asylum.⁵⁰ The UNHCR notes that, “Outbreak of conflict in Eastern Ukraine had a major impact on the 2014 figures, in view of the fact that 271,200 or close to 99 percent of the claims in the Russian Federation were lodged by Ukrainians.”⁵¹ Temporary asylum, in the Russian Federation, has been described as follows:

... This kind of asylum is equivalent to Europe’s “humanitarian status” and is given out on compassionate grounds. That is to say, if an asylum seeker does not meet the criteria for full refugee status, but cannot be extradited back to his country of origin

⁴⁸ *ibid* 52–54.

⁴⁹ For Canada only see, UNHCR, ‘Asylum Trends 2014: Levels and Trends in Industrialized Countries’ (2015) 3 <<http://www.unhcr.org/551128679.html>> accessed 10 January 2016.

⁵⁰ UNHCR Statistical Yearbook 2014’ (2015) 52 <<http://www.unhcr.org/56655f4cb.html>> accessed 10 January 2016.

⁵¹ *ibid*.

for “humanitarian” reasons, then he is eligible for temporary asylum status. There are many “humanitarian” grounds such as the risk of a person experiencing inhumane treatment in their country. There were 8,952 applications for temporary asylum granted to 5,728 people between 2007 and 2012.⁵²

If temporary asylum in the Russian Federation is equivalent to “humanitarian status” in Europe, then it is clearly not Convention refugee status. It is patently self-evident that the 245,600 asylum applications the UNHCR received surpasses by a wide margin any of the States that are listed in Table 2. Germany ranks high on this list with some 173,100 asylum applications, second only to the Russian Federation, but with the caveat that temporary asylum is equivalent to “humanitarian status.” If that is the case, Germany would rank number one amongst States in terms of the number of new asylum applications proper received in the world today.

The increasing number of refugee and appeal applications that are being conducted under the UNHCR’s statutory or mandate refugee status is troubling. As noted earlier, the UNHCR cannot decide whether the applicant is a Convention or territorial refugee, unless it does so jointly or on behalf of a State, but rather simply decides whether the person is a mandate or statutory refugee. This raises concerns regarding whether the UNHCR has sufficient resources, financial, materiel and personnel, to fulfill its broad and growing mandate while assuming more and more of the new refugee and appeal applications. Moreover, it has been observed that the UNHCR should not be conducting its RSD for States unless absolutely necessary.⁵³ States ought to be conducting their own RSD processes, perhaps in conjunction with the UNHCR, as in some jurisdictions. If so, the UNHCR’s limited resources could be used more effectively elsewhere for the assistance of refugees. If, however, States are unable or unwilling to fulfill their obligations to conduct their own RSD, then the UNHCR will have to try and fill this gap. Presumably, this would be done in conjunction with the State or with the State’s consent and agreement, as appropriate.

⁵² Tom Balmforth, ‘Explainer: How do you get asylum in Russia?’ Radio Free Europe, and Radio Liberty <<http://www.rferl.org/content/explainer-russia-asylum/25057895.html>> accessed 10 January 2016.

⁵³ Michael Kagan, ‘Why is the UNHCR doing RSD anyway? A UNHCR Report identifies the hard questions’, in *Rights in Exile, The International Refugee Rights Initiatives Refugee Legal Aid Newsletter* (1 January 2015) <<http://rightsinexile.tumblr.com/post/106852080002/why-is-unhcr-doing-rsd-anyway-a-unhcr-report>> accessed 14 September 2017.

TABLE 3⁵⁴

Top Ten UNHCR Offices with New Refugee Claims			
<i>Country</i>	<i>2012</i>	<i>2013</i>	<i>2014</i>
Turkey	26,500	44,800	87,800
Jordan	25,000	6,700	29,100
Malaysia	19,400	53,600	25,700
Lebanon	1,800	2,800	14,500
Kenya	20,000	19,200	12,100
Egypt	6,700	10,800	10,000
Cameroon	3,500	5,800	9,100
India	2,900	5,600	7,000
Pakistan	3,900	5,200	5,800
Indonesia	7,200	8,300	5,700
	<i>94,400</i>	<i>162,800</i>	<i>206,700</i>

Table 3 lists the top ten UNHCR regional offices that received new refugee applications for the last three years where statistics are fully available. It is interesting to note that, in 2014, Turkey received the highest number of new refugee claims, followed by Jordan, Malaysia, Lebanon, Kenya, and Egypt. The top five UNHCR regional offices accounted for 72 per cent of all new refugee applications.⁵⁵ Further, 80 per cent of the UNHCR’s RSD work was concentrated in just seven countries.⁵⁶ However, most importantly there was a dramatic increase in the number of new refugee claims from 2012 to 2014 on this list of top ten UNHCR regional offices. There has been, in fact, a 119 per cent increase in the number of new refugee claims made at UNHCR regional offices between 2012 and 2014. All these UNHCR regional offices experienced an increase in the number of refugee claims over the previous year, save Malaysia, Kenya, Egypt, and Indonesia. Six out of the ten UNHCR regional offices experienced an increase over the previous year and Turkey experienced the highest increases among all UNHCR regional offices around the world from 2012 to 2014. The reason for the tremendous increase in the number of new refugee claims in Turkey as well as Jordan and Lebanon is the

⁵⁴ UNHCR Statistical Yearbook 2014’ (2015) 52 <<http://www.unhcr.org/56655f4cb.html>> accessed 10 January 2016.

