9. Ethics and the exclusion of those who are ‘not deserving’ of Convention refugee status

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There are two different kinds of injustice, the injustice of those who inflict an injury and the injustice of those who do not, when they can, protect others who are being injured.¹

INTRODUCTION

The purpose of the 1951 Convention relating to the Status of Refugees (‘Refugee Convention’) and its 1967 Protocol is to provide those persons who are outside their country of nationality or former habitual residence, if they are stateless, and who have a well founded fear of persecution on one or more of five grounds (that is, race, religion, nationality, political opinion or membership in a particular social group) with international protection.² However, not everyone who meets these criteria is, in fact,

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¹ Marcus Tullius Cicero, ‘On Duty: Book One’ in *Selected Works of Cicero: A New Translation* (Roslyn, NY: Walter J. Black Inc., 1948) 329.

² Convention relating to the Status of Refugees, Geneva, adopted 28 July 1951, entry into force 22 April 1954, 189 UNTS 150 (‘Refugee Convention’), available at http://treaties.un.org/pages/ViewDetailsII.aspx?&src=TREATY&mt_dsg_no=V~2&chapter=5&Temp=mtdsg2&lang=en and Protocol relating to the Status of Refugees, New York, adopted 31 January 1967, entry into force

eligible for Convention refugee status. Persons can be excluded from Convention refugee status for a number of reasons, including whether there are 'serious reasons for considering' that they have committed a crime against peace, a war crime or a crime against humanity; a serious non-political crime outside the country of refuge; or have been guilty of acts contrary to the purposes and principles of the United Nations.³ These are part of the so-called 'exclusion clauses' found in the Refugee Convention that are intended to exclude those persons who are 'not deserving of international protection'.⁴

It is now over 60 years since the Refugee Convention was first negotiated and adopted by states and the Office of the United Nations High Commissioner for Refugees (UNHCR) was established. It would be rather trite to note that in the last nearly two and half generations there have been incredibly dramatic changes in the world and to the international refugee protection regime. Consider, for instance, the role and size of the UNHCR. It has expanded enormously since it was first

4 October 1967, 606 UNTS 267, available at http://treaties.un.org/pages/ViewDetails.aspx?src=UNTS&tabid=2&mtldsg_no=V-5&chapter=5&lang=en. See Art. 1F of the Refugee Convention.

³ See Art. 1F(a), (b) and (c). It is also important to point out that para. 7(d) of the 1950 UNHCR Statute and Art. I(5) of the 1969 Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa require the UNHCR and African Union (AU) member states to deny refugee status to persons who would fall within these same exclusion categories but who would qualify, otherwise, as refugees. Recent contributions to the discussion of the proper application of these provisions include Pia Zambelli, 'Problematic Trends in the Analysis of State Protection and Article 1F(a) Exclusion in Canadian Refugee Law' (2011) 23(2) *International Journal of Refugee Law* 252; Jennifer Bond, 'Excluding Justice: The Dangerous Intersection between Refugee Claims, Criminal Law, and "Guilty" Asylum Seekers' (2012) 24(1) *International Journal of Refugee Law* 37; Satvinder Singh Juss, 'Complicity, Exclusion, and the "Unworthy" in Refugee Law' (2012) 31(3) *Refugee Survey Quarterly* 1; Satvinder Singh Juss, 'Terrorism and the Exclusion of Refugee Status in the UK' (2012) 17(3) *Journal of Conflict and Security Law* 1; Joseph Rikhof, *The Criminal Refugee: The Treatment of Asylum Seekers with a Criminal Background in International and Domestic Law* (Dordrecht: Republic of Letters Publishing, 2012). See also UNHCR, Expert Meeting on Complementarities between International Refugee Law, International Criminal Law and International Human Rights Law, Summary Conclusions, Arusha, Tanzania, 11–13 April 2011.

⁴ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (Geneva: UNHCR, 1992) 33, 35, at para. 140.

established by a United Nations General Assembly Resolution on 14 December 1950, with a limited three-year mandate.⁵ The UNHCR began with a staff of 34 and budget of US\$300,000, and it now has a staff of 7,684 national and international staff and a budget of US\$3.59 billion.⁶ Today, the UNHCR is a permanent UN agency that operates in 126 countries around the world with 135 main locations and 279 sub-offices, often in remote locations.⁷ The Refugee Convention has changed significantly since it was first negotiated and acceded to by states parties. When the Refugee Convention first came into force in 1954 there were only six states parties and today there are 147 states parties.⁸ The geographic and temporal limitations of the Refugee Convention were lifted by the 1967 Protocol relating to the Status of Refugees. These seminal international refugee rights instruments have evolved and developed further through their continuous application and the interpretation by refugee law decision-makers across states, and within the UNHCR for that matter, over the years and with the ever-changing times.⁹ In addition, it is pertinent to point out that international human rights law, upon which international refugee law is based, has evolved into a 'sophisticated system of rights and duties between the individual and the State'.¹⁰

⁵ UNHCR, 'History of the UNHCR, a Global Humanitarian Organization of Humble Origins', available at www.unhcr.org/pages/49c3646cbc.html.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ Marilyn Achiron, 'A Timeless Treaty under Attack' in 'The 50th Anniversary of the 1951 Geneva Convention: The Wall Behind which Refugees Can Shelter' (2001) 2(123) *Refugees* 14, available at www.unhcr.org/3b5e90ea0.html. As of 1 April 2011, there were 147 states parties to one or both of these international instruments. UNHCR, 'States Parties to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol', available at www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=3b73b0d63&query=Number of State Parties to the 1951 Convention.

⁹ James C. Simeon, 'The 60th Anniversary of the 1951 Convention Relating to the Status of Refugees' (2011) 71 *Refugee Update* (Summer) 3.

