

Exclusion in International Refugee Law:
20th Century Principles for 21st Century Practice?

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ABSTRACT

The principle of exclusion is one of the oldest and most basic concepts of international refugee law, operating at the intersection of international criminal law, human rights law, humanitarian law and extradition law. Despite its long and significant history, this paper argues that the doctrine is outdated, and that contemporary developments in international law necessitate that it be put to rest.

This paper proceeds by first providing an outline of the exclusion clauses, explaining their importance and how they came to be included in the Refugee Convention. Next, developments in international human rights law and international criminal law are reviewed, demonstrating that the evolution of these branches of international law render the concept of exclusion problematic. Finally, it is argued that the exclusion clauses no longer serve to uphold the integrity of refugee protection in the manner originally intended by the drafters of the Refugee Convention.

Introduction

The principle of exclusion is one of the oldest and most basic concepts of international refugee law, operating at the intersection of international criminal law, human rights law, humanitarian law and extradition law. It is sometimes referred to as the ‘ultimate sanction’ in refugee law, as it stands for the proposition that some criminal acts are so egregious that they preclude offenders from deriving any benefit or protection from the law.

Provisions concerning exclusion from refugee status have been part of most of the major international instruments and declarations concerning refugee law, including the *Convention Governing the Status of Refugee Problems in Africa*,¹ the *Statute of the Office of the United Nations High Commissioner for Refugees* (UNHCR),² the *Declaration on Territorial Asylum*,³ the “*Bangkok Principles*”,⁴ and the *Convention Relating to the Status of Refugees* (hereinafter

¹ *Organization of African Union Convention Governing the Specific Aspects of Refugee Problems in Africa*, 10 September 1969, 1001 U.N.T.S. 45 (Article 1(5)).

² *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428 (V) (Article 7(d)).

³ *Declaration on Territorial Asylum*, 14 December 1967, A/RES/2312 (XXII) (Article 1(2)).

⁴ *Principles Concerning Treatment of Refugees*, “*Bangkok Principles*”, 31 December 1966, Asian-African Legal Consultative Organization (Article 1(7)).

'*Refugee Convention*').⁵ While the *Refugee Convention* remains the primary instrument of binding international law relating to the status of refugees, the concept of exclusion existed long before that treaty was concluded. For example, in 1948 the international community drafted the *Universal Declaration of Human Rights*, Article 14(2) which proclaimed that the right to seek and enjoy asylum "could not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes of the United Nations".⁶ Moreover, the *Constitution of the International Refugee Organization*, which also dates back to 1948, contains the following provisions:

Persons who will not be the concern of the Organization:

- 1) War criminals, quislings, and traitors.
- 2) Any other person who can be shown:
 - a. To have assisted the enemy in persecuting civil populations of countries, Members of the United Nations; or,
 - b. To have voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations.
- 3) Ordinary criminals who are extraditable by treaty.
- ...
- 5) Persons who are in receipt of financial support and protection from their country of nationality, unless their country of nationality requests international assistance for them.⁷

Despite the long and significant history of exclusion in refugee law, this paper will argue that the current state of international law requires that this doctrine be put to rest. Although the literature on this topic has identified some of the problems that will be raised in this paper, most have reserved a residual place for the exclusion clauses, arguing that *interpretation* is the primary issue and can resolve the ambiguities that exist in the current refugee protection regime.

⁵ *Convention Relating to the Status of Refugees*, 28 July 1951, 189 U.N.T.S. 137, Can. T.S. 1969 No. 6 [*Refugee Convention*] (Article 1F).

⁶ *Universal Declaration of Human Rights*, GA Res. 217(III), UN GAOR, 3rd Sess., UN Doc. A/810 (1948) 71.

⁷ *Constitution of the International Refugee Organization*, 20 August 1948, 18 U.N.T.S. 283 (Annex II).

Alternatively, this paper argues that while exclusion was once an important and useful tool in refugee law, the conditions that gave rise to its necessity have ceased to exist. Instead of providing a useful purpose in international law, the exclusion clauses now complicate refugee law to such extent that they can actually perpetuate injustice rather than uphold the ‘integrity’ of refugee protection, and therefore should be reconsidered.

The first section of this paper provides a basic outline of the exclusion clauses, providing a brief explanation of each clause and the rationale as to why it was included in the *Refugee Convention*. The analysis then proceeds to examine two distinct branches of international law that have matured since the conclusion of the *Refugee Convention*: international human rights law and international criminal law. Concerning international human rights law, it will be demonstrated that the rights of children and the prohibition against torture have developed in such a way that makes the concept of exclusion highly problematic. With regard to international criminal law, it will be argued that developments in the concept of universal jurisdiction and the establishment of international criminal justice mechanisms provide more desirable avenues of justice than exclusion.

The Exclusion Clauses – History and Purpose

As mentioned in the introduction to this paper, there are a number of areas where the principle of exclusion has been articulated in refugee law. However, the primary instrument of binding international law is the *Refugee Convention*. The ‘exclusion clauses’ are found in Article 1F of the treaty,⁸ which states:

⁸ Although the exclusion clauses technically encompass Articles 1 D, E and F of the *Refugee Convention*, the term ‘exclusion clause’ as it is used in this paper refers exclusively to Article 1F. Article 1D excludes individuals from refugee status who are receiving assistance from other organs or agencies of the United Nations. Article 1E excludes those who have been granted rights consistent with those of nationals in the country of refuge.