⁵⁵ *ibid* 56.

⁵⁶ *ibid* 57.

escalating Syrian civil war.

From this list of the top ten UNHCR regional offices with new refugee claims, it is apparent that there are long standing civil wars or insurgencies and armed conflicts that have been “seriously disturbing the public order,”⁵⁷ whether within the borders of these countries or contiguous to them, or both, that have contributed to the escalating numbers of new refugee claims.⁵⁸ Security concerns lie at the very root of the difficulties confronting these countries that result in displacement and forced migration.⁵⁹

TABLE 4⁶⁰

Top Ten Source Countries for New Refugee Claims Filed with States in 2014	
Ukraine	288,600
Syria	170,000
Iraq	100,00
Afghanistan	73,400
Eritrea	60,000
Serbia and Kosovo: S/RES/1244 (1999)	55,300
Democreatic Republic of Congo	48,100
Somalia	41,100
Pakistan	35,100
Nigeria	32,000

Out of the 1.47 million asylum and refugee applications submitted to States and the UNHCR in 2014, the top ten source countries are listed in Table 4.⁶¹ Again,

⁵⁷ ‘Article 35(1)’, ‘Convention relating to the Status of Refugees’ (28 July 1951, in force 22 April 1954) 1989 UNTS 137 and the ‘Protocol relating to the Status of Refugees’ (31 January 1967, in force 4 October 1967) 19 UNTS 6223, 6257.

⁵⁸ ‘The International Institute for Strategic Studies, IISS, ‘All Conflicts’, Armed Conflicts Database, Monitoring Conflicts Worldwide <<https://acd.iiss.org/en/conflicts>> accessed 20 March 2015.

⁵⁹ UNHCR, ‘UNHCR report shows a leap in asylum applications in industrialized countries’ (21 March 2014) <<http://www.unhcr.org/532afe986.html>> accessed 31 March 2015. Wherein it states, ‘The three major components of global forced displacement are internal displacement, refugee numbers, and asylum-seekers (together totaling 45.2 million people, as of data from early 2013).’

⁶⁰ UNHCR Statistical Yearbook 2014’ (2015) 52 <<http://www.unhcr.org/56655f4cb.html>> accessed 10 January 2016.

⁶¹ *ibid.* At the Third International Humanitarian Pledging Conference for Syria, Antonio

the relationship between protracted war, armed conflict, and extremist violence, and displacement and forced migration is evident in each of these countries.⁶² This is most obvious in relation to the countries of Ukraine, Syria, Iraq, Afghanistan, and Eritrea, where war and terrorism coverage often dominates the news media.⁶³

It is also relevant to consider the number of substantive decisions taken by States and the UNHCR in their asylum and refugee applications in the last four years for which statistics are available. Table 5 indicates that the UNHCR made eleven per cent of the decisions on all asylum and refugee applications in 2013 and 9 per cent of all asylum and refugee applications in 2014. There was a three per cent increase over the previous year in 2013 and a two per cent drop in these figures in 2014 and despite this percentage drop in the proportion of substantive decisions taken in 2014, there was still a substantial increase in the total number of RSD decisions that the UNHCR made in 2014, of close to 100,000 decisions. What is less clear is why there has been such a precipitous drop in the number of joint, UNHCR and States, substantive decisions taken on asylum and refugee applications. This represented a 97 per cent drop in the total number of joint decisions taken in just one year. These figures increased in 2014, but came nowhere

Guterres, United Nations High Commissioner for Refugees at the time, stated that, 'Over 3.9 million [Syria refugees] are registered in the neighbouring countries, and they are becoming increasingly impoverished and vulnerable, with living conditions deteriorating drastically. Two million people rely on food assistance for their survival. Over a third of all refugees in the region live in substandard shelter—in Lebanon and the urban areas of Jordan their proportion reaches 50%. More than 600,000 refugee children are not going to school. There are serious response gaps in vital health care.' Written statement, Third International Humanitarian Pledging Conference for Syria, Remarks by António Guterres, United Nations High Commissioner for Refugees, Kuwait City, 31 March 2015.

⁶² The International Institute for Strategic Studies, IISS, Armed Conflicts Database, Monitoring Conflicts Worldwide, 'All Conflicts' <<https://acd.iiss.org/en/conflicts>> accessed March 20, 2015. See UNHCR, 'Global Trends 2013, "War's Human Costs"' United Nations High Commissioner for Refugees (2014) <<http://www.unhcr.org/cgi-bin/texis/vtx/home/opensslPDFViewer.html?docid=5399a14f9&query=Global%20Trends%202013>> accessed 23 January 2016. Wherein it quotes, Antonio Guterres, UN High Commissioner for Refugees at the time, as stating, 'We are seeing here the immense costs of not ending wars, of failing to resolve or prevent conflict. Peace is today dangerously in deficit. Humanitarians can help as a palliative, but political solutions are vitally needed. Without this the alarming levels of conflict and the mass suffering that is reflected in these figures will continue.'