¹⁰ Jane McAdam has argued persuasively that, 'In the half-century since the Convention's inception, international human rights law has evolved as a sophisticated system of rights and duties between the individual and the State, which has affected traditional notions of State sovereignty and behavior in an unprecedented manner'. *The Refugee Convention as a Rights Blueprint for Persons in Need of International Protection*, UNHCR Policy Development and Evaluation Service, New Issues in Refugee Research Paper No. 125 (July 2006) 1, available at www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=44b7b7162&query=janemcadam. Also found in Jane McAdam, 'The Refugee Convention as a Rights Blueprint for Persons in Need of International

Nevertheless, despite the tremendous changes that have occurred since the Refugee Convention and its 1967 Protocol came in to force, these international instruments have remained the essential humanitarian legal mechanisms used to address the plight of those human beings who are suffering the most vile degradation to their human dignity as persons, and breaches to their most fundamental human rights by the deliberate actions of other persons, organizations, institutions and/or states.¹¹

Bearing the foregoing in mind, this chapter attempts to explore some of the ethical and moral dilemmas¹² of the exclusion clauses, specifically,

Protection' in Jane McAdam (ed.), *Forced Migration, Human Rights and Security* (Oxford: Hart Publishing, 2008) 263.

¹¹ It is worth noting that the Preamble to the Refugee Convention states, 'Expressing the wish that all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States' (emphasis in original). James C. Hathaway notes cogently that 'the Refugee Convention and its Protocol are conceived here not as accords about immigration, or even migration, but as part and parcel of international human rights law. This view is fully in line with the positions adopted by senior courts which have analyzed the object and purpose of the Refugee Convention ... It is no more than a necessary means to a human rights end, that being the preservation of the human dignity of an involuntary migrant when his or her country of origin cannot or will not meet their responsibility. In pith and substance, refugee law is not immigration law at all, but is rather a system for the surrogate or substitute protection of human rights': *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005) 4–5. Jane McAdam has argued further that, 'Though a specialist treaty, the Refugee Convention nevertheless forms part of the corpus of human rights law, both informing and informed by it. Accordingly, with respect to the status it confers on protected persons, the Convention acts as a type of *lex specialis*. It does not seek to displace the *lex generalis* of international human rights law, but rather complements and strengthens its application'. New Issues in Refugee Research Paper No. 125, above note 10, at 4 and in McAdam, above note 10, at 268.

¹² According to *The New Encyclopaedia Britannica* (Macropaedia, 15th edn, Chicago, IL: Encyclopaedia Britannica Inc., 1992) vol. 18, 492, ethics or moral philosophy is that branch of philosophy that deals with normative theory and the application of sets of principles to practical moral problems. Ethics deals with 'the fundamental issues of practical decision making, and its major concerns include *the nature of ultimate value and the standards by which human actions can be judged to be right or wrong*' (emphasis added). From *Oxford Paperback Dictionary* (4th edn, Oxford: Oxford University Press, 1994) 272, 524, 225, it can be discerned that ethical (morally correct, honourable) and/or moral (the principles of what is right and wrong in conduct) dilemmas (a problem or

Article 1F of the Refugee Convention and its 1967 Protocol. It is commonly asserted that those who are excluded from Convention refugee status because there are 'serious reasons for considering' that they have committed a crime against peace, a war crime, or a crime against humanity; a serious non-political crime outside the country of refuge; or are guilty of acts contrary to the purposes and principles of the United Nations, are *not deserving* of international refugee protection. The first ethical consideration addressed here, then, is whether it is appropriate to label anyone as 'not deserving of international refugee protection'?

It has been argued that with the emergence of the modern international human rights system that guarantees fundamental human rights to all, it is no longer appropriate to label some persons as 'deserving of international refugee protection' and others as 'not deserving of international refugee protection'. This is especially so given the fact that different legal standards are applied when deciding whether a refugee claimant ought to be excluded from Convention refugee status who is alleged to have committed a crime against peace, a war crime, or a crime against humanity versus a person who is charged with a serious international criminal offense. Thus, the differing legal standards between international refugee law and international criminal law render this type of labeling of persons as 'not deserving of international refugee protection' highly inappropriate, particularly in those situations where the person has yet to be indicted, tried and found guilty of such detestable and horrific crimes.¹³ Further, aside from the negative moral and ethical connotations

difficult choice) arise when you have a perplexing problem and you are forced to choose between two or more equally undesirable alternatives.

It is interesting to note in this regard what W. Gunther Plaut, in his classic work, *Asylum: A Moral Dilemma* (Westport: Praeger Publishers, 1995) 14, states: 'Moral law is defined in the same source [*Webster's New International Dictionary*] as "a general rule of right living; especially such a rule or group of rules conceived as universal and unchanging and as having the sanction of God's will, of conscience, of man's moral nature, or of natural justice as revealed to human reason". In this study "ethical" is treated as a synonym for moral. Gary E. Rubin (1991, 30) has explained the need to consider the moral implications of immigration and refugee policies: "No matter how dispassionate, objective or scholarly, *all* work in this field *inevitably* rests on moral principles ... It is impossible to address or even frame questions in this field without the guidance of an ethical value system, even if it is an unconscious one."

¹³ Natural justice dictates that the 'presumption of innocence' must prevail in any criminal proceeding. This undoubtedly ranks as a fundamental ethical principle as well.

with respect to 'labeling' persons per se,¹⁴ a fundamental principle of justice and fairness is the presumption of innocence in any criminal proceedings and, accordingly, it is neither proper nor correct, in a technical legal sense, to state that a person is *not deserving* of international refugee protection. Even those who are excluded from Convention refugee status cannot be refoiled or sent back to a country where there would be 'more than a mere possibility' of being persecuted.¹⁵ Non-refoulement is deemed to be *jus cogens* or a peremptory norm in international law and, consequently, no state can send a person back to a country where they could face persecution. The principle of non-refoulement is then the very keystone of the international refugee protection system in the world today.¹⁶

The second ethical question addressed is whether those persons who are excluded from Convention refugee status ought to be prosecuted? This question may not be relevant in those instances where the refugee claimant has been tried, convicted, and has served their penalty for any serious non-political crimes committed prior to their arrival in the country where they are seeking refuge. However, if this is not the case, then it may be appropriate either to extradite the person to stand trial for their crimes or for the state, where the person is seeking asylum, to consider prosecuting the claimant. A criminal prosecution could be pursued only in those instances where it is warranted, that is, where there is sufficient reliable and trustworthy evidence and there are reasonable as well as good grounds for obtaining a conviction.

¹⁴ Roger Zetter, 'More Labels, Fewer Refugees: Remaking the Refugee Label in the Era of Globalization' (2007) 20(2) *Journal of Refugee Studies* 182.