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.⁹

The first subclause will be the focus of this paper, and is arguably the area in which the jurisprudence is the clearest. The *UNHCR Guidelines on International Protection: Application of the Exclusion Clauses* (hereinafter ‘*Guidelines*’) provide some insight as to why this may be the case, as they indicate that there are various international legal instruments that help define the scope, nature and content of the crimes listed in Article 1F(a), including the *Convention on the Prevention and Punishment of the Crime of Genocide*, the *Geneva Conventions for the Protection of Victims of War*, and the *Rome Statute of the International Criminal Court* to name a few.¹⁰ Thus, the class of individuals that is excludable under Article 1F(a) is relatively clear because of the extensive international law concerning war crimes and crimes against humanity.

The jurisprudence behind Article 1F(b), unlike Article 1F(a), is slightly unclear because of the varied interpretation of the acts that would constitute ‘serious’ or ‘non-political’ crimes. Some have suggested that severity and political nature could be determined by referring to bilateral extradition treaties as between countries.¹¹ However, it has been argued that such an interpretation would undermine the fundamentally *international* nature of the *Refugee*

⁹ *Refugee Convention*, *supra* note 5 (Article 1F).

¹⁰ *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 at para 10 [*Guidelines*].

¹¹ James Hathaway & Colin Harvey. “Framing Refugee Protection in the New World Disorder” (2001) 34 *Cornell Int’l L.J.* 257 at 279, 285.

Convention, which critics allege would be lost if interpretation depended on bilateral treaties.¹² In order to harmonize the understanding of these requirements, UNHCR has suggested that murder, rape and armed robbery constitute clear examples of serious crimes,¹³ and notes that “a serious crime should be considered non-political when other motives (such as personal reasons or gain) are the predominant feature of the specific crime committed.”¹⁴ Ultimately, these crimes remain mere suggestions for interpretation upon which no clear consensus has been achieved, and therefore provide limited guidance.

Finally, the Article 1F(c) provision yields no manageable standard against which asylum seekers can be assessed for refugee status. The *Guidelines* suggest that this clause is “only triggered in extreme circumstances by activity which attacks the very basis of the international community’s coexistence”,¹⁵ and there is some consensus that it should only apply to those “formally entrusted with domestic implementation of UN principles and purposes, [and] not ordinary citizens”.¹⁶ Despite this, the lack of clarity surrounding this clause has led some, such as the Government of the Netherlands, to deem that the clause is inherently vague and thus could never be properly relied upon for the purpose of exclusion from refugee status.¹⁷

The drafters of the *Refugee Convention*, according to the *travaux préparatoires*, included the Article 1F exclusion clauses for two primary reasons. First, it was said that refugee status had to be protected from abuse by preventing ‘undeserving’ cases from receiving protection.¹⁸ In other words, the drafters believed that because of the fundamentally humanitarian nature of

¹² Ben Saul, “Exclusion of Suspected Terrorists from Asylum: Trends in International and European Refugee Law” (July 2004). Institute for International Integration Studies Discussion Paper No. 26.

¹³ *Guidelines*, *supra* note 10 at para. 14.

¹⁴ *Ibid* at para. 15.

¹⁵ *Ibid*. at para. 17.

¹⁶ Hathaway & Harvey, *supra* note 11 at 267.

¹⁷ *Ibid*. at 271.

¹⁸ Geoff Gilbert, “Current Issues in the Application of the Exclusion Clauses” in Erika Feller, Volker Turk and Frances Nicholson, eds., *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003) 425 at 427-428.

asylum, it would undermine the credibility of the refugee system if morally culpable individuals were able to benefit from protection. Secondly, the drafters were seriously concerned that refugee status could lead to impunity for war crimes, an apprehension underscored by their recent experiences with Nazi Germany during World War II.¹⁹ This is illustrated by the fact that earlier drafts of the exclusion clauses contained explicit reference to the International Military Tribunal at Nuremberg.²⁰ While these rationales may have been sound at the time of drafting, the remainder of this paper seeks to demonstrate that the contemporary state of international law renders these clauses largely unhelpful and generally problematic, and therefore in need of reform.

Maturation of International Human Rights Law

Since the *Refugee Convention* entered into force, there have been a number of developments in international human rights law that complicate the application of the exclusion clauses. Some of the more recently concluded treaties have created conflicts of international law, defined as situations where the fulfillment of one treaty obligation causes the violation of another. In this section, two examples will illustrate this point: the *Convention on the Rights of the Child* and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (hereinafter “*Convention Against Torture*”).

¹⁹ *Ibid.* at 428.

²⁰ Karen Musalo *et. al*, *Refugee Law and Policy: a Comparative and International Approach*, 2d ed. (Durham, NC: Carolina Academic Press, 2002) at 700.

Rights of the Child

The *Convention on the Rights of the Child* entered into force on September 2, 1990 and is an instrument of binding international law.²¹ It has nearly reached universal acceptance among members of the United Nations, with only two states failing to complete the ratification process: Somalia and the United States.²² As such, it is the most widely and rapidly ratified human rights treaty in history.²³ Implementation of the treaty is monitored by the United Nations Committee on the Rights of the Child, a body of independent experts responsible for overseeing the practice of states parties and reporting findings to the General Assembly of the United Nations.²⁴

Article 1 of the *Convention on the Rights of the Child* defines a ‘child’ as a person under the age of 18. One of the most salient provisions of the treaty is Article 3(1), which states:

In all actions concerning children, whether undertaken by the public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration [emphasis added].²⁵

There are two optional protocols that accompany the *Convention on the Rights of the Child*: the *Optional Protocol on the Involvement of Children in Armed Conflict* and the *Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography*. Implementation of these protocols is also overseen by the United Nations Committee on the Rights of the Child. Thus, it can be said that international human rights regime, specifically as it relates to children, has developed significantly since the conclusion of the *Refugee Convention*. Unfortunately, none of

²¹ *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3, Can. T.S. 1992 No. 3.

