

**Excluding Refugee and Asylum Applicants Under the UNHCR's
Statute or Mandate**

**James C. Simeon, Associate Professor and Director
School of Public Policy and Administration
Faculty of Liberal Arts & Professional Studies
York University, Toronto, Ontario, Canada**

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Introduction

The United Nations High Commissioner's Office for Refugees plays a very important role in refugee status adjudication on a global scale. This is far larger than the single largest State contribution and many more times larger than many other States combined. Refugee status determination (RSD) comprises a very important operational role for the UNHCR and continues to draw an ever growing larger portion of its resources. However, the information publicly available on RSD is rudimentary at best and seemingly lacking entirely in some vitally important areas. For instance, one of the most crucial areas of refugee status determination (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.¹ Given the state of the world today and the number of protracted armed conflicts and/or wars, inter-state and intra-state,² and the basic fact that the single most important cause of forced

¹ Article 1F, *Convention relating to the Status of Refugees*, Geneva, 28 July 1951, in force 22 April 1954, 1989 UNTS 137 and the *Protocol relating to the Status of Refugees*, New York, 31 January 1967, in force 4 October 1967, 19 UNTS 6223, 6257.

² 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 March 23, 2015] This website lists some 65 countries in the world that are engaged in various forms of ongoing conflicts with some 618 different militias-guerrillas, separatist groups, anarchic groups, and drug cartels. The breakdown according to regions is as follows: Africa: 65 countries and 177 militias-guerrillas, separatist groups and anarchic groups; Asia: 16 countries with 145 militias-guerrillas, separatist groups and anarchic groups; Europe: 9 countries with 72 militias-guerrillas, separatist groups and anarchic groups; Middle East: 8 countries with 199 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, Department of Peace and Conflict Research, Uppsala Data Conflict Program, indicates that there were 24 intrastate ongoing armed conflicts and 9 internationalized intrastate ongoing armed conflicts in the world in 2013. <http://www.pcr.uu.se/research/ucdp/>. [accessed March 24, 2015]. See also the 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=-

displacement in the world today is war and/or armed conflict, the likelihood of refugee and asylum applicants being excluded for these types of international crimes is most probably not only likely to continue but is probably on the rise.

This paper begins by reviewing the legal basis for the UNHCR's role in RSD. The legal authority of the UNHCR is based in 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 paper then examines 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 paper examines how the UNHCR handles those cases that are determined to fall under Article 1F, the so-called Exclusion Clauses. The administrative structures and procedures, including the internal appeal process, are described and considered. The paper concludes by providing a broad overview and assessment of UNHCR's methods for excluding statutory or mandate refugee applicants. It makes a case for lifting the veil on RSD procedures and particularly those that involve persons who are excluded from statutory or mandate refugee status. Providing basic information and statistics in this regard would be a positive step towards strengthening policy relevant research on this topic and advancing the international community's principal aim of ending impunity for perpetrators of the most serious international crimes.³ Indeed, this is not only a matter of justice, prosecuting those who are responsible for the most serious breaches of international criminal law, but absolutely essential for ensuring the all

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³ International Criminal Court, About the Court, http://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx. [accessed March 24, 2015]

human rights, including those who considered to be the most vulnerable, refugees, are truly protected under the rule of law.⁴

International Protection and the Competence of the UNHCR

The United Nations (UN) High Commissioner's Office for Refugees was established by the United Nations General Assembly through resolution 319 A (IV) of 3 December 1949 and came into effect 1 January 1951.⁵ 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, 1950.⁶ 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.⁷ 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.⁸ This includes

⁴ James C. Simeon, "Ethics and the exclusion of those who are "not deserving" of Convention Refugee Status," *Contemporary Issues in Refugee Law*, Edited by Satvinder Singh Juss and Colin Harvey, Cheltenham, UK: Edward Elgar Publishing Limited, 2013., pp. 258-288.

⁵ *Statute of the Office of the High Commissioner for Refugees*, Geneva, October 2010. "Introductory Note," p. 2, <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=3b66c39e1&query=1950%20Statute%20of%20the%20UNHCR>. [accessed March 13, 2015]

⁶ UNHCR, The UN Refugee Agency, "History of UNHCR, A Global Humanitarian Organization of Humble Origins," <http://www.unhcr.org/pages/49c3646cbc.html>. [accessed March 7, 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 March 7, 2015]

⁷ *Ibid.* *Convention relating to the Status of Refugees*, Geneva, 28 July 1951, in force 22 April 1954, 1989 UNTS 137 and the *Protocol relating to the Status of Refugees*, New York, 31 January 1967, in force 4 October 1967, 19 UNTS 6223, 6257.