¹⁵ This is the standard of proof of a well founded fear of persecution in Canada. In *Ponniah, Manoharan v MEI* (FCA no. A-345-89), Heald, Hugessen, Desjardins, 16 May 1991, reported as *Ponniah v Canada (Minister of Employment and Immigration)* (1991) 13 Imm. LR (2d) 241 (FCA), Desjardins J (at 245) stated as follows: "'Good grounds" or "reasonable chance" is defined in *Adjei* as occupying the field between upper and lower limits; it is less than a 50 per cent chance (i.e., a probability), but more than a minimal or mere possibility. There is no intermediate ground: what falls between the two limits is "good grounds"'.¹⁶

¹⁶ Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford: Oxford University Press, 2007), where at 354 they assert that 'the general consensus is that it [non-refoulement] has now attained that status [*jus cogens* or a principle of international law]. It encompasses non-refoulement to persecution, based on article 33 of the 1951 Convention, and also to torture or cruel, inhuman or degrading treatment or punishment.'

The third ethical question raised is whether prosecuting, either domestically or internationally, those who have been excluded under Article 1F is essential for ensuring that international human rights, and by extension international refugee rights, are truly protected under the rule of law? The answer to this third question must be surely an emphatic 'yes'. It is self-evident that by not doing so, when it is appropriate and warranted, would be to allow impunity for those who are serious human rights abusers and the persecutors of others. It also ensures that those persons who commit serious human right violations are held to account for their actions in severely abusing other people's human rights and/or their human dignity as a person.

These three ethical questions are pertinent or relevant to how the Refugee Convention and its 1967 Protocol are applied and interpreted by refugee law decision-makers, at all levels in the refugee status determination process, among states parties to these international refugee rights instruments, and to the UNHCR and, specifically, to the way in which the UNHCR conducts its own refugee status determination under its Statute.¹⁷

It has been noted that with the end of the Cold War the relevance of international humanitarianism has come to the fore along with a resurgence of interest in 'ethical questions', or what some have referred to as 'new normative approaches' to international and legal theory. For instance, in this regard, Peter Nyers has observed:

Until quite recently, to speak of 'ethics' and 'international politics' as anything other than two separate and distinct fields of inquiry (and practice) would have been interpreted as proof of a profound, perhaps even dangerous, naiveté to the 'realities' of world politics. Questions of ethical responsibility in the international realm were seen as altogether incommensurable with the doctrine of political realism that dominated discussions of world politics during the cold war. At the time, any perspective that did not interpret world politics as the pursuit of power politics by amoral, self-interested, and utility-seeking sovereign states acting in a dangerous and anarchic realm was effectively marginalized or ignored.¹⁸

¹⁷ UNHCR, *Procedural Standards for Refugee Status Determination Under UNHCR's Mandate*, available at www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=4317223c9&query=RSD.

¹⁸ Peter Nyers, *Rethinking Refugees: Beyond States of Emergency* (New York: Routledge, Taylor and Francis Group, 2006) 26. Gil Loescher argued nearly two decades ago that, 'The time has come to move beyond charity and to broaden the scope of the approach to the refugee problem. International cooperation to resolve the humanitarian and political problems of refugees and

The relevance of ethical concerns to matters of law and justice are most assuredly axiomatic or self-evident on their face. Nevertheless, the import of bringing ethical questions of significant national and international public policy, administration and law concerns to the fore at this time is not only propitious, but necessary for the advancement of the broader vision that underscores the basis of the present international refugee protection regime and the modern international human rights system on which it is based, as well as, indeed, the very principles and purposes for which the United Nations was originally conceived and created to achieve.

An examination of these three ethical questions relevant to the exclusion of certain persons from Convention and/or mandate refugee status leads to the conclusion that it is no longer, if it ever was, appropriate to label anyone as being *undeserving* of international protection. Nevertheless, exclusion from Convention and/or mandate refugee status is still appropriate for those individuals who severely abuse other people's human dignity and fundamental human rights and, in those instances, where the evidence clearly warrants it, these people ought to be prosecuted for their commission and/or involvement in these vile international and/or domestic crimes. Finally, the prosecution of these individuals is not only necessary to ensure that impunity no longer prevails when there is a commission of gross violations of individual and collective human rights and/or severe offenses to people's human dignity, whether specifically and/or generally, but is absolutely crucial for the preservation and the advancement of our modern international human rights system and the international refugee protection regime, which is an integral and vital part of our present day international human rights system; that is, in fact, the very basis for achieving and maintaining

more active diplomatic intervention by the UN and regional organizations is in the long-term interests of all governments. Stability and growth in all parts of the world depend on controlling the disruptive forced migrations. There have never been easy answers to the plight of the world's refugees. But given the inescapable reality that the global refugee crisis is here to stay, the time is undoubtedly right for a new, comprehensive and humane approach. The world has responded with imagination and effectiveness before; it can do so again.' *Beyond Charity: International Cooperation and the Global Refugee Crisis* (Oxford: Oxford University Press, 1993) 205. This chapter takes the position that the prosecution of those who persecute others and/or deny their human dignity as persons is a small and necessary step in trying to address the root causes of the 'global refugee crisis' as well as satisfying the dictates of justice that are essential for the protection of everyone's human rights under the rule of law.

international peace and security within a growing sphere of greater prosperity, freedom and justice for all within the global community.

UNITED NATIONS AND ITS CHARTER

It is relevant to note how many people lost their lives as a result of two World Wars that took place about 20 years apart. The First World War took place from 1914 to 1918, and the Second World War took place from 1939 to 1945.¹⁹ While estimates vary widely, some figures indicate that there were some 28 million fatalities in the First World War; this included some 15 million military personnel and 13 million civilians who were killed.²⁰

The Second World War has been called the deadliest war in history and it included the introduction of 'total war' and events involving the mass death of civilians, including the Holocaust, as well as the only use of nuclear weapons in warfare.²¹ The estimates of the number of fatalities that occurred as a result of the Second World War are from 50 million to over 70 million. For instance, Matthew White has estimated that the number of fatalities as a result of the Second World War, between 1939 and 1945, was 66 million people.²²

¹⁹ It should be noted that there is some debate as to when these World Wars actually commenced. This is relevant, of course, in terms of determining the estimates of the number of casualties and fatalities that were a consequence of these wars.