²² UNICEF, *Convention on the Rights of the Child – Frequently Asked Questions*, online: UNICEF <http://www.unicef.org/crc/index_30229.html>.

²³ *Ibid.*

²⁴ Office of the United Nations High Commissioner for Human Rights, *Committee on the Rights of the Child – Monitoring Children’s Rights*, online: Office of the United Nations High Commissioner for Human Rights <<http://www2.ohchr.org/english/bodies/crc/>>.

²⁵ *Convention on the Rights of the Child*, *supra* note 21 (Article 3(1)).

these (relatively) modern instruments concerning childrens' rights addressed the issue of child asylum seekers in detail.²⁶

Turning to the exclusion clauses of the *Refugee Convention*, it should be noted that these provisions do not distinguish between adult and minor asylum seekers. UNHCR has recognized this in its *Guidelines*, which specifically states that “the exclusion clauses apply in principle to minors”.²⁷ Moreover, refugee scholars have noted that this is not simply a theoretical possibility; van Krieken notes, for example, that “[c]hildren under eighteen can and have been excluded in special cases” [emphasis added].²⁸ Others have remarked that this oversight was merely a result of the drafters' inability to perceive the exclusion clauses as applicable to children. Happold, for example, notes:

The Refugee Convention was agreed with the Second World War fresh in the drafters' minds. The participation of children in armed conflicts was not a problem, or, at least, was not seen as one....Where children had participated in hostilities it was as irregulars—partisans or resisters.²⁹

While this oversight may have been unimportant at the time that the *Refugee Convention* was being negotiated, the increasing participation of children in excludable acts (by child soldiers, for example) renders the failure to distinguish minors from adults highly problematic. A 2001 report of the Coalition to Stop the Use of Child Soldiers declared that, worldwide, approximately 300,000 children serve with government or rebel forces at any given time.³⁰ In

²⁶ Article 22 of the *Convention on the Rights of the Child* does mention child asylum seekers, but simply states that they should be treated in accordance with applicable international laws and customs. The *Optional Protocol on the Involvement of Children in Armed Conflict* makes no mention of child asylum seekers.

²⁷ *Guidelines*, *supra* note 10 at para. 28.

²⁸ P.J. van Krieken, ed., *Refugee Law in Context: The Exclusion Clause* (The Hague: Kluwer Law International, 1999) at 22.

²⁹ Matthew Happold, “Excluding Children from Refugee Status: Child Soldiers and Article 1F of the Refugee Convention” (2002) 17:6 *Am. U. Int'l L. Rev.* 1131 at 1136.

³⁰ Coalition to Stop the Use of Child Soldiers, *Global Report on Child Soldiers* (London, 2001).

performance of military service, children are frequently susceptible to committing excludable offences under Article 1F(a) of the *Refugee Convention*.³¹

The provisions of the *Convention on the Rights of the Child* and the *Refugee Convention* present a conflict of law for states parties to these conventions, both of which boast near-universal ratification.³² In cases where a child asylum seeker has committed an act for which he or she could be excluded from refugee protection, the country of asylum is faced with the following dilemma: either grant refugee status in contravention of the *Refugee Convention*, or exclude the child from protection in violation of the *Convention of the Rights of the Child*. Conferring refugee status on the child violates a strict interpretation of the *Refugee Convention*, which is written in mandatory language: it states that protection “shall not apply to any person [meeting the criteria enumerated in Article 1F]” [emphasis added]. This interpretation is supported by consideration of the provision’s drafting history and the *travaux préparatoires*.³³ Conversely, it would be rare, if ever, that the exclusion of a child from refugee protection would be in his or her ‘best interest’,³⁴ violating the guiding principle of the *Convention on the Rights of the Child*. The provisions of these treaties are therefore logically incoherent, and present a conflict of international law for those states that are party to both instruments.

To circumvent this conflict, some scholars have relied upon Article 30 of the *1969 Vienna Convention of the Law of Treaties* (hereinafter “*Vienna Convention*”), which stipulates

³¹ See generally, P.W. Singer, *Children at War* (Los Angeles: University of California Press, 2006).

³² As was mentioned above, the *Convention on the Rights of the Child* has been ratified by almost all members of the United Nations (192 countries as of November 2005). See UNICEF, *Convention on the Rights of the Child – Frequently Asked Questions*, online: UNICEF <http://www.unicef.org/crc/index_30229.html>. The *Refugee Convention* is also widely ratified; as of October 1, 2008, there were 144 states parties to the *Refugee Convention*, its *Optional Protocol*, or both. See UNHCR, *States Parties to the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, online: UNHCR <<http://www.unhcr.org/3b73b0d63.html>>.

³³ Happold, *supra* note 29 at 1134-35. The US draft proposal of the *Refugee Convention* permitted state discretion over the use of the exclusion clauses, but the French delegation submitted an amendment that insisted on mandatory exclusion of war criminals which was later adopted by the drafting committee.

³⁴ European Council on Refugees and Exiles, *Position on Exclusion from Refugee Status* (London, 2004) at 281.

that successive treaties modify prior treaties.³⁵ This argument would suggest that, following the rule of *lex posterior*, the *Convention on the Rights of the Child* should modify the exclusion provisions of the *Refugee Convention*, making the exclusion of children on the grounds of Article 1F illegal. However, it should be recalled that this rule of interpretation only applies where there is significant overlap between the treaties. The overlap between the *Refugee Convention* and the *Convention on the Rights of the Child* is minimal at best, therefore is not likely to qualify under Article 30 of the *Vienna Convention*.³⁶

Moreover, such an interpretation would likely run contrary to Article 31 of the *Vienna Convention*, which specifically calls for interpretation “in good faith in accordance with the ordinary meaning to be given to terms of the treaty in their context and in light of its object and purpose”.³⁷ Although ‘reading in’ an exception for children into Article 1F(a) of the *Refugee Convention* would be desirable for reasons of public policy, it would constitute a disingenuous application of the rules of statutory interpretation of international treaties.