⁶³ For example, see Thomas Adamson, 'France pays tribute to victims of terrorism' *The Globe and Mail* (11 January 2016) A9. Mitch Potter, 'Analysis: Trajectory of gloom trails 2015' *Toronto Star* (14 January 2016) A11. BBC News, 'Asia: Jakarta attacks: Indonesia's new breed of militants' <<http://www.bbc.com/news/world-asia-35310951>> accessed 14 January 2016; BBC News, 'Ukrainian Crisis' <<http://www.bbc.com/news/world-europe-26270866>> accessed 21 January 2016; BBC News, 'Islamic State Conflict' <<http://www.bbc.com/news/24758587>> accessed 21 January 2016; BBC News, 'Syria's War' <<http://www.bbc.com/news/world-middle-east-17258397>> accessed 21 January 2016.

near the numbers that UNHCR were experienced in 2012—18,200.

TABLE 5⁶⁴

Asylum and Refugee Substantive Decisions Taken 2011-2014				
	2011	2012	2013	2014
States	518,200	627,200	590,200	957,400
UNHCR	52,600	54,400	72,100	99,600
Jointly	6,500	18,200	500	4,400
Totals	577,300	699,800	662,800	1,061,400
UNHCR Only	9%	8%	11%	9%

It is interesting to point out that global Refugee Recognition Rate (RRR), which combines both States and the UNHCR decisions, was 32 per cent for all asylum and refugee decisions that were taken during 2013.⁶⁵ The RRR in 2014 dropped to 27 per cent.⁶⁶ The Total Recognition Rate (TRR), a figure that is calculated by dividing the number of asylum-seekers granted Convention refugee status or a complementary form of protection by the total number of substantive decisions (Convention refugee status, complementary protection, and rejected cases), was 43 per cent in 2013.⁶⁷ The TRR was substantially higher at first instance for applicants from particular countries. For instance, for those asylum and refugee applicants who were from Syria, Myanmar, South Sudan, and Eritrea, the TRR was over 90 per cent.⁶⁸ Likewise, the recognition rates were also high for asylum-seekers from Somalia (82 per cent), Iraq (79 per cent), the Democratic Republic of the Congo (74 per cent), Sudan (69 per cent), the Islamic Republic of Iran (67

⁶⁴ UNHCR Statistical Yearbook 2014' (2015) 52 <<http://www.unhcr.org/56655f4cb.html>> accessed 10 January 2016.

⁶⁵ *ibid.*, 'UNHCR Statistical Yearbook 2013'. The UNHCR calculates the Refugee Recognition Rate (RRR) as the number of asylum-seekers granted Convention refugee status divided by the total number of substantive decisions (Convention status, complementary protection, and rejected cases).

⁶⁶ *ibid.*, 'UNHCR Statistical Yearbook 2014'.

⁶⁷ *ibid.*, 'UNHCR Statistical Yearbook 2013'. It is important to note that non-substantive decisions are excluded, to the extent possible, from both the RRR and TRR calculations. 'For the purpose of global comparability, UNHCR only uses these two recognition rates and does not report rates calculated by national authorities.'

⁶⁸ *ibid.*

per cent), and Afghanistan (65 per cent).⁶⁹ The TRR for 2014 was 59 per cent.⁷⁰

It is also interesting to note that at the end of 2014, 1.8 million individuals were still awaiting decisions in their asylum claims. This is the highest figure in the last fifteen years.⁷¹ However, the UNHCR notes that the true number of pending asylum claims is unknown because many States do not keep or report these statistics.⁷²

These statistics clearly establish that the UNHCR is the single largest refugee status decision-making body in the world by a very wide margin over the largest States, Germany and the United States. It is important to emphasise that the UNHCR determines who is a statutory or mandate refugee, unlike States, which can determine who is a territorial or Convention refugee. The statistics on the number of new refugee claims at the UNHCR and among States reinforces that the major source countries for refugees are those who have been engaged in protracted internal armed conflict. This is further reinforced by the fact that the high RRR's for refugee applicants, who are coming from the top ten source countries, come from countries that are afflicted by protracted internal armed conflicts. This also applies to the TRR, which stood at 59 per cent for 2014. The TRR for some of the war torn countries is much higher with Syria, Myanmar, South Sudan and Eritrea all at 90 per cent; Somalia at 82 per cent; Iraq 79 per cent; and the Democratic Republic of the Congo at 74 per cent.

Overall, the above statistics suggest that the vast majority of the world's refugees come from countries where war and protracted armed conflict prevail.⁷³ This, in turn, suggests that exclusion under Article 1F of the 1951 Convention will likely remain an issue in determining whether a person is eligible to receive statutory or mandate refugee status from the UNHCR. Hence, this underscores the need to address the issue of the exclusion dilemma that will not diminish, but will, in all likelihood, increase steadily over time.

⁶⁹ *ibid.*

⁷⁰ *ibid.*, 'UNHCR Statistical Yearbook 2014'.

⁷¹ *ibid.* 55.