²⁰ Matthew White, 'Source List and Detailed Death Tolls for the Primary Megadeaths of the Twentieth Century', available at <http://necrometrics.com/20c5m.htm>; Matthew White, 'Historical Atlas of the Twentieth Century' in *Necrometrics, Death Tolls Across History* (last updated 25 March 2003), available at <http://users.erols.com/mwhite28/20centry.htm>. See also 'Military and Civilian War Related Deaths Through the Ages', available at www.taphilo.com/history/war-deaths.shtml#wwi; 'Estimated War Dead, World War II', *War Chronicle* (A web archive to honor battle and those who told the tale), available at <http://warchronicle.com/numbers/WWII/deaths.htm>; *World War I Tech*, Modern Marvels Series, Season 10, The History Channel, A&E Television Network (2004), available at <http://ahiv.alexanderstreet.com.ezproxy.library.yorku.ca/View/877637>.

²¹ *The Greatest Conflict*, War Chronicles Series, The History Channel, A&E Television Network (1985), American History in Video, available at <http://ahiv.alexanderstreet.com.ezproxy.library.yorku.ca/View/660675>.

²² White, 'Source List' and 'Historical Atlas of the Twentieth Century', above note 20.

The combined number of military and civilian fatalities as a result of these two World Wars has been estimated at something in the order of 94 million fatalities. This is a staggering loss of human life, not to mention the millions of people who suffered permanent disability and other serious injuries, as well as the suffering and the loss of family members' loved ones, the destruction of property, and in some instances entire cities.

Obviously, the sheer destruction, devastation and havoc that these two World Wars inflicted on humanity, particularly with the advent of 'total war' and modern weapons of mass destruction such as nuclear, chemical and biological weapons, are not only grotesquely repugnant, both ethically and morally, but also rationally incomprehensible conduct for humankind. Indeed, one could say this was the very reason why the United Nations was founded at the end of the Second World War; that is, to bring an end to the cycle of misery that 'total war' entails and the use of weapons of mass destruction.

The Charter of the United Nations was signed on 26 June 1945 in San Francisco, at the conclusion of the United Nations Conference on International Organization, and came into force on 24 October 1945.²³ The Preamble of the Charter states that:

We the Peoples of the United Nations determined:

- to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and
- to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and
- to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and
- to promote social progress and better standards of life in larger freedom ...²⁴

The purpose of the United Nations is, then, to prevent the 'scourge of war', particularly World War and 'total war' that leads inevitably to the annihilation of millions of people. It does so through the protection and advancement of fundamental human rights and the ultimate dignity and worth of persons and people, under international law and through the promotion of social progress to achieve 'a better standard of life in larger freedom'.

²³ 'Introductory Note', United Nations Charter, available at www.un.org/en/documents/charter/intro.shtml.

²⁴ *Ibid.* Preamble.

And, to achieve these ends the United Nations seeks:

- to practice tolerance and live together in peace with one another as good neighbours, and
- to unite our strength to maintain international peace and security, and
- to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and
- to employ international machinery for the promotion of the economic and social advancement of all peoples.²⁵

Accordingly, the practice of tolerance, working together to maintain international peace and security and only using armed forces in the common interest, while using international institutions for the promotion of economic and social advancement for all peoples, are the principal means to these overriding collective goals.

In fact, Chapter 1, 'Purposes and Principles', Article 1 of the Charter of the United Nations states that the purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.²⁶

It is worth emphasizing, then, that the very first explicit purpose and principle of the United Nations is clearly and succinctly, to maintain 'international peace and security' by taking 'effective collective measures for the prevention and removal of any threats to peace', 'the suppression of any acts of aggression or other breaches of the peace', and to bring

²⁵ *Ibid.*

²⁶ *Ibid.* Chapter 1 'Purposes and Principles'.

about 'by peaceful means' 'adjustments and the settlement of international disputes' or situations that might lead to a breach of the peace, 'in conformity with the principles of justice and international law'.

The second explicit purpose and principle of the United Nations is quite simply 'to develop friendly relations among nations' and 'to take other appropriate measures to strengthen universal peace'.

Thus, it would not be overly simplistic or exceedingly commonplace to state that the very *raison d'être* of the United Nations is the maintenance of 'international peace and security' through the strengthening of 'universal peace'.²⁷

UNDERPINNINGS OF THE INTERNATIONAL HUMAN RIGHTS SYSTEM

Indeed, some of the first measures undertaken by the newly formed United Nations were the drafting, negotiation, ratification and the promotion to accession by Member States of international human rights instruments. The most notable of these international instruments was, of course, the 1948 Universal Declaration of Human Rights (UDHR).

The Preamble to the UDHR states, in part, as follows:

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

²⁷ John W. Holmes and Don Page have noted, 'The UN is essentially a network of institutions for multilateral diplomacy rather than a world government, and as such its achievements depend upon the collective strength of its members. That is why it has been unable to resolve such perennial problems as the escalating arms race, regional conflicts in the Middle East, Cambodia and Cyprus, human rights violations in South Africa, the increasing gap between rich and poor and refugees'. *The Canadian Encyclopedia*, available at www.the-canadianencyclopedia.com/articles/united-nations.

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that *human rights should be protected by the rule of law*.²⁸

It is banal to note that the UDHR underscores the significance of human rights, and their promotion and protection, under the rule of law, as the bulwark against war and especially World Wars. The ultimate importance of the inherent dignity of 'the person' and of the equal and inalienable rights of all members of the human family is reinforced throughout this seminal human rights declaration.²⁹

Hence, it can be argued that the foremost purposes of the United Nations is to 'save succeeding generations from the scourge of war' through the creation of an international human rights system that would be protected by the rule of law. What has emerged through the auspices of the United Nations over the last 60 years, then, is a highly sophisticated international human rights system.³⁰ The United Nations Office of

²⁸ Universal Declaration of Human Rights, available at www.un.org/en/documents/udhr/index.shtml (emphasis added). It is worth noting that a Canadian, Prof. John Peter Humphrey, McGill University, drafted the 1948 Universal Declaration of Human Rights. John Peter Humphrey, 'Father of the Modern Human Rights System', available at <http://humphreyhampton.org/biography.php>; 'John Humphrey', available at www.udhr.org/history/Biographies/biojh.htm; 'John Peters Humphrey (1905–1995)', Quebec History, Marianopolis College, available at <http://faculty.marianopolis.edu/c.belanger/quebechistory/bios/johnhumphrey.htm>.