The fact that this conflict cannot be resolved by interpretative instruments and techniques suggests that some revision of this issue is necessary. While the exclusion of children may have historically considered unimportant or irrelevant, the ratification of instruments like the *Convention on the Rights of the Child* combined with the prevalent use of child soldiers suggests that this is no longer the case. The exclusion clauses of the *Refugee Convention* therefore remain an obstacle to ensuring appropriate protection of child asylum seekers, and should be reconsidered.

³⁵ *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331, Can. T.S. 1980 No. 37 [*Vienna Convention*] (Article 30).

³⁶ Michael Gallagher, “Soldier Boy Bad: Child Soldiers, Culture and Bars to Asylum” (2002) 13:3 Int’l J. of Refugee Law 310 at 332.

³⁷ *Vienna Convention*, *supra* note 34 (Article 31).

Prohibition Against Torture and Refoulement

Another area of international human rights law that has developed significantly since the conclusion of the *Refugee Convention* is the prohibition against torture. Today, the prohibition is generally agreed among international legal scholars to be a rule of customary international law that has achieved the status of a *jus cogens* norm.³⁸ More recently, the prohibition has been codified in treaty law following the entry into force of the *Convention Against Torture* on June 26, 1987.³⁹ Article 3(1) of the instrument discusses a prohibition against refoulement to torture:

No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.⁴⁰

Similar to the *Convention on the Rights of the Child*, the *Convention Against Torture* is overseen by the United Nations Committee Against Torture, a group of 10 independent experts that are charged with monitoring implementation of the treaty and investigating individual claims of torture.⁴¹ The *Convention Against Torture* has also been accompanied by an Optional Protocol, which entered into force on June 22, 2006.⁴² This Optional Protocol subjects states parties to regular visits by international experts to ensure that torture is not occurring in their territories. These developments indicate that the rules surrounding the prohibition of torture in both treaty and customary international law have expanded and crystallized since the signing of the *Refugee Convention*, and now require a complete prohibition on the use of torture.

³⁸ The American Law Institute, *Restatement of the Law, Third, Foreign Relations Law of the United States* (St. Paul, Minn.: American Law Institute Publishers, 1987) at para. 102.

³⁹ *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 23 August 1985, 1465 U.N.T.S. 85, Can. T.S. 1987 No. 36 [*Convention Against Torture*] (Article 3(1)).

⁴⁰ *Ibid.*

⁴¹ Office of the United Nations High Commissioner for Human Rights, *States Committee Against Torture – Monitoring the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, online: Office of the United Nations High Commissioner for Human Rights <<http://www2.ohchr.org/english/bodies/cat/index.htm>>.

⁴² *Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 18 December 2002, A/RES/57/199.

Turning to the *Refugee Convention*, it can be said that the drafters of the treaty wanted to ensure that refugees would not be returned to their countries of origin should they risk being harmed. This apprehension was reflected in Article 33(1) of the *Refugee Convention*, which states:

No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion [emphasis added].⁴³

Although the *Refugee Convention* discusses danger to “life or freedom” when discussing refoulement (as opposed to more direct language prohibiting torture itself), there is a general consensus among refugee scholars that this provision includes expulsion or return to torture.⁴⁴ At first glance, Article 33(1) may appear to be consistent with the contemporary developments in international norms surrounding the prohibition against torture. However, a deeper legal analysis reveals that this is not the case.

First, it should be noted that Article 33(2) contains a provision that allows an exception for criminality. In other words, it does not protect those who have been convicted of a “particularly serious crime...[so as to] constitute a danger to the community [in the country of asylum]”.⁴⁵ The class of individuals falling into this category is therefore unable to seek protection from the non-refoulement provision of the *Refugee Convention*.

Secondly, and perhaps more importantly, it should be noted that the Article 33 provision applies exclusively to those who are deemed to be refugees according to the provisions in Article 1. Thus, any asylum seeker who is unsuccessful in his or her claim for refugee status cannot rely upon the non-refoulement provision, including those who have been deemed ‘excluded’ under

⁴³ *Convention Against Torture*, *supra* note 39 (Article 33).

⁴⁴ Guy Goodwin-Gill & Jane McAdam, *The Refugee in International Law*, 3d ed. (Oxford: Oxford University Press, 2007) at 345-346.

⁴⁵ *Refugee Convention*, *supra* note 5 (Article 33(2)).

Article 1F. State practice has confirmed this interpretation of “exclusion before inclusion”; for example, the Canadian Federal Court of Appeal has determined that there is no need to consider the substantive merits of a refugee claim if the asylum seeker is excludable under Article 1F,⁴⁶ and a significant number of other countries follow this approach.⁴⁷ While UNHCR has supported the universal application of the non-refoulement clause, including for those unsuccessful in their asylum claims, this does not appear to be a legal obligation required by the *Refugee Convention*.⁴⁸ Thus, an asylum seeker that has been excluded from protection under Article 1F is forced to rely upon other human rights instruments if he or she faces the possibility of torture upon return to the country of origin.

Unlike the *Convention on the Rights of the Child*, rules of interpretation may be able to better guide the interpretation of the *Refugee Convention* and the *Convention Against Torture*. For example, following the rule of *lex posterior*, Article 3 of the *Convention Against Torture*, which prohibits the refoulement of ‘any person’ would trump Article 33 of the *Refugee Convention*, which only applies to ‘refugees’. Thus, the failed (or excluded) asylum seeker would be able to rely upon the *Convention Against Torture* to prevent deportation to torture.