⁸ 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 March 7, 2015] 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 March 7, 2015]

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*.⁹ However, it also invokes a number of important principles with respect to the exclusion of persons from territorial asylum. For example, at the very outset it states that, “Everyone has the right to seek and to enjoy in other countries asylum from persecution.”¹⁰ 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”,¹¹

Article 1(2) 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.¹²

And, 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.¹³

⁹ Ibid., 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:

⁹ *Statute of the Office of the High Commissioner for Refugees*, General Assembly Resolution 428(V), 14 December 1950., p. 6. <http://www.unhcr.org/cgi-bin/texis/vtx/home/opensslPDFViewer.html?docid=3b66c39e1&query=1950%20Statute%20of%20the%20UNHCR> [accessed March 7, 2015]

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

¹³ Ibid.

All of this is to note that the *1967 Declaration of Territorial Asylum* evokes fully the now well established and entrenched principles of excluding those persons who have committed or are 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, in paragraph two of the UN General Assembly resolution 428 (V) it calls upon Governments “to cooperate with United Nations High Commissioner for Refugees in the performance of his functions concerning refugees falling under the competence of his Office.”¹⁴ 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.¹⁵

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 realizing the most basic of international refugee law principles, *non-refoulement*.¹⁶

¹⁵ Ibid.

¹⁶ “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: Oxford University Press, 2007), p. 1. [Emphasis added]

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.¹⁷

Indeed, they note that *non-refoulement* has been pronounced in the *1984 Cartagena Declaration*,

Section III, paragraph five, to be:

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*.¹⁸

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.”¹⁹

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.

Whereas, the *1951 Convention* and its *1967 Protocol* are treaties that provide States with the legal

¹⁷ Sir Elihu Lauterpacht and Daniel Bethlehem, “The scope and content of the principle of *non-refoulement*: Opinion,” *Refugee Protection in International Law: Global Consultations*, eds., Erika Feller, Volker Turk, Frances Nicholson (Cambridge: Cambridge University Press, 2003), p. 89.

¹⁸ Ibid., p. 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.” in *Human Rights and Refugees, Internally Displaced Persons and Migrant Workers: Essays in Memory of Joan Fitzpatrick and Arthur Helton*. ed. Anne F. Bayefsky (Boston: Martinus Nijhoff Publishers, 2006), p. 221.

¹⁹ UNHCR, The UN Refugee Agency, “Conventions, Key Legal Documents,” <http://www.unhcr-centraleurope.org/en/resources/conventions.html>. [accessed March 11, 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.”

bases for determining whether a person is a Convention or a territorial refugee.²⁰ It is also worth emphasizing that even though the *1950 Statute* does not include the ground of “membership in a particular social group”²¹, 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 (RSD) purposes, the UNHCR applies the *1951 Convention* and *1967 Protocol*.²²

It is also worth noting that there are three basic forms of asylum in international law: territorial, extraterritorial, and, neutral.²³ “Territorial asylum is granted within the territorial bounds of the state offering the asylum and is the exception to the practice of extradition.”²⁴ “Extraterritorial asylum is the asylum granted in embassies, legations, consulates, warships, and merchant vessels in foreign territories”²⁵ 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.”²⁶ UNHCR has pointed out that “territorial asylum can only be provided by States”²⁷ and that “UNHCR may recognize refugees

²⁰ 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,” *International Journal of Refugee Law*. Vol. 22, No. 1 (March 2010), pp. 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.

²¹ *Statute of the Office of the High Commissioner for Refugees*, General Assembly Resolution 428(V), 14 December 1950., paragraph 6A(ii), p. 7. <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=3b66c39e1&query=1950%20Statute%20of%20the%20UNHCR>. [accessed March 17, 2015]

²² 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/opendocPDFViewer.html?docid=4317223c9&query=UNHCR%20mandate%20status>

²³ George J. Andreopoulos, “Asylum Law – Alternate Title: *political asylum*,” *Encyclopaedia Britannica*, [Emphasis in the original] <http://www.britannica.com/EBchecked/topic/40220/asylum#ref41289>. [accessed March 14, 2015]

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ UNHCR, *Statistical Yearbook 2003*, Chapter 3, Asylum and Refugee Status Adjudication, p. 38, <http://www.unhcr.org/cgi->

under its mandate, but it cannot provide asylum.”²⁸ 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. Whereas, on the other hand, by definition, territorial asylum cannot be included in mandate or statutory refugee status.