⁷² *ibid.*

⁷³ In fact more than half of the world's refugees come from three countries: Syrian Arab Republic (4.9 million); Afghanistan (2.7 million), and Somalia (1.1 million). UNHCR, 'Global Trends, Forced Displacement in 2015' (2016) 3 <<http://www.unhcr.org/576408cd7.pdf>> accessed 21 July 2017. All three countries have been wracked by protracted armed conflict, and in several instances for decades, and are considered to be amongst the deadliest armed conflicts on earth.

IV. EXCLUDING APPLICANTS FROM ASYLUM OR REFUGEE STATUS

Even if an applicant is determined to be a Convention or territorial refugee or a mandate or statutory refugee they can be excluded from this status under Article 1F of the *1951 Convention* or Section 7(d) of the *1950 Statute*. These are commonly referred to as the “Exclusion Clauses.”⁷⁴

The *1950 Statute* outlines, at Chapter II, Section 7(d) where the competence of the High Commissioner for Refugees shall not extend. It lists four distinct areas, including:

(d) In respect to whom there are *serious reasons for considering* that he has committed a crime covered by the provisions of the treaties of extradition or a Tribunal or by the provision of article 14,⁷⁵

Chapter II, Section 7(d) is similar to the Exclusion Clauses in Article 1F of the *1951 Convention*, which states:

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

- (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (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.⁷⁶

⁷⁴ Variations of the Exclusion Clauses are found consistently in other international refugee law instruments such as the ‘1969 OAU Convention Governing Specific Aspects of the Refugee Problem in Africa’, Article 1F of the ‘1951 Convention’, but adds an additional provision that states that any person can be excluded for being guilty of acts that are contrary to the purpose and principles of the Organization for African Unity. See Article 5 of the OAU Convention <<http://www.unhcr.org/45dc1a682.html>> accessed March 24, 2015.

⁷⁵ ‘Statute of the Office of the High Commissioner for Refugees’, General Assembly Resolution 428(V), 14 December 1950, 9. [Emphasis added.] <<http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=3b66c39e1&query=1950%20Statute%20of%20the%20UNHCR>> accessed 13 March 2015.

⁷⁶ ‘Convention relating to the Status of Refugees’ (1989 UNTS 137, 1951, in force 22 April 1954) and the ‘Protocol relating to the Status of Refugees (19 UNTS 6223 6257, 1967, in force 4 October 1967).

As noted above, just as the UNHCR utilises the *1951 Convention*, operationally, for the purposes of deciding who is a mandate or statutory refugee, it also uses Article 1F in deciding who ought to be excluded from mandate or statutory refugee status. This is clearly articulated in the *UNHCR Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention* relating to the Status of Refugees.⁷⁷ At “Introduction, E, Responsibility for determination of exclusion,” paragraph 7, it notes as follows:

States parties to the 1951 Convention/1967 Protocol and/or OAU Convention and UNHCR need to consider whether the exclusion clauses apply in the context of the determination of refugee status. Paragraph 7(d) of UNHCR’s Statute covers similar grounds to Article 1F of the 1951 Convention, although UNHCR officials should be guided by the language of Article 1F, as it represents the later and more specific formulation.

This further applies in the situation where there is a cancellation or revocation of refugee status on the basis of exclusion. Paragraph 6 of these Guidelines, at “D. Cancellation or revocation on the basis of exclusion”, it states:

Where facts which would have led to exclusion only come to light after the grant of refugee status, this would justify **cancellation** of refugee status on the grounds of exclusion. The reverse is the information casting doubt on the basis on which an individual has been excluded should lead to reconsideration of eligibility for refugee status. Where a refugee engages in conduct falling within Article 1F(a) or 1F(c), this would trigger the application of the exclusion clauses and the **revocation** of refugee status, provided all the criteria for the application of these clauses are met.⁷⁸

The adjudication of the exclusion clauses for refugee applications under mandate or statutory refugee status is covered in detail in the UNHCR’s *Procedural Standards of Refugee Status Determination under UNHCR’s Mandate*.⁷⁹ Those refugee

⁷⁷ 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) HCR/GIP/03/05. <<http://www.unhcr.org/3f7d48514.pdf>> accessed 18 January 2016.

⁷⁸ *ibid.*

⁷⁹ UNHCR, ‘Procedural Standards for Refugee Status Determination Under UNHCR’s Mandate’ Design and Printing, IMP Alpes, Unit 4.8.2, Procedures for Examining the Application of Article 1F 4-26–4-28. <<http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=4317223c9&query=UNHCR%20mandate%20status>> accessed 16 January 2016.

applicants who are excluded have an automatic right to an appeal.⁸⁰ Indeed, certain decisions dealing with exclusion can only be taken by the Division of International Protection (DIP) in UNHCR Headquarters in Geneva. Article 1F cases that involve complex “doctrinal or interpretative issues” or children must be sent to the DIP for final recommendation.

Typically, decisions involving Article 1F are subject to the review of the RSD Supervisor or the UNHCR Head Office, or both.⁸¹

Once an exclusion decision has been finalized by the UNHCR Office it should be **submitted to the Senior Legal Advisor in the relevant Bureau for concurrence and copied to DIP as appropriate** before the individual is notified. Exclusion cases that raise complex doctrinal or interpretative issues relating to Article 1F of the 1951 Convention or which involve children must be **submitted to DIP**, which will make the final recommendation. (See 4.4.3 – *Procedures for Consultations with UNHCR Headquarters on RSD Decisions*)⁸² [Emphasis in the original.]