²⁹ UDHR, above note 28.

³⁰ The UNHCR has stated the following: 'But human rights law is constantly evolving, and advances in this field over the past decade including those impacting on the protection of refugees and other persons of concern to UNHCR have been enormous. The case-law of the human rights courts, including the European Court and the Inter-American Court, has undergone extensive development while United Nations human rights supervisory bodies (e.g. the treaty bodies) and regional bodies, such as the African Commission and Inter-American Commission on Human Rights, have developed the content and widened the scope of human rights standards. Increasingly, these standards are being applied to the protection of refugees and other persons of concern to UNHCR – that is, to asylum seekers, returnees, stateless persons, and internally displaced persons. *In fact, it is now acknowledged that international refugee law, international human rights law, and international humanitarian law should be applied in concert to best protect refugees and other persons of concern to UNHCR*' (emphasis added). UNHCR, *Human Rights and Refugee Protection*, Self-Study Module 5 (15 December 2006) vol. 2, 1, available at www.unhcr.org/cgi-bin/texis/vtx/home/opensslPDFViewer.html?docid=45a7ad712&query=thegrowthofhumanrights.

the High Commissioner for Human Rights has listed these international human rights instruments that member states have agreed to respect and to abide by.³¹ The most prominent of these are the International Bill of Rights and the nine core international human rights treaties.

The International Bill of Rights is comprised of the following international instruments:

- Universal Declaration of Human Rights 1948;
- International Covenant on Economic, Social and Cultural Rights 1966;
- International Covenant on Civil and Political Rights 1966;
- Optional Protocol to the International Covenant on Civil and Political Rights 1966;
- Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty 1989.³²

The nine core international human rights treaties are shown in Table 9.1.³³

As I have argued elsewhere, it is important to consider what treaties were introduced by the United Nations and came into force first of all.³⁴ As noted previously, the Universal Declaration of Human Rights was introduced first in 1948. However, the first Convention that was introduced under the auspices of the United Nations was the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. The order in which the first UN Conventions were negotiation and adopted is as follows:

1948 Convention on the Prevention and the Punishment of the Crime of Genocide;³⁵

³¹ See UNHCR, 'International Law', available at www2.ohchr.org/english/law/.

³² *Ibid.*

³³ *Ibid.*

³⁴ James C. Simeon, 'The Essence of Refugee Status Determination', paper presented at the Canadian Association for Refugee and Forced Migration Studies (CARFMS), CARFMS 11: Human Rights Challenges, McGill University, Montreal, Quebec, 11–13 May 2011.

³⁵ It is relevant to point out that the 1948 Universal Declaration of Human Rights was adopted by the UN General Assembly on 10 December 1948, see www.un.org/en/documents/udhr/history.shtml. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide was adopted by the UN General Assembly on 9 December 1948, the day before the UDHR was adopted by the UN General Assembly. However, the 1948 Convention on the Prevention

Table 9.1 Core international human rights treaties

<i>Acronym</i>	<i>International Instrument</i>	<i>Date</i>	<i>Monitoring Body</i>
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination	21 December 1965	CERD
ICCPR	International Covenant on Civil and Political Rights	16 December 1966	CCPR
ICESCR	International Covenant on Economic, Social and Cultural Rights	16 December 1966	CESCR
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women	18 December 1979	CEDAW
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	10 December 1984	CAT
CRC	Convention on the Rights of the Child	20 November 1989	CRC
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	18 December 1990	CMW
CPED	International Convention for the Protection of All Persons from Enforced Disappearance	20 December 2006	CED
CRPD	Convention on the Rights of Persons with Disabilities	13 December 2006	CRPD
1949	Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field;		
1949	Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea;		
1949	Geneva Convention (III) relative to the Treatment of Prisoners of War;		

and Punishment of the Crime of Genocide did not come in to force until 12 January 1951, after it received the requisite accessions of 20 states as required under Art. XIII of the Convention. Audiovisual Library of International Law, Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 9 December 1948, William A. Schabas, Professor of International Law, National University of Ireland, Galway, Director of the Irish Centre for Human Rights, available at <http://untreaty.un.org/cod/avl/ha/cppcg/cppcg.html>.

- 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War;³⁶
- 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others;
- 1951 Convention relating to the Status of Refugees;
- 1951 Equal Remuneration Convention;
- 1954 Convention relating to the Status of Stateless Persons.

It is evident that one of the very first Conventions that was negotiated amongst states, under the auspices of the United Nations, was the 1951 Convention relating to the Status of Refugees. Why is this noteworthy and important? It is significant and relevant for a number of reasons.

As we know, persecution constitutes a severe breach of one's dignity as a person as well as one's most fundamental human rights. On a scale of harm, persecution is, undoubtedly, on the farthest end of the scale of harm and suffering that anyone can be confronted with or possibly be able to endure, short of losing their life. According to the dictionary, persecution means 'to be subject to constant hostility or cruel treatment, especially because of religious or political beliefs'.³⁷ Paragraph 51 of the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status* ('UNHCR Handbook'), is helpful in this regard and it states:

There is no universally accepted definition of 'persecution', and various attempts to formulate such a definition have met with little success. From Article 33 of the 1951 Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights – for the same reasons – would also constitute persecution.³⁸

Raison d'être of the 1951 Convention relating to the Status of Refugees

Refugees, under the Refugee Convention and its 1967 Protocol have a 'well founded fear of persecution'. They are frequently described as the some of the world's most 'vulnerable persons' because they are at risk of

³⁶ For a complete listing of the 1949 Geneva Conventions see the ICRC, Geneva Conventions, The 1949 Geneva Conventions and their Additional Protocols, <http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/index.jsp>.

³⁷ *Oxford Paperback Dictionary* (4th edn, Oxford: Oxford University Press, 1994) 597.

³⁸ UNHCR Handbook, above note 4, at 14, para. 51.

suffering irreparable harm should they stay in their country or countries of alleged persecution, that is, they could lose their life or freedom due to their race, religion, nationality, political opinion, or membership in a particular social group. Consequently, if one is seeking to establish an international human rights system, it stands to reason that if you cannot protect those who are suffering the most egregious violations to their most fundamental human rights and their dignity as human beings, then how effective can the human rights system be that has been established? Or, to put it somewhat differently, if those who are suffering the most severe breaches to their human rights and dignity as human beings cannot be protected, then how effective is the international human rights system in practice? Clearly, a human rights system that is not able to protect those that are suffering the most severe breaches to their human rights and dignity as people is not an effective system for the protection of international human rights. There was also the matter of addressing the protection needs of the millions of refugees in Europe that were, of course, a direct consequence of the Second World War.