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”²⁹ 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 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.³⁰

And, paragraph 6B that states as follows:

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.³¹

The determination of who is eligible to receive the protection of the UNHCR, that is, the determination of mandate or statutory refugee status, or in other words, the determination of those

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²⁸ Ibid.

²⁹ *Statute of the Office of the High Commissioner for Refugees*, General Assembly Resolution 428(V), 14 December 1950., p. 6. <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=3b66c39e1&query=1950%20Statute%20of%20the%20UNHCR>. [accessed March 13, 2015]

³⁰ Ibid., p. 7.

³¹ Ibid., p. 8.

who fall within the competence of the UNHCR, is deemed to be a “core UNHCR protection function.”³² 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.”³³ 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 UNHCR has a mandate to ensure international protection and seek appropriate solutions to refugees within its competence.”³⁴

To summarize, then, 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 there owing to serious and indiscriminate threats to life, physical integrity or freedom resulting from generalized violence or events seriously disturbing the public order.”³⁵ At the heart of the international refugee protection system in the world today is the preemptory norm, *non-refoulement*, that 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.³⁶

³² 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/opendocPDFViewer.html?docid=4317223c9&query=UNHCR%20mandate%20status>. [accessed March 23, 2015]

³³ Ibid.

³⁴ UNHCR, *Refugee Status Determination: Identifying who is a refugee, Self-Study Module 2*, pp. 10-11. <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=43144dc52&query=handbook%20on%20determining%20mandate%20refugee%20status>. [accessed March 23, 2015]

³⁵ Ibid., pp. 8-9.

³⁶ *Article 35(1), Convention relating to the Status of Refugees*, Geneva, 28 July 1951, in force 22 April 1954, 1989 UNTS 137 and the *Protocol relating to the Status of Refugees*, New York, 31 January 1967, in force 4 October 1967, 19 UNTS 6223, 6257.

Mandate or Statutory Refugee Status Determination

The UNHCR *Statistical Report 2013* states that out of the 175 countries and territories where information was available, governments were responsible for refugee status determination procedures in 103 countries (59%) and the UNHCR was responsible in 50 countries (29%). In addition, the UNHCR conducted mandate refugee status determination (RSD) procedures in 25 countries or territories (12%).³⁷ Hence, the UNHCR in 2013 had conducted RSD under its competence in at least some 75 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; the provision of durable solutions to refugees, including, resettlement; and, research on relevant issues and concerns, monitoring States' parties compliance 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. This includes the following:

- In countries which are not Party to the *1951 Convention/1967 Protocol*; or
- 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*, or
- As a precondition for the implementation of durable solutions such as resettlement;³⁸

³⁷ *UNHCR Statistical Yearbook 2013*, (Geneva, United Nations High Commissioner for Refugees, 2014), p. 55. <http://www.unhcr.org/54cf9a629.html>. [accessed March 18, 2015]

³⁸ UNHCR, *Refugee Status Determination: Identifying who is a refugee, Self-Study Module 2*, p. 11. <http://www.unhcr.org/cgi->

It is important and informative to note the number of asylum and refugee applications received by both States and the UNHCR has increased significantly over that last several years. Table one indicates the number of new and appeal asylum and refugee applications that were received by States and the UNHCR from 2011 to 2013.

Table 1³⁹

New and Appeal Refugee and Asylum Applications Registered from 2011 to 2013

| | <u>2011</u> | <u>2012</u> | <u>2013</u> |
|-------------------|--------------------|--------------------|--------------------|
| States | 734,100 | 781,400 | 870,700 |
| UNHCR | 98,800 | 125,500 | 203,200 |
| Joint | 31,700 | 22,800 | 5,800 |
| | 864,600 | 929,700 | 1,079,700 |
| UNHCR Only | 11% | 13% | 19% |

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 UNHCR but the number of Joint, State and UNHCR application, have been sharply declining, particularly, from 2012 to 2013. The most dramatic increase or decrease occurred from 2012 to 2013. There was a 14.6% increase in the number of new and appeal refugee and asylum applications amongst the States. There was a 51.3% increase of new and appeal refugee applications at the UNHCR and an 81.7% drop in the number of Joint applications processed by States and the UNHCR. Why there was this tremendous

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³⁹ *UNHCR Statistical Yearbook 2013*, (Geneva, United Nations High Commissioner for Refugees, 2014), p. 56. <http://www.unhcr.org/54cf9a629.html>. [accessed March 18, 2015]

drop in Joint new and appeal refugee and asylum applications registered is unclear. While the numbers appear to be increasing over time the highest percentage increase in these applications was clearly with the UNHCR. The UNHCR now accounts for about one-fifth (19%) of all of the new and appeal refugee and asylum applications in the world today.