The appeal of those who’s refugee applications are excluded under Article 1F go to the “Protection and National Security” Unit of the Division of International Protection within the UNHCR Headquarters in Geneva for final recommendation.

Statutory or mandate refugee status decisions that are appealed to the DIP are considered by the “Protection and National Security” Unit.⁸³ The refugee applications are screened for security purposes to ensure that the applicants are not wanted under any indictments by any national or international criminal courts. Outstanding warrants may or may not go against the refugee applicant’s claim for refugee protection. It is reasonable to assume that an indictment from the ICC would be taken very seriously indeed.⁸⁴ In comparison, however, it may be less detrimental to a refugee’s application were his name to appear on an Interpol list

⁸⁰ *ibid* 4.8.3 Review and Approval of Exclusion Decisions, 4–26.

⁸¹ *ibid* 4–26.

⁸² *ibid*.

⁸³ The ‘Protection and National Security Unit’ has a limited staff complement of three persons and, consequently, a limited capacity for dealing with exclusion cases that come under its purview. ‘Undesirable and Unreturnable? Policy Challenges Around Excluded Asylum Seekers and other Migrants Suspected of Serious Criminality Who Cannot be Removed’ Preliminary Workshop, Centre for International Criminal Justice, Faculty of Law, VU University, Amsterdam, (27 March 2015).

⁸⁴ *ibid.*, General Issues, Unit 2, 2–2, where it states that, ‘All requests that are received by **international courts or tribunals** for information about persons registered or in contact with the UNHCR should be forwarded to DIP.’ [Emphasis in the original].

of outstanding warrants.⁸⁵

The UNHCR takes its policies on refugee applicants' privacy and confidentiality seriously.⁸⁶ Accordingly, it does not publish the number of refugee decisions based on the exclusion clauses or the number of refugee claimants who are excluded under Article 1F(a), (b), or (c). Nor does it publish the figures for the number of refugee applicants who have won their case following the appeal of their decision to be excluded from statutory or mandate refugee status. Nor are any statistics provided on the number that are assessed on appeal by the "Protection and National Security" Unit in the DIP in the UNHCR Headquarters. It would be sheer speculation to estimate what portion of the 8,600 appeals that were processed within the UNHCR in 2013 or the 11,200 appeals that were processed by UNHCR in 2014 would have dealt with exclusion.⁸⁷ Further, there is no information on what percentage of the refugee applicants were excluded by the UNHCR under each of the subsections of Article 1F.

The UNHCR does not disclose refugee applicant's information, but depending on the operational context, there could in fact be a disclosure of information to a State. The information that would be provided is limited to basic biographical information such as the applicant's name, date of birth, nationality, and whether their application for statutory or mandate refugee status was accepted or rejected. This information would only be disclosed at the request of the host government where the UNHCR was operating. Information sharing between the UNHCR and States is highly discreet and is typically conducted in an informal manner.

It is unclear whether the UNHCR monitors what happens to the refugee applicants who are excluded. Some are, undoubtedly, prosecuted.⁸⁸ Others are likely not and remain as *prima facie* refugees within their refugee camp context and others remain within their particular place of residence, typically, within an urban setting. The fact is that the UNHCR is silent on how it treats those who have been

⁸⁵ UNHCR, 'Guidance Note on Extradition and International Refugee Protection' (April 2008) <<http://www.refworld.org/docid/481ec7d92.html>> accessed 24 March 2015.

⁸⁶ UNHCR, 'Procedural Standards for Refugee Status Determination Under UNHCR's Mandate', Design and Printing, IMP Alpes, Unit, General Issues, Confidentiality in UNHCR RSD Procedures, 2-1 <<http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=4317223c9&query=UNHCR%20mandate%20status>> accessed 16 January 2016.

⁸⁷ UNHCR, 'Global Trends 2013, "War's Human Costs"' (Geneva: UNHCR, 2014) <<http://www.unhcr.org/5399a14f9.html>> accessed 19 January 2016; UNHCR, 'Global Trends, Forced Displacement in 2014' in UNHCR (ed), *World at War* (2015) 30 <<http://unhcr.org/556725e69.html>> accessed 7 January 2016. <<http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=556725e69&query=2014%20refugee%20appeals>> accessed 19 January 2016.

⁸⁸ This is based on a reasonable presumption that some refugee applicants will come to the attention of the authorities and will be arrested and prosecuted. It does not imply in any way that the UNHCR discloses any such information to the host State's authorities.

excluded from mandate or statutory refugee status. It has no explicit policies for how to deal with those who have been excluded from refugee status or asylum. We are aware, however, that the UNHCR is concerned about the situation of those who have been excluded from asylum and who have been prosecuted but not convicted of any crimes.⁸⁹ The 2011 Expert Meeting on Complementarities between International Refugee Law, International Criminal Law, and International Human Rights Law: Summary Conclusions, Arusha, Tanzania, states at paragraph 45 that,