It would be erroneous, however, to believe that the *Convention Against Torture* provides tangible benefits for all excluded asylum seekers. For example, it does not provide any assistance for those who might be excluded from refugee status in countries that are not states parties to the *Convention Against Torture*, including several countries in Africa, the Middle East and South Asia.⁴⁹ Moreover, the *Convention Against Torture* applies only to those facing torture

⁴⁶ *Gonzalez v. Canada (Minister of Employment and Immigration)*, [1994] 3 F.C. 646.

⁴⁷ Gilbert, *supra* note 18 at 428-429.

⁴⁸ EXCOM General Conclusion on International Protection, No. 81 (XLVIII) 1997.

⁴⁹ These countries include Angola, the Central African Republic, Iran, Papua New Guinea, Suriname, Tanzania, and Zimbabwe. These countries have ratified the *Refugee Convention* or the 1967 *Optional Protocol Relating to the Status of Refugees*, but have not ratified the *Convention Against Torture*.

at the hands of state agents or by state acquiescence.⁵⁰ Refugees, on the other hand, may (and often do) face persecution by non-state actors. Thus, a refugee that faces persecution and torture by non-state actors, and who was excluded from refugee status under Article 1F, would not be able to avail himself or herself of protection under the *Convention Against Torture*.

This discussion serves to indicate that, once again, the exclusion provisions render the *Refugee Convention* problematic on the backdrop of contemporary international law. During the drafting of the *Refugee Convention*, concern about deportation extended only to those who were deemed to be refugees. Today, the prohibition against torture is said to be a norm of international law, and yet the exclusion provisions of the *Refugee Convention* continue to create a legal atmosphere where failed asylum seekers may face deportation to torture. These developments support the need to revisit the exclusion provisions so that asylum seekers are not forced to rely upon treaties like the *Convention Against Torture*, which may not adequately address their legal vulnerabilities.

Maturation of International Criminal Law

Another area in which international law has progressed since the adoption of the *Refugee Convention* is in international criminal law. Two developments have significantly improved the prospects for prosecution of international crimes which more completely deal with the issue of impunity over war crimes: the exercise of universal jurisdiction, and the establishment of international criminal courts and tribunals.

In order to comprehend why ‘impunity’ and ‘refugee status’ are not diametrically opposed, it is important to first clarify what refugee status does, and more importantly does not,

⁵⁰ Chris Ingelse, *The UN Committee Against Torture: An Assessment* (The Hague: Kluwer Law International, 2001) at 210.

entail. The conflation of these terms may lead to a misunderstanding of the avenues that are available to deal with asylum seekers who may have committed crimes excludable under Article 1F(a) of the *Refugee Convention*.

The rights and protections available to asylum are outlined in the *Refugee Convention*. They include, to mention a few, access to housing, public education, and public relief (welfare).⁵¹ However, there is no provision that precludes refugees from being prosecuted for crimes; for instance, the Chapter II provisions of the *Refugee Convention* indicate that the juridical status of a refugee is largely the same as that of nationals of the country providing protection.⁵² Therefore, while refugees have ‘access to courts’ in their countries of asylum, they may also be brought in front of courts. As long as the country of asylum can make a persuasive claim to exercise jurisdiction over the crime, prosecution is possible.

In short, refugee status provides no immunity for past commission of serious crimes. This having been clarified, it is possible to explore the two areas of international criminal law that provide increased prospects for the prosecution of refugee war criminals: universal jurisdiction and international criminal tribunals.

Universal Jurisdiction

The first area, universal jurisdiction, is admittedly not as developed as other theories by which states may claim jurisdiction in international law. That said, universal jurisdiction has been invoked with increasing frequency and success following the negotiation of the *Refugee Convention*. As the following examples will illustrate, this is especially true with respect to serious international crimes such as those mentioned in Article 1F(a) of the *Refugee Convention*.

⁵¹ *Refugee Convention*, *supra* note 5 (Articles 21-23).

⁵² *Ibid.* (Articles 12-16).

Perhaps the most famous exercise of universal jurisdiction was the trial of Nazi war criminal Adolf Eichmann, who was prosecuted by Israel in 1961 for his role in the Holocaust.⁵³

When considering the matter, the court stated:

The abhorrent crimes defined in this Law [under which Eichmann is charged] are crimes not under Israeli law alone. These crimes which offend the whole of mankind and shocked the conscience of nations are grave offences against the law of nations itself (“*delicta juris gentium*”). [I]n the absence of an International Court, the international law is in need of the judicial and legislative authorities of every country, to give effect to its penal injunctions and to bring criminals to trial.⁵⁴

Similarly, in a decision rendered by the British House of Lords, it was held that Chilean dictator Augusto Pinochet should be extradited pursuant to an arrest warrant issued by Spanish magistrate Balthasar Garzón.⁵⁵ The charges were for crimes of genocide, terrorism and torture committed in Chile, with Spain exercising jurisdiction based on the principle of universality. Had it not been for the intervention of the British Home Secretary Jack Straw, Pinochet would have likely faced trial in Spain.⁵⁶ Like the Eichmann case, the Spanish extradition request had nothing to do with domestic war crimes legislation, but was rather based on the international legal interest *erga omnes* to prosecute war criminals.⁵⁷

However, to resolve lingering unclarity concerning the dubious nature of universal jurisdiction in international law, many countries have passed legislation granting universal jurisdiction over war criminals in domestic courts. For example, in 1993, Belgium passed a law

⁵³ *A.G. Israel v. Eichman* (1961), 36 I.L.R. 5 (Dist. Ct. Jerusalem).