Table 2 presents the number of new asylum applications that were received by States and the UNHCR in 2013.

Table 2⁴⁰

New Asylum Applications Received by States and the UNHCR in 2013

| | |
|-----------------------|----------------------------|
| UNHCR | 194,600 |
| Germany | 109,600 |
| United States | 84,400 |
| South Africa | 70,000 |
| France | 60,200 |
| Sweden | 54,300 |
| Malaysia | 53,600 |
| Turkey | 44,800 |
| United Kingdom | 29,900 |
| Italy | 25,700 |
| Switzerland | 19,400 |
| Canada | 10,400⁴¹ |

The 2013 statistics by country reveal that the single largest recipient among States was Germany, followed by the United States and South Africa. However, the UNHCR surpasses any of the States listed by a wide margin. In addition to the 194,600 new refugee claims of the UNHCR, there were 8,600 appeals. The total number of new refugee and asylum applications plus the number of appeals at the UNHCR is a staggering with 203,200 refugee and asylum appeal applications.

The increasing number of refugee and appeal applications at the UNHCR is troubling. As noted previously, the UNHCR cannot decide whether the applicant is a Convention or territorial

⁴⁰ Ibid., pp. 56-57.

⁴¹ For Canada only see, *UNHCR, Asylum Trends 2013: Levels and Trends in Industrialized Countries*, 2014, p. 8. http://www.unhcr.ch/fileadmin/user_upload/dokumente/06_service/zahlen_und_statistik/UNHCR_Asylum_Levels_and_Trends2013released.pdf. [accessed March 18, 2015]

refugee, unless it does so jointly or on behalf of a State, but rather a mandate or statutory refugee. This raises concerns regarding whether the UNHCR has sufficient resources, financial, materiel and personnel, to fulfil its broad and growing mandate while assuming more and more of the new refugee and appeal applications. It has been observed that the UNHCR should not be conducting its own RSD. Its limited resources could be used more effectively elsewhere for the assistance of refugees. However, if States are unable or unwilling to fulfil their obligations to conduct their own RSD, then, the UNHCR is forced to fill the gap.

Table 3 lists the top ten UNHCR regional offices that received new refugee applications. It is interesting to point out that Malaysia received the highest number of new refugee applications, followed by Turkey, Kenya, Egypt, Indonesia, and Jordan. The top five UNHCR Regional Offices accounted for 70 percent of all of the new refugee applications.⁴² Further, 80 percent of the UNHCR's RSD work was concentrated in just eight countries.⁴³ However, most importantly there has dramatic increase in the number of new refugee claims from 2012 to 2013 in this list of top ten UNHCR Offices.

Table 3⁴⁴

Top Ten UNHCR Offices with New Refugee Claims

| <u>Country</u> | <u>2012</u> | <u>2013</u> |
|-----------------------|--------------------|--------------------|
| Malaysia | 19,400 | 53,600 |
| Turkey | 26,500 | 44,800 |
| Kenya | 20,000 | 19,200 |
| Egypt | 6,700 | 10,800 |
| Indonesia | 7,200 | 8,300 |
| Jordan | 2,500 | 6,700 |
| Yemen | 3,400 | 6,100 |
| Cameroon | 3,500 | 5,800 |

⁴²

⁴³ *UNHCR Statistical Yearbook 2013*, (Geneva, United Nations High Commissioner for Refugees, 2014), p. 57. <http://www.unhcr.org/54cf9a629.html>. [accessed March 18, 2015]

⁴⁴ *Ibid.*

| | | |
|--------------|---------------|----------------|
| India | 2,900 | 5,600 |
| Libya | 4,500 | 5,600 |
| | 93,100 | 166,500 |

There has been, in fact, a 78% increase in the number of new refugee claims made at UNHCR Offices between 2012 and 2013. All these UNHCR regional offices experienced an increase in the number of refugee claims over the previous year, save Kenya. While nearly all of these countries experienced an increase, it was Malaysia and Turkey that experienced the highest increases among all UNHCR Regional Offices around the world. The reasons for the tremendous increase in the number of new refugee claims in Malaysia and Turkey are, again, escalating instances of armed conflict.