In practical terms, the question of the relocation of acquitted persons who are unable to return to their country of origin due to threats of death, torture or other serious harm is a real one. The problem of such relocation of persons is not easy to resolve and this problem is expected to persist beyond the existence of the ICTR and to arise in the future for other international criminal institutions and, in particular, the ICC. At present, three out of eight individuals who have been acquitted by final judgment before the ICTR have been unable to find countries willing to accept them. It was agreed that durable solutions need to be found for those acquitted by an international criminal tribunal or court and who are unable to return to their country of origin. Indeed, this is a fundamental expression of the rule of law and essential feature of the international criminal justice system. Concern was accordingly expressed about the consequences of failing to find such solutions.⁹⁰

Those who are excluded from statutory or mandate refugee status by the UNHCR are technically not eligible to receive international protection.⁹¹ They

⁸⁹ UNHCR, 'Expert Meeting on Complementarities between International Refugee Law, International Criminal Law and International Human Rights Law: Summary Conclusions' (July 2011) <<http://www.refworld.org/docid/4e1729d52.html>> accessed 31 March 2015.

⁹⁰ *ibid.*

⁹¹ UNHCR, 'Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the Convention relating to the Status of Refugee', Distr. General (HCR/GIP/03/05, 4 September 2003) <<http://www.unhcr.org/3f7d48514.html>> accessed 20 January 2016. Paragraph 8 and 9 are worth quoting here in their entirety:

8. Although a State is precluded from granting refugee status pursuant to the 1951 Convention or the OAU Convention to an individual it has excluded, it is not otherwise obliged to take any particular course of action. The State concerned can choose to grant the excluded individual stay on other grounds, but obligations under international law may require that the person concerned be criminally prosecuted or extradited. A decision by UNHCR to exclude someone from refugee status means that that individual can no longer receive protection or assistance from the Office.

9. An excluded individual may still be protected against return to a country

would certainly not be eligible for resettlement to another country. Presumably, they would also be precluded from local integration, one of the three durable solutions along with resettlement and voluntary repatriation. They could, however, be subject to prosecution or extradition, given the nature of the crimes that they were found to be guilty of committing. Lastly, from the example noted immediately above, even when the person is prosecuted and found “not guilty”, the mere fact that they were charged and tried on these offences may be sufficient for them not to be able to return to their countries of nationality or former habitual residence where they potentially could face persecution. In essence, they become “unreturnable” simply by virtue of the charges laid and the matter being brought to trial, irrespective of the outcome. Here, then, is one aspect of the exclusion dilemma.⁹² When the UNHCR excludes a refugee claimant from statutory or mandate refugee status it is denying, technically, the person from receiving international protection. It is not clear, however, what in fact happens to those refugee claimants who are excluded from refugee status by the UNHCR. Are they de-registered as refugees, do they cease to be *prima facie* refugees, and are they asked to leave the refugee camp? If they are a high-profile war criminal, should they be brought to the attention of the host State for possible extradition or prosecution under universal jurisdiction? If there is an outstanding indictment from the ICC against the refugee claimant, should they notify the ICC or the host State, or both? Should the UNHCR keep track of such cases? In other words, should the UNHCR keep records of how many of these serious offenders are actually charged and prosecuted; how many are actually convicted; the nature of their penalty or sentence; the average penalty (whether monetary or otherwise); and the average length of their sentence? Indeed, it might be relevant to suggest that the UNHCR should also request and compile these statistics for States as well.

It may also be worth considering whether the mere act of excluding someone may result in undue hardship for the refugee applicant? For instance, can the act of exclusion result in the refugee claimant becoming “undesirable and unreturnable?” When can the action of excluding someone from statutory or mandate refugee status

where he or she is at risk of ill-treatment by virtue of other international instruments. For example, the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment absolutely prohibits the return of an individual to a country where there is a risk that he or she will be subjected to torture. Other international and regional human rights instruments contain similar provisions.

⁹² The word ‘dilemma’, of course, has several related meanings. For instance, it can be ‘a situation requiring a choice between equally undesirable alternatives’ or ‘any difficult or perplexing situation or problem.’ Dictionary.com <<http://dictionary.reference.com/browse/dilemma>> accessed 19 January 2016. Another definition of dilemma is ‘a situation in which a difficult choice has to be made between two different things you could do.’ Cambridge Dictionaries Online <<http://dictionary.cambridge.org/dictionary/english/dilemma>> accessed 19 January 2016.

be detrimental, if not harmful, to the point of it being persecutory to the refugee claimant themselves? The UNHCR has taken the position that exclusion should only be applied in the most atrocious instances where the person, unquestionably, falls clearly within the parameters of Article 1F.⁹³ By the same token, the Executive Committee of the United Nations High Commissioner for Refugees has called for,

(v) the need to apply scrupulously the exclusion clauses stipulated in Article 1F of the 1951 Convention and in other relevant international instruments, to ensure that the integrity of the asylum institution is not abused by the extension of protection to those who are not entitled to it;

(vii) the responsibility of host States, working, where appropriate, with international organizations, **to identify and separate any armed or military elements from refugee populations**, and to settle refugees in secure locations at a reasonable distance, to the extent possible, from the frontier of the country of origin, with a view to safeguarding the peaceful nature of asylum;⁹⁴ [Emphasis added]

Hence, not excluding someone who has committed or is complicit in a war crime, a crime against humanity, actions that are contrary to the purposes and principles of the United Nations, or any combination of these, undermines the integrity of the institution of asylum itself, as the persecutors, who have created refugees, then effectively become the beneficiaries of a system intended to benefit refugees. Failing to bring to justice these individuals is fundamentally unfair and unjust at best, and at worst perpetuates the impunity of the perpetrators of such horrendous crimes.