Indeed, the most vulnerable persons are also, presumably, those who ought to receive international assistance and protection first and foremost. Those in the greatest need shall come first. Is this not a humanitarian ethical principle, if not a principle of justice? Those who endure the greatest pain and suffering or who are in need the most should be treated and served first. Hence, the superseding priority why the Refugee Convention was adopted, ratified and came into force first before many of the other human rights Conventions and Covenants.

It is important to point out that the crime of genocide is deemed to be a 'crime against humanity' and that it clearly constitutes persecution.³⁹ 'Torture' and other forms of 'cruel, inhuman or degrading treatment and

³⁹ *Mugesera v Canada (Minister of Citizenship and Immigration)* 2005 SCC 40; [2005] SCJ No. 39. The Supreme Court of Canada concluded (at para. 145): 'We conclude from the preceding discussion that *the criminal act of persecution is the gross or blatant denial of a fundamental right on discriminatory grounds*. The guilty mental state is discriminatory intent to deny the right' (emphasis added).

Further, the Supreme Court of Canada pronounced (at para. 150):

For counselling of murder to be considered a crime against humanity under international law, murders must actually have been committed. Mr. Duquette's finding that no murders were proven to have resulted from the speech therefore precludes a finding that Mr. Mugesera counselled murder within the meaning of s. 7(3.76). The other possible underlying act, persecution, is a gross or blatant denial of fundamental rights on discriminatory grounds equal in severity to the other acts enumerated in s. 7(3.76). Hate speech, particularly when it advocates egregious acts of violence, may constitute persecution. In this case, it does.

punishment'⁴⁰ may also constitute persecution. While it is evident that these various forms of harm that can be inflicted on people can be persecutory they may not rise to the level of persecution in all instances. For example, one episode of extensive questioning or interrogation may constitute cruel treatment but it may not amount to persecution. This would depend, of course, on a number of factors, such as the length of the interrogation, the manner in which it was conducted, the degree of discomfort and/or harm, if any, that the person experienced, and the questions that were asked, among other factors. The courts in Canada have ruled that to rise to the level of persecution the interrogation, as outlined in this example, would have to constitute 'serious harm' to the individual.⁴¹ In addition, the 'serious harm' inflicted must be repetitive or persistent or systematic.⁴²

The very purpose of the Refugee Convention, then, is to protect people who have managed to flee their country of nationality or former habitual residence and have a well founded fear of the loss of their most essential and precious human rights, their right to their life and freedom and to their inherent dignity as human beings. If these most indispensable and elemental human rights cannot be protected, then is there any need to protect any others? Clearly not. All other human rights are contingent on these necessary human rights being met first and foremost. The protection of these most essential human rights and all those that follow is the very purpose of the Refugee Convention and its 1967 Protocol.

Accordingly, then, the Refugee Convention is very much a human rights instrument that is intended to provide international protection for those who have a well founded fear of being persecuted and are outside

See also the Audiovisual Library of International Law, Convention on the Prevention and Punishment of the Crime of Genocide, above note 35.

⁴⁰ 1984 Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment, available at www2.ohchr.org/english/law/cat.htm.

⁴¹ *Sagharichi v Canada (Minister of Employment and Immigration)* (1993) 182 NR 398 (FCA). The Supreme Court of Canada in *Ward* drew upon the work of James C. Hathaway when it adopted his definition of persecution: "Persecution", for example, undefined in the Convention, has been ascribed the meaning of "sustained or systemic violation of basic human rights demonstrative of a failure of state protection"; see J.C. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1996) 104–5. *Canada (Attorney General) v Ward* [1993] 2 SCR 689; 20 Imm. LR (2d) 733, 734.

⁴² The Federal Court of Appeal in Canada stated: 'that an isolated instance can only in very exceptional cases satisfy the element of repetition and relentlessness found at the heart of persecution (cf. *Rajudeen*)'. *Valentin v Canada (Minister of Employment and Immigration)* [1991] 3 FC 390, 396 (CA).

of their country of nationality or former habitual residence. They are often those who have suffered the most vile and despicable breaches to their most fundamental and basic human rights and dignity as persons and, hence, are the people who are the most in need of international protection. Indeed, it can be argued that the Refugee Convention is an integral component of the modern international human rights system. Moreover, the Refugee Convention has also been described as 'the cornerstone of modern international refugee law'.⁴³

DEFINING WHO IS A CONVENTION REFUGEE

The Refugee Convention definition of who is a refugee has been criticized for being far too narrow and constrained and only including a limited number of people who are in dire need of international protection. For instance, it does not include those persons who are internally displaced within their own country. These persons may be indistinguishable from those who manage to cross their national borders and enter a neighboring country or any other country and, therefore, would come under the protection of the Refugee Convention and its 1967 Protocol, if the state is a signatory to the Refugee Convention and/or its 1967 Protocol, and the UNHCR. Those who are displaced forcibly due to natural catastrophes such as earthquakes, hurricanes, tsunamis, volcanic eruptions, droughts, and so on, would not fall within the Refugee Convention because they do not have a well founded fear of persecution *per se*. Natural disasters do not target people on the basis of one of the five grounds in the Refugee Convention, that is, race, religion, nationality, political opinion, or membership in a particular social group. Natural disasters do not discriminate, of course, in this way. People who are

⁴³ James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005) 91. Jane McAdam underscores this further when she notes: 'To provide maximum protection, international human rights treaties must not be viewed as discrete, unrelated documents, but as interconnected instruments which together constitute the international obligations to which States have agreed ... Human rights law not only provides an additional source of protection for persons with an international protection need, but also strengthens the status accorded to all refugees through its universal application. Accordingly, while human rights law widens threshold eligibility for protection, the Convention remains the blueprint for rights and legal status.' New Issues in Refugee Research Paper No. 125, above note 10, at 14 and in 'The Refugee Convention as a Rights Blueprint for Persons in Need of International Protection', above note 10, at 280.

displaced due to natural calamities may be highly deserving of international protection, but, they cannot be Convention refugees under the current definition found in the Refugee Convention.⁴⁴

Excluding Those who are Deemed to be Not Deserving of International Protection

The strict legal parameters of who can be a Convention refugee, perhaps, is most evident in those persons who are excluded under the Refugee Convention as being 'not deserving' of Convention refugees status. This includes those persons who fall under Article 1F of the Refugee Convention, or the 'exclusion clauses'. Article 1F states as follows:

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.⁴⁵

Perhaps the very first ethical question that ought to be raised is, 'Should there even be exclusion clauses in the Refugee Convention?' Should those who are seeking refugee protection be excluded from Convention refugee status because they fall within any of these three categories of criminal activity or intolerable conduct, even though they might have a 'well founded fear of persecution' if they were to be returned to their country of nationality or former habitual residence?