⁵⁴ *Ibid.*

⁵⁵ *Regina v. Bow Street Magistrate, Ex parte Pinochet*, [1999] W.L.R. 827 (H.L.).

⁵⁶ British Broadcasting Corporation (BBC). “Pinochet ‘unfit to face trial’” *BBC News* (12 January 2000), online: <http://news.bbc.co.uk/2/hi/uk_news/599526.stm>.

⁵⁷ Peter Malanczuk, ed., *Akehurst’s Modern Introduction to International Law*, 7th ed. (New York: Routledge, 1997) at 58-60.

giving its courts unrestrained jurisdiction over serious international crimes.⁵⁸ In 2009, pursuant to the *Crimes Against Humanity and War Crimes Act*,⁵⁹ Canada convicted Desire Munyaneza of genocide, crimes against humanity and war crimes for his role in the 1994 Rwanda genocide.⁶⁰ In fact, as of 2008, 37 countries have conducted over 10,000 domestic trials for international crimes in the past 15 years.⁶¹ Therefore, it is readily apparent that universal jurisdiction is becoming more widely accepted and utilized in international law, virtually all of which has occurred after the conclusion of the *Refugee Convention*.

While universal jurisdiction has been increasingly used to prosecute those accused of war crimes and crimes against humanity, the practice is less frequently applied in the refugee context. Because of the high costs and evidentiary standards of criminal prosecution, suspect asylum seekers are more frequently dealt with using immigration techniques rather than prosecution for war crimes or crimes against humanity. Such techniques include both exclusion under Article 1F(a), as well as criminal prosecution for immigration fraud leading to denaturalization and/or deportation.⁶² While immigration measures can successfully exclude an asylum seeker from achieving refugee status, the criminal activity for which the individual was excluded remains unaddressed. An important exception to this practice is the Dutch approach, which targets three refugee exclusion cases annually for domestic criminal prosecution of war crimes or crimes against humanity.⁶³

⁵⁸ John Currie *et al.*, *International Law: Doctrine, Practice and Theory* (Toronto: Irwin Law Inc., 2007) at 466. Although jurisdiction under this law was originally unrestrained, some restrictive amendments were passed in 2003 which significantly limited its scope of application.

⁵⁹ *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24.

⁶⁰ *Munyaneza c. R.*, 2009 QCCA 2326.

⁶¹ Joseph Rikhof, "Fewer Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Impunity" (2009) 20:1 Criminal Law Forum 51.

⁶² Department of Justice Canada, *Crimes Against Humanity and War Crimes Program: Summative Evaluation – Final Report* (Ottawa: Office of Strategic Planning and Performance Management, October 2008) at 31-45.

⁶³ *Ibid.*

It is clear, therefore, that universal jurisdiction is an evolving avenue for the prosecution of the crimes enumerated in Article 1F(a) of the *Refugee Convention*. It provides for a more comprehensive exercise of justice than the practice of exclusion, as the ‘active’ step of prosecuting war criminals is arguably a better alternative in the fight against impunity than the ‘passive’ decision to simply deny refugee status. Moreover, the mere denial of refugee status to war criminals does not fulfill the principle of *aut dedere aut judicare*, which holds that criminals in foreign jurisdictions must be either extradited or prosecuted.

A good example of the approach advocated here is the case of *Prosecutor v. Habibullah J.* In that case, the accused, who was the head of a department in the Afghan military intelligence service (*KhAD-e Nezami*) sought asylum in the Netherlands and was granted refugee status in 1996.⁶⁴ However, following subsequent government investigations, a criminal investigation was launched under Articles 8 and 9 of the *Wartime Offences Act*, a Dutch law that concerns violations of the laws and customs of war.⁶⁵ He was ultimately convicted and sentenced to 9 years imprisonment.⁶⁶

Having recognized that universal jurisdiction provides a useful, but underutilized avenue by which to process asylum-seekers accused of committing serious war crimes, it is possible to consider how the international criminal justice system may assist with the prosecution of asylum seeking war criminals.

⁶⁴ Erwin Van Der Borght, “Prosecution of International Crimes in the Netherlands: An Analysis of Recent Case Law” (2007) 18:1 Criminal Law Forum 87 at 119.

⁶⁵ Van Der Borght, *supra* note 63 at 120.

⁶⁶ *Ibid.*

International Criminal Courts and Tribunals

At the time that the *Refugee Convention* was being negotiated, the international community had recently witnessed the prosecution of war criminals at the International Military Tribunal at Nuremberg and the International Military Tribunal for the Far-East (Tokyo). While these events signaled the beginning of truly international prosecution of criminal acts, international criminal law has developed significantly since that time. The world has since witnessed the creation of the International Criminal Tribunals for the Former Yugoslavia and Rwanda. Shortly thereafter, the International Criminal Court (ICC) was established on July 17, 1998, and by April 2002 sixty countries had signed and ratified the *Rome Statute of the International Criminal Court* [hereinafter '*Rome Statute*'], bringing it into force.⁶⁷

As was mentioned above, concerns about impunity (especially for war crimes and crimes against humanity) were a central force behind the insertion of the exclusion clauses into the *Refugee Convention*. At the time that the *Refugee Convention* was concluded, no institutional judicial mechanism had jurisdiction over serious international crimes, and hence war crimes and crimes against humanity had been dealt with on an *ad-hoc* basis. Considering this historical context, the drafters of the *Refugee Convention* were more than justified in their concerns about ensuring responsibility for serious international crimes. With limited instruments and institutions at their disposals, it is understandable why the drafters chose to avail these legitimate concerns by incorporating the exclusion provisions.