The significance of the exclusion clauses, then, lies in their ability to assist in maintaining the integrity of the international refugee system by excluding those

⁹³ UNHCR, 'Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the Convention relating to the Status of Refugees' Distr. General (HCR/GIP/03/05, 4 September 2003) <<http://www.unhcr.org/3f7d48514.html>> accessed 20 January 2016. Wherein, at paragraph two, it states:

... The exclusion clauses must be applied "scrupulously" to protect the integrity of the institution of asylum, as is recognised by UNHCR's Executive Committee in Conclusion No. 82 (XLVIII), 1997. At the same time, given the possible serious consequences of exclusion, it is important to apply them with great caution and only after a full assessment of the individual circumstances of the case. The exclusion clauses should, therefore, always be interpreted in a restrictive manner.

⁹⁴ UNHCR, 'Safeguarding Asylum, No. 82 (LXVIII) – 1997', EXCOM Conclusions (17 October 1997) <<http://www.unhcr.org/3ae68c958.html>> accessed 20 January 2016.

who have severely breached the human rights and human dignity of others and who have created refugees. What is *not* transparent, or at all acknowledged or considered, is what role the UNHCR plays or ought to play in ensuring that those persons who are excluded under its mandate or statute are dealt with appropriately at the conclusion of their RSD hearings. The dilemma lies in choosing how best to deal with those who have been excluded from refugee status by the UNHCR. It is evident that the UNHCR needs to disclose aggregate statistical data on the number of refugee claimants who are excluded from statutory or mandate refugee status. It further needs to provide adequate information regarding what happens to these persons during the post-exclusion stage. Moreover, the UNHCR ought to seriously consider developing common post-exclusion international standards for States and for its own RSD staff who are confronted continuously with these types of cases.

The “Undesirable and Unreturnable?” project, based on the collaborative efforts of the Centre for International Criminal Justice (CICJ), VU University Amsterdam, and the Refugee Law Initiative (RLI), School of Advanced Study, University of London, is one serious effort to try and explore all reasonable avenues for addressing the “post-exclusion dilemma.”⁹⁵ These range from prosecution, extradition to deportation, diplomatic assurances, voluntary return, indefinite detention, humanitarian alternatives and withholding of any status. This research project’s final report includes a policy brief that outlines a number of directions for future policy responses that include: limiting the number of criminal migrants that end up in “legal limbo;” and, increasing the number of returns and removals.⁹⁶ The policy brief concludes by observing:

Without a coordinating body pushing for and overseeing the implementation of a harmonized and coherent approach, it is not likely that this will take shape in the near future. So far, UNHCR has considered the issue of unreturnable 1F-excluded asylum seekers to fall outside its mandate. It has not published

⁹⁵ For further information regarding this research initiative please see the ‘Undesirable and Unreturnable? Policy Challenges around Excluded Asylum-Seekers and Migrants Suspected of Serious Criminality but who cannot be removed’ website at <<https://rli.sas.ac.uk/research-projects/undesirable-and-unreturnable>> accessed 20 August 2017. See also the following reports ‘Preliminary Workshop: Undesirable and Unreturnable? Policy Challenges around Excluded Asylum-Seekers and Migrants Suspected of Serious Criminality but who cannot be removed’ (27 March 2015), VU University, Amsterdam <<https://rli.sas.ac.uk/sites/default/files/files/Preliminary%20Workshop%20Report.pdf>> accessed 20 August 2017.

⁹⁶ Refugee Law Initiative and Centre for International Criminal Justice, ‘Undesirable and Unreturnable? Policy Challenges around Excluded Asylum-Seekers and Other Migrants Suspected of Serious Criminality who cannot be Removed’ (Undated) <<https://cicj.org/wp-content/uploads/2016/09/Undesirable-and-Unreturnable-Full-report.pdf>> accessed 21 July 2017.

any guidance in this regard.⁹⁷

It is evident from the above that policy guidance with respect to the issue of the exclusion dilemma is needed, and that this research initiative goes some way in helping to bring attention to this issue and how it ought to be addressed. However, the UNHCR is clearly in the best position to provide much-needed guidelines for States with respect to the legal issues and concerns relating to the exclusion dilemma. The justifications for doing so, both legally and morally, would be the need to maintain the integrity of the refugee system itself, and the UNHCR's role in supervising the *1951 Convention*, the *1967 Protocol*, and other international refugee rights instruments.

V. CONCLUSIONS

The information available pertaining to UNHCR's RSD structures and procedures is highly limited. The UNHCR would prefer to have each State perform its own RSD. Nonetheless, from UNHCR's own statistical reports, it is evident that the UNHCR has the single largest RSD system in the world and that UNHCR's RSD operations are larger than Germany and the United States combined, the two single largest State RSD systems. Moreover, as noted above, the UNHCR accounts for 11 per cent of the refugee and asylum decisions in the world in 2013 and 9 percent in 2014, and these figures, along with the number of new refugee and asylum applications that it receives each year, seem to be growing over time. If this trend continues, it is reasonable to conclude that the UNHCR will have to allocate greater portions of its resources and overall budget to RSD. Presumably, this will have to come at the cost of doing less in other areas of its operations or refugee protection obligations, or both. Nonetheless, it is worth emphasising that RSD is one of the UNHCR's most important core functions and operational roles.