⁴⁴ Jane McAdam, *Climate Change Displacement and International Law: Complementary Protection Standards*, UNHCR Division of International Protection, Legal and Protection Policy Research Series (May 2011), available at www.unhcr.org/4dff16e99.html, in which Prof. Jane McAdam argues (at 13): 'Superior courts around the world have explained that the Refugee Convention does not cover "individuals in search of better living conditions, and those victims of natural disasters, even when the home state is unable to provide assistance, although both of these cases might seem deserving of international sanctuary"' (emphasis added). See *Canada (Attorney General) v Ward* [1993] 2 SCR 689, 732.

⁴⁵ UNHCR, Convention and Protocol relating to the Status of Refugees, Geneva, December 2010, available at www.unhcr.org/3b66c2aa10.html.

The UNHCR Handbook, at paragraph 140, states that Article 1F 'enumerates the categories of persons who are *not considered to be deserving* of international protection'.⁴⁶ It is worth noting that prior to the Second World War, there were no provisions 'to exclude from the larger group of then assisted refugees certain persons who were deemed unworthy of international protection'.⁴⁷ When the Refugee Convention was being negotiated amongst states, the Nuremberg and Tokyo War Crimes Trials were still very much in the minds of the representatives of the various states who were in attendance. Accordingly, there was agreement that war criminals and common criminals, who would present a danger to security and public order, should not be protected under the Refugee Convention.⁴⁸ However, it is important to stress that the UNHCR recognizes that, given the serious consequences of exclusion for the person concerned, the interpretation of these exclusion clauses must be restrictive.⁴⁹

With respect to Article 1F(a), which excludes those persons who have '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*',⁵⁰ it is important to point out that this provision incorporates international humanitarian law and international criminal law into the Refugee Convention. Indeed, Article 1F(a) can be seen as falling on the intersection between international humanitarian, international criminal and international refugee law.

With respect to the first ethical question whether a person should be excluded from Convention refugee status even if they would have a well founded fear of persecution, the answer would have to be 'yes', because those who have committed war crimes, crimes against humanity or crimes against peace should not benefit from refugee protection. The two justifications for the exclusion clauses that were presented by the drafters of the Refugee Convention were, first, to provide Convention refugee status to those persons who are culpable morally and who have committed gross human rights violations against other people would undermine the credibility of the international refugee system; and secondly, granting Convention refugee status could possibly lead to impunity for those who

⁴⁶ UNHCR Handbook, above note 4, at 33, para. 140 (emphasis added).

⁴⁷ *Ibid.* 35, para. 147.

⁴⁸ *Ibid.* 35, para. 148.

⁴⁹ *Ibid.* 35, para. 149.

⁵⁰ Refugee Convention, above note 2, emphasis added.

have committed crimes against peace, war crimes or crimes against humanity.⁵¹

Accordingly, is it reasonable to ask whether the perpetrators of armed conflicts, whether interstate or intrastate, that is, those persons who cause others to flee for their lives and freedom, should also be the beneficiaries of a grant of asylum? Is it reasonable for us to accept that someone who has committed a crime against peace, a war crime or a crime against humanity should be given sanctuary? In other words, should those who create refugees, in the first instance, be accepted as refugees themselves? The answer, I think, is patently obvious. Those who cause refugees should not themselves be the beneficiaries of international protection as a Convention or mandate refugee. To do otherwise would grate against our individual and collective consciences as being fundamentally unjust.⁵²

Criminality in the context of war, as in times of peace, has its reckoning, whether it is perpetrated on a small scale or in a widespread and systemic fashion. Crimes of this nature are so heinous and vile that they immediately and instinctively repulse us as human beings. Actions that inflict such deep and traumatic pain, suffering and sustained grief on a personal, collective and societal level can never be countenanced. Indeed, what is especially so repugnant about armed conflict or war is that it provides the fertile ground for such terrible crimes not only to occur but to be fostered.

In other words, stating it rather boldly and directly, those persons who are responsible for severe breaches of other persons' human rights, whether in times of war or peace, or those who have created refugees, should not be given the benefit of international refugee protection in the form of Convention or mandate refugee status.

With respect to the ethical principles underlying the exclusion clauses, James C. Hathaway has stated:

⁵¹ See also the 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 (UNHCR, 4 September 2003) para. 2, available at www.unhcr.org/cgi-bin/texis/vtx/home/opensslPDFViewer.html?docid=3f7d48514&query=exclusionclauses.

⁵² 'The Golden Rule' is, of course, 'treat others as you would want others to treat you'. It is premised on the notion of equal treatment and reciprocity and is considered one of the foundations of ethics. Jeffrey Wattles, *The Golden Rule* (New York: Oxford University Press, 1996). To persecute others is obviously not consistent with the Golden Rule. Violating this basic moral principle through the serious breach of other people's human dignity and their most fundamental human rights, then, precludes such persons from the benefits of Convention refugee status.

The general impetus for the elaboration of Article 1(F) of the Convention was a determination to give legal force to Article 14(2) of the Universal Declaration of Human Rights, which provides that the right to asylum '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'. Article 1(F) primarily reflects a principled commitment to the promotion of an international morality through refugee law ...