However, this is no longer the case. A comparison of the *Rome Statute* and the *Refugee Convention* Article 1F(a) shows that the ICC may exercise jurisdiction over all of the crimes contemplated by the *Refugee Convention*, and even goes further to include the crime of

⁶⁷ John Moore and Jerry Pubantz, *The New United Nations: International Organizations in the 21st Century* (Upper Saddle River: Pearson Prentice Hall, 2006) at 244-245.

genocide.⁶⁸ With the existence of this new forum of justice, it appears that the original motivation for the Article 1F(a) is rendered moot. As was mentioned above, nothing in international law, and specifically in the *Rome Statute*, precludes a convention refugee from being brought before the ICC. The scope of the court's jurisdiction is discussed in Article 17(1) of the *Rome Statute*, which states:

Having regard to paragraph 10 of the Preamble and Article 1, the Court shall determine that a case is inadmissible where:

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
- (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
- (d) The case is not of sufficient gravity to justify further action by the Court.⁶⁹

Considering that Article 17 gives the ICC such broad jurisdiction over serious international crimes, the relevance of the Article 1F(a) exclusion clause comes into serious disrepute. Similar to the argument mentioned above, the 'active' step of referring suspected war criminals to the ICC is a greater measure against impunity than simply denying refugee status. It is also a failure to observe the principle of *aut dedere aut judicare*, which is obligatory for states parties to the *Rome Statute*.⁷⁰

⁶⁸ *Rome Statute of the International Criminal Court*, 17 July 1998, Can T.S. 2002 No. 13 [*Rome Statute*] (Article 6).

⁶⁹ *Ibid.*, Article 17(1).

⁷⁰ Joan Fitzpatrick, "The Post-Exclusion Phase: Extradition, Prosecution and Expulsion" (2000) 12:1 Int'l J. of Refugee Law 272 at 280-281.

Although the discourse above is based specifically on the ICC as an institutional judicial mechanism, it should also be noted that many other courts tribunals are charged with prosecuting the same category of crimes contemplated in Article 1F(a) of the *Refugee Convention*. These include the International Criminal Tribunal for Rwanda,⁷¹ the International Criminal Tribunal for the Former Yugoslavia,⁷² the Special Court for Sierra Leone,⁷³ and the Extraordinary Chambers in the Courts of Cambodia.⁷⁴ These courts could also play a role in prosecuting war crimes and crimes against humanity that are committed by asylum seekers.

In conclusion, it can be said that the Article 1F(a) provision of the *Refugee Convention in particular* must be revisited. Its necessity in the contemporary international legal context is questionable given the rise of universal jurisdiction and the prevalence of international tribunals, both of which are arguably more useful in combating refugee impunity.

Conclusion and Recommendations for Reform

This paper has undertaken a comprehensive analysis of the concept of exclusion in international refugee law, focusing particularly on the Article 1F(a) provision which excludes suspected war criminals from refugee protection. By analyzing developments in international treaty law, jurisdiction, and judicial mechanisms, it has been demonstrated that the current regime of exclusion is not only logically incoherent, but it also aims at an imperfect pursuit of justice which simply denies refugee status to those suspected of committing war crimes. While the denial of refugee status means that war criminals may have difficulty in accessing asylum, it

⁷¹ *Statute of the International Criminal Tribunal for Rwanda*, 8 Nov 1994, UN Doc. S/RES/955 (1993) (Articles 1-3).

⁷² *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, 25 May 1993, UN Doc. S/RES/827 (1993) (Articles 1, 3, 4-5).

⁷³ *Statute of the Special Court for Sierra Leone*, 14 August 2000, (Articles 1-2).

⁷⁴ *Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea* (NS/RKM/1004/006) (Articles 1 and 4-5).

leaves the issue of their actual crimes unaddressed. A holistic vision of justice must demand much more, a view that is supported by the evolution of international law that has occurred since the conclusion of the *Refugee Convention*.

This having been said, there is little reason to maintain any adherence to the exclusion clauses of the refugee convention. As has been discussed in this paper, treaty interpretation provides patchwork remedies to the many inconsistencies between the exclusion clauses and other international treaties. Therefore, the most appropriate way forward may be for states parties to consider a second optional protocol to remove the operation of the exclusion clauses from the original treaty. While this may seem like a radical suggestion, it is important to remember that the entire purpose of the 1967 *Optional Protocol Relating to the Status of Refugees* was to remove the temporal and geographic restrictions that exist in the *Refugee Convention*.⁷⁵ Thus, it is within the realm of possibilities that states parties could seek the conclusion of a second optional protocol to further reflect new and important concepts of international criminal justice.

A secondary and complimentary recommendation is to make use of international criminal courts to assist in bringing asylum seekers to account for any alleged war crimes or crimes against humanity. One area for further research might consider how such prosecutions might actually support the jurisprudence of institutions like the ICC; the legitimacy of such an organization might benefit from looking at asylum war crimes cases rather than simply focusing on high stakes and high profile cases.

Finally, countries that have the financial and institutional capacity to prosecute suspicious asylum seekers should continue to exercise universal jurisdiction over these criminals where

possible. Although economic and political considerations of exercising such jurisdiction have not been addressed in this paper, this is an area of future research. This paper has demonstrated that the judicial rationale for exercising such jurisdiction is strong (and continuing to garner support), but ultimately economic and political constraints will need to be overcome before this possibility becomes a reality.

Bibliography

JURISPRUDENCE

A.G. Israel v. Eichman (1961), 36 I.L.R. 5 (Dist. Ct. Jerusalem).