From the statistics presented above, it is evident that the UNHCR makes a significant contribution to the total RSD that is done in the world today on an annual basis. It surpasses by far the largest single State that undertakes RSD. Furthermore, the UNHCR conducts RSD operations in some 75 countries around the world. The geographic spread and reach of the UNHCR exceeds that of any State. While there are significant differences to the RSD that is conducted by industrialised States, with highly sophisticated judicial systems, and the UNHCR, which is based on administrative structures and procedures, nevertheless, the UNHCR's contribution in this regard cannot be discounted.

One of the major distinctions between the RSD systems conducted by industrialized States and those of the UNHCR is the juridical nature and relative transparency of these States' RSD systems. The UNHCR is clearly lacking in the same transparency in this regard. There may be good reasons for this to

⁹⁷ *ibid.*

some degree, given the necessity to protect a refugee applicant's privacy and the confidentiality of their claim for refugee protection, and given the operational requirements of the UNHCR working within its host States. Nonetheless, more can be done by the UNHCR for greater transparency in its RSD operations with respect to exclusion, with only a modicum of additional effort.

This is perhaps most evident in relation to matters dealing with exclusion under Article 1F of the *1951 Convention*, which the UNHCR relies on when considering matters dealing with the exclusion of refugee applicants for statutory or mandate refugee status. The UNHCR does not provide any statistics as to the number of refugee applicants that are excluded on an annual basis, or indeed what happens to those who are excluded from statutory or mandate refugee status. Although it is evident that, in some situations and circumstances, high-profile refugee applicants are most likely brought to the attention of international criminal special UN tribunals or the International Criminal Court, the UNHCR generally does not bring these matters before host governments where the RSD is conducted, unless the government explicitly makes such a request.⁹⁸ In such instances, only the most basic information is provided and whether the applicant's claim for refugee status has been accepted or rejected. The basis of the refugee claim is not disclosed to the States in question.

The lack of information disclosed by the UNHCR to States or the public at large leaves much to speculation or to the possible misunderstanding of how UNHCR conducts its RSD operations, with respect to exclusion and to how it deals with those who have committed serious international crimes. This is clearly one area of its RSD operations that the UNHCR might wish to consider correcting. The shedding of light on how the UNHCR conducts its RSD when issues of exclusion are raised would be most welcomed by not only States, but also by the public at large.

The main considerations here are undoubtedly the concerns of privacy and confidentiality. However, these concerns can be addressed easily, simply by providing information publicly in an aggregate statistical form without any refugee applicant being identified or open to any form of identification. Balancing the rights of the refugee applicants with the right of the general public to know more about the manner in which the UNHCR conducts its RSD with respect to exclusion is not simple and straightforward. Nevertheless, finding a way forward on this issue is the best way to proceed if we hope to advance this aspect of the UNHCR's contribution to RSD and, overall, its mandate to provide international protection to the "people of concern" it has responsibility to protect, including, of

⁹⁸ These conclusions are based on a reasonable inference based on what is publicly available on the UNHCR's operations with respect to its RSD procedures and the application and interpretation of the Exclusion Clauses.

course, refugees and asylum seekers.

Another key area of concern is how best to address the exclusion dilemma that occurs when the UNHCR excludes a person from statutory or mandate refugee status or those who have been excluded from Convention, or territorial refugee status for that matter. In the first instance, the UNHCR and States should be obligated to keep track of what happens to those who are excluded from statutory or Convention refugee status. Secondly, the UNHCR and States need to develop guidelines for how to deal with those who have been excluded under Article 1F. It is reasonable to presume that many of these excluded refugee claimants would not be able to return to their countries of nationality or former habitual residence. What then would be the alternatives for dealing with these failed refugee claimants? It seems reasonable to presume that, as a minimum, some form of arbitration, if not prosecution, that entails an admission of responsibility should be in order. This should be accompanied by a requirement for restitution, in some manner if possible, and concrete evidence of rehabilitation, followed by restoration to a fully responsible and contributing member of society, whether in their host State or elsewhere.

All of this is contingent on the UNHCR first undertaking to provide greater transparency to its RSD operations with respect to the exclusion, from statutory or mandate refugee status, of those refugees who are denied refugee protection for the commission of serious criminality under the provisions of Chapter II, Section 7(d) under its *1950 Statute*. The UNHCR should be providing statistics on who is being excluded from refugee protection under its mandate and what becomes of these persons. For example, are they prosecuted for their direct or indirect involvement or commission serious international crimes? Moreover, the UNHCR should be providing guidelines to States and to its own UNHCR staff for how to deal with those who are excluded from refugee protection for the commission of serious international crimes not only to fulfill its obligation to protect the integrity of the international refugee protection regime but to help ensure that there is no impunity for the commission of international crimes that produce the very refugees it is obligated to protect.