In this list of top ten UNHCR Offices with new refugee claims, it is apparent that there were long standing insurgencies or armed conflicts, that have been seriously disturbing the public order, whether within the borders of these countries and/or contiguous to them that have contributed to the escalating numbers of new refugee claims.⁴⁵ Security concerns lie at the very root of the difficulties confronting these countries that result in displacement and forced migration.

Table 4⁴⁶

New Refugee Claims Filed with UNHCR and States in 2013

| | |
|--|---------------|
| Syria | 64,300 |
| Democratic Republic of Congo | 60,500 |
| Myanmar | 57,400 |
| Afghanistan | 49,000 |
| Iraq | 45,700 |
| Russian Federation | 39,900 |
| Somalia | 35,200 |
| Eritrea | 34,800 |
| Serbia (and Kosovo: S/RES/ 1244 (1999)) | 34,600 |
| Pakistan | 33,600 |

⁴⁵ 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]

⁴⁶ *UNHCR Statistical Yearbook 2013*, (Geneva, United Nations High Commissioner for Refugees, 2014), p. 57. <http://www.unhcr.org/54cf9a629.html>. [accessed March 18, 2015]

Out of the 916,900 asylum and refugee applications submitted to States and the UNHCR in 2013, the top ten source countries are listed in Table 4.⁴⁷ Again, the relationship between protracted armed conflict and displacement and forced migration is evident in each of these countries.⁴⁸

It is also relevant to consider the number of substantive decisions taken by States and the UNHCR in their asylum and refugee applications for 2013. Table 5 indicates that the UNHCR made about 11 percent of the decisions on all asylum and refugee applications that were taken in that year. This was a 3% increase over the previous year and it represented a substantial increase in the total number of RSD decisions that the UNHCR made in 2013. What is less clear is why there has been a precipitous drop in the number of joint, UNHCR and States, substantive decisions taken on asylum and refugee applications. This represented a 97% drop in the total number of joint decisions taken in just one year.

Table 5⁴⁹

Asylum and Refugee Substantive Decisions Taken 2011-2013

| | <u>2011</u> | <u>2012</u> | <u>2013</u> |
|--------------|--------------------|--------------------|--------------------|
| State | 518,200 | 627,200 | 590,200 |
| UNHCR | 52,600 | 54,400 | 72,100 |

⁴⁷ Ibid.

⁴⁸ 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 Cost*, (Geneva: UNHCR, 2014). Wherein it quotes, Antonio Guterres, UN High Commissioner for Refugees, 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." (Introduction)

⁴⁹ *UNHCR Statistical Yearbook 2013*, (Geneva, United Nations High Commissioner for Refugees, 2014), p. 59. <http://www.unhcr.org/54cf9a629.html>. [accessed March 18, 2015]

| | | | |
|---------------------|----------------|----------------|----------------|
| Jointly | 6,500 | 18,200 | 500 |
| Totals | 577,300 | 699,800 | 662,800 |
| % UNHCR Only | 9% | 8% | 11% |

It is interesting to point out that global Refugee Recognition Rate (RRR), that combines both States and the UNHCR decisions, was 32 percent for all asylum and refugee decisions that were taken during 2013.⁵⁰ 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 percent in 2013.⁵¹ 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 percent.⁵² Likewise, the recognition rates were also high for asylum-seekers from Somalia (82%), Iraq (79%), the Democratic Republic of the Congo (74%), Sudan (69%), the Islamic Republic of Iran (67%), and Afghanistan (65%).⁵³

Excluding Applicants from Asylum and/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*

⁵⁰ Ibid. 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).

⁵¹ Ibid. 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." (p. 59)

⁵² Ibid.

⁵³ Ibid.

or paragraph 7(d) of the *1950 Statute*. These are referred to commonly as the so-called Exclusion Clauses.⁵⁴

The *1950 Statute* at paragraph 7 outlines where the competence of the High Commissioner for Refugees shall not extend and it includes 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 14,⁵⁵

Paragraph 7(d) is similar to Article 1F of the *1951 Convention*, the so-called Exclusion Clauses, that state:

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.⁵⁶

As noted above, just as the UNHCR utilizes 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

⁵⁴ 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 an 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]

⁵⁵ *Statute of the Office of the High Commissioner for Refugees*, General Assembly Resolution 428(V), 14 December 1950., p. 9. [Emphasis added.] <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=3b66c39e1&query=1950%20Statute%20of%20the%20UNHCR>. [accessed March 13, 2015]

⁵⁶ *Convention relating to the Status of Refugees*, Geneva, 28 July 1951, in force 22 April 1954, 1989 UNTS 137 and the *Protocol relating to the Status of Refugees*, New York, 31 January 1967, in force 4 October 1967, 19 UNTS 6223, 6257. [Emphasis added.]

Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees.⁵⁷ 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.⁵⁸

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.⁵⁹

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*.⁶⁰ Those refugee applicants who are excluded have an automatic right to an appeal.⁶¹ Indeed, certain decisions dealing with exclusion can only be taken by the Department of International Protection (DIP) in UNHCR Headquarters in Geneva.

⁵⁷ UNHCR, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, HCR/GIP/03/05, 4 September 2003.

⁵⁸ *Ibid.*, p. 3.

⁵⁹ *Ibid.*

⁶⁰ UNHCR, *Procedural Standards for Refugee Status Determination Under UNHCR’s Mandate*, Design and Printing, IMP Alpes, Unit 4, 4.8.2 Procedures for Examining the Application of Article 1F, pp. 4-26 – 4-28.

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

⁶¹ *Ibid.*, 4.8.3 Review and Approval of Exclusion Decisions. p. 4-26.

Article 1F cases that involve complex “doctrinal or interpretative issues” or children must be sent to the DIP for the final recommendation. The decisions are subject of the review of the RSD Supervisor and/or the UNHCR Head Office.⁶²

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*)⁶³ [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 Department of International Protection within the UNHCR Headquarters in Geneva for final recommendation.

Statutory or mandate refugee status decisions that are appealed to the Department of International Protection are considered by the “Protection and National Security” unit. The refugee application 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 International Criminal Court would be taken very seriously indeed.⁶⁴ Whereas, if the refugee applicant’s name appears on an Interpol list of outstanding warrants for arrest for certain types of crimes may not be given the same weight.⁶⁵

⁶² Ibid., p. 4-26.

⁶³ Ibid.

⁶⁴ Ibid., General Issues, Unit 2, p. 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]

⁶⁵ UN High Commissioner for Refugees (UNHCR), *Guidance Note on Extradition and International Refugee Protection*, April 2008, <http://www.refworld.org/docid/481ec7d92.html>. [accessed March 24, 2015]

The UNHCR takes its policies on refugee applicants' privacy and confidentiality seriously.⁶⁶ 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 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 Department of International Protection in UNHCR Headquarters. It would be sheer speculation to estimate what portion of the 8,600 appeals that were processed within the UNHCR in 2013 would have dealt with exclusion. What percent 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 be a disclosure of information to a State. The information that would be provided would be 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 discrete and is conducted typically in an informal way.

It is unclear whether the UNHCR monitors what happens to the refugee applicants who are excluded. Some are, undoubtedly, prosecuted. 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.

⁶⁶ UNHCR, *Procedural Standards for Refugee Status Determination Under UNHCR's Mandate*, Design and Printing, IMP Alpes, Unit, General Issues, Confidentiality in UNHCR RSD Procedures, p. 2-1.
<http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=4317223c9&query=UNHCR%20mandate%20status>

Conclusions

The information available pertaining to UNHCR's RSD structures and procedures is highly limited. The UNHCR would prefer to have each State in the world 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 about 11% of the refugee and asylum decisions in the world and that this figure along, with the number of new refugee and asylum applications that it receives each year, these figures seem to be growing. 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 operations and refugee protection obligations. Nonetheless, it is worth emphasizing that RSD is one of the UNHCR's most important 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. While there are significant differences to the RSD that is conducted by industrialized States, with highly sophisticated judicial based systems, and the UNHCR that 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 their relative transparency. The UNHCR is clearly lacking in transparency in this regard. There may good reasons for this to 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 on matters dealing with exclusion under Article 1F of the *1951 Convention*, that 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 what, indeed, 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 brought to the attention of international criminal special UN tribunals or the International Criminal Court, generally, the UNHCR does not bring these matters forward to host Governments where the RSD is conducted, if and unless the Governments explicitly make such a request. In such instance, only the most basic information is provided and whether the applicant's claim for refugee status has been accepted for rejected. The basis of the refugee claim is not disclosed to the States in question.

The lack of information that is 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 clearly is 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, by the public at large.

The main consideration here is undoubtedly the concerns of privacy and confidentiality. However, these concerns can be addressed easily by only 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 general public's right to know

more about the manner in which the UNHCR conducts its RSD with respect to exclusion is not simple and straightforward, but, 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 course, refugees and asylum seekers.