Gonzalez v. Canada (Minister of Employment and Immigration), [1994] 3 F.C. 646.

Munyaneza c. R., 2009 QCCA 2326.

Regina v. Bow Street Magistrate, Ex parte Pinochet, [1999] W.L.R. 827 (H.L.).

LEGISLATION

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 23 August 1985, 1465 U.N.T.S. 85, Can. T.S. 1987 No. 36.

Convention on the Rights of the Child, 20 November 1989, 1577 U.N.T.S. 3, Can. T.S. 1992 No. 3.

Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 137, Can. T.S. 1969 No. 6.

Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24.

Declaration on Territorial Asylum, 14 December 1967, A/RES/2312 (XXII) (Article 1(2)).
Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428 (V).

Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (NS/RKM/1004/006).

Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 18 December 2002, A/RES/57/199.

Organization of African Union Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969, 1001 U.N.T.S. 45.

Principles Concerning Treatment of Refugees, "Bangkok Principles", 31 December 1966, Asian-African Legal Consultative Organization.

Rome Statute of the International Criminal Court, 17 July 1998, Can T.S. 2002 No. 13.

Statute of the International Criminal Tribunal for Rwanda, 8 Nov 1994, UN Doc. S/RES/955 (1993)

Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 25 May 1993, UN Doc. S/RES/827 (1993).

Statute of the Special Court for Sierra Leone, 14 August 2000.

Universal Declaration of Human Rights, GA Res. 217(III), UN GAOR, 3rd Sess., UN Doc. A/810 (1948) 71.

Constitution of the International Refugee Organization, 20 August 1948, 18 U.N.T.S. 283.

Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, Can. T.S. 1980 No. 37.

SECONDARY MATERIALS

British Broadcasting Corporation (BBC). “Pinochet ‘unfit to face trial’” *BBC News* (12 January 2000), online: <http://news.bbc.co.uk/2/hi/uk_news/599526.stm>.

Convention Relating to the Status of Refugees, HCR/GIP/03/05, 4 September 2003.

Coalition to Stop the Use of Child Soldiers, *Global Report on Child Soldiers* (London, 2001).

Currie, John *et al.*, *International Law: Doctrine, Practice and Theory* (Toronto: Irwin Law Inc., 2007).

Department of Justice Canada, *Crimes Against Humanity and War Crimes Program: Summative Evaluation – Final Report* (Ottawa: Office of Strategic Planning and Performance Management, October 2008).

European Council on Refugees and Exiles, *Position on Exclusion from Refugee Status* (London, 2004).

EXCOM General Conclusion on International Protection, No. 81 (XLVIII) 1997.

Ingelse, Chris. *The UN Committee Against Torture: An Assessment* (The Hague: Kluwer Law International, 2001).

Fitzpatrick, Joan. “The Post-Exclusion Phase: Extradition, Prosecution and Expulsion” (2000) 12:1 Int’l J. of Refugee Law 272.

Goodwin-Gill, Guy & Jane McAdam, *The Refugee in International Law*, 3d ed. (Oxford: Oxford University Press, 2007).

- 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.
- Gallagher, Michael. “Soldier Boy Bad: Child Soldiers, Culture and Bars to Asylum” (2002) 13:3 Int’l J. of Refugee Law 310.
- Gilbert, Geoff. “Current Issues in the Application of the Exclusion Clauses” in Erika Feller, Volker Turk and Frances Nicholson, eds., *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003).
- Hathaway, James & Colin Harvey. “Framing Refugee Protection in the New World Disorder” (2001) 34 Cornell Int’l L.J. 257.
- Happold, Matthew. “Excluding Children from Refugee Status: Child Soldiers and Article 1F of the Refugee Convention” (2002) 17:6 Am. U. Int’l L. Rev. 1131.
- Malanczuk, Peter, ed., *Akehurst’s Modern Introduction to International Law*, 7th ed. (New York: Routledge, 1997).
- Moore, John and Jerry Pubantz. *The New United Nations: International Organizations in the 21st Century* (Upper Saddle River: Pearson Prentice Hall, 2006).
- Musalo, Karen et. al, *Refugee Law and Policy: a Comparative and International Approach*, 2d ed. (Durham, NC: Carolina Academic Press, 2002).
- Office of the United Nations High Commissioner for Human Rights, *Committee on the Rights of the Child – Monitoring Children’s Rights*, online: Office of the United Nations High Commissioner for Human Rights <<http://www2.ohchr.org/english/bodies/crc/>>.
- Office of the United Nations High Commissioner for Human Rights, *States Committee Against Torture – Monitoring the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, online: Office of the United Nations High Commissioner for Human Rights <<http://www2.ohchr.org/english/bodies/cat/index.htm>>.
- Rikhof, Joseph. “Fewer Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Impunity” (2009) 20:1 Criminal Law Forum 51.
- Saul, Ben. “Exclusion of Suspected Terrorists from Asylum: Trends in International and European Refugee Law” (July 2004). Institute for International Integration Studies Discussion Paper No. 26.
- Singer, P.W. *Children at War* (Los Angeles: University of California Press, 2006).

The American Law Institute, *Restatement of the Law, Third, Foreign Relations Law of the United States* (St. Paul, Minn.: American Law Institute Publishers, 1987).

UNICEF, *Convention on the Rights of the Child – Frequently Asked Questions*, online: UNICEF <http://www.unicef.org/crc/index_30229.html>.

Van Der Borcht, Erwin. “Prosecution of International Crimes in the Netherlands: An Analysis of Recent Case Law” (2007) 18:1 *Criminal Law Forum* 87.

van Krieken, P.J. *Refugee Law in Context: The Exclusion Clause* (The Hague: Kluwer Law International, 1999).