This fundamental conviction that certain persons are beyond the pale – simply 'not ... deserving of international protection' – led the drafters to craft Article 1(F) as a mandatory mechanism of exclusion.⁵³

It is evident that the exclusion clauses play an essential role in ensuring that:

The stigma of having acted contrary to fundamental international norms is so significant that the drafters of the Refugee Convention determined that international criminals should never be allowed to benefit from refugee status. To hold otherwise would be to risk a loss of public confidence in the logic of a duty to protect refugees arriving at their borders.⁵⁴

From the foregoing, it is evident that the exclusion clauses play a necessary and essential role in the Refugee Convention and by extension in the maintenance of the international refugee rights regime. Accordingly, one must conclude that on the basis of ethical and moral principle, the exclusion clause should be included as part of the Refugee Convention.

Nevertheless, a number of researchers and legal scholars have taken the position that it is no longer appropriate to refer to persons as 'not deserving of international refugee protection'. Ben Saul, for instance, has argued:

The denial of protection in refugee law to persons because they are 'unworthy' is plainly outdated given developments in modern human rights law. Human rights are *rights*, not privileges, and cannot be suspended for bad behaviour. While the human rights of serious domestic criminals may be limited on objective, public interest grounds (for instance, imprisonment is a legitimate restriction on freedom of movement), a serious domestic criminal cannot be racially vilified or sexually harassed – unlike persons excluded from refugee status who may be returned to such treatment. Domestically,

⁵³ James C. Hathaway and Colin J. Harvey, 'Framing Refugee Protection in the New World Disorder' (2001) 34(2) *Cornell International Law Journal* 263 (citations not included).

⁵⁴ *Ibid.* 318–19.

States do not permit criminals to face persecution or discrimination simply because they become 'undeserving' of protection. Perhaps it is time to revise the Refugee Convention to more fully respect human dignity.⁵⁵

Indeed, public international law has evolved to the point that no one can have their human rights or human dignity taken away from them, even those who have committed the most atrocious and heinous crimes imaginable.⁵⁶ For instance, Article 33 of the Refugee Convention, the non-refoulement provision, states that:

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.⁵⁷

It is now accepted that Article 33(1) of the Refugee Convention is a peremptory norm or *jus cogens* in international law.⁵⁸ This prohibits any state, whether a signatory to the Refugee Convention and/or its 1967

⁵⁵ Ben Saul, *Protecting Refugees in the Global 'War on Terror'*, Legal Studies Research Paper No. 08/130 (University of Sydney, Sydney Law School, October 2008) 13, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1292604.

⁵⁶ The three fundamental characteristics of human rights are: (1) Human rights are inalienable. (2) Human rights are indivisible, interdependent and interrelated. (3) Human rights are universal. René Cassin's famous description of human rights is instructive. He said that, 'Human rights are what no one can take away from you'. This underscores the basic point that everyone, irrespective of their conduct, no matter how reprehensible, cannot be denied their human rights or human dignity. 'Understanding Human Rights' in *COMPASS: A Manual for Human Rights Education with Young People*, available at http://eycb.coe.int/compass/en/chapter_4/4_1.html. The United Nations has noted that: 'Human rights are universal and inalienable; indivisible; interdependent and interrelated. They are universal because everyone is born with and possesses the same rights, regardless of where they live, their gender or race, or their religious, cultural or ethnic background. Inalienable because people's rights can never be taken away. Indivisible and interdependent because all rights – political, civil, social, cultural and economic – are equal in importance and none can be fully enjoyed without the others. They apply to all equally, and all have the right to participate in decisions that affect their lives. They are upheld by the rule of law and strengthened through legitimate claims for duty-bearers to be accountable to international standards'. United Nations Population Fund (UNPFA), 'Human Rights, Human Rights Principles', available at www.unfpa.org/rights/principles.htm.

⁵⁷ Refugee Convention, above note 2.

⁵⁸ See above note 15.

Protocol or not, from expelling any refugee claimant to another state where they might face persecution. Thus, even if an applicant for refugee protection was found to be excluded under Article 1F(a), they could not be sent back to any country where they might have reasonable grounds or more than a mere possibility of being persecuted. This would not, however, mean that they would have the benefit of Convention refugee status and all of rights and benefits that accrue from this legal status. They would have to draw on other international human rights instruments for protection.⁵⁹

From Exclusion to Prosecution: Should Those Persons who are Excluded under Article 1F also be Prosecuted?

An interesting argument has been presented that the Article 1F exclusion clauses of the Refugee Convention have been rendered largely moot or redundant, at best, or problematic, at worst, due to the significant advancements that have occurred in the field of international humanitarian and international criminal law. The argument that has been presented is that, with the proliferation of international instruments, specifically, international human rights treaties, the fulfilment of one treaty obligation might very well lead to the violation of another treaty obligation.⁶⁰ The example cited deals with the 1989 Convention on the Rights of the Child (CRC)⁶¹ and the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).⁶² It is pointed out that the exclusion clauses do not make any distinction between minors and adults, and given the prevalence of the use of children in armed conflict, make the possibility of excluding children from Convention refugee status a real concern. However, the possibility of excluding a child soldier from Convention refugee status, say under Article 1F(a), would clearly be contrary to the fundamental

⁵⁹ Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford: Oxford University Press, 2007).

⁶⁰ Justin Mohammed, 'Exclusion in International Refugee Law: 20th Century Principles for 21st Century Practice?' Graduate Student Essay Contents Papers 2011, Canadian Association for Refugee and Forced Migration Studies, CARFMS/ACERMF, <http://carfms.apps01.yorku.ca/node/26#attachments> (accessed 15 February 2013).

⁶¹ Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3, Can. TS 1992 No. 3 (CRC).

⁶² Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 23 August 1985, 1465 UNTS 85, Can. TS 1987 No. 36 (CAT).

principle of the CRC, ensuring that the 'best interest of the child' is the primary consideration.⁶³

But perhaps the most telling argument in this vein is that the exclusion clauses do not adequately address the issue and concern of impunity for those persons who have been excluded from Convention refugee status because they have committed, say, war crimes or crimes against humanity. With the advent of 'universal jurisdiction' and the establishment of an International Criminal Court (ICC) and the UN tribunals and other special courts, states now have an obligation to either 'prosecute or extradite'⁶⁴ those persons who have been excluded from Convention refugee status under Article 1F(a). Where there are outstanding indictments on the part of the ICC and other UN tribunals and special courts, this is presumably less of a concern for states. There is no concern about living up to their obligations to have the alleged war criminal or perpetrator of crimes against humanity extradited to stand trial before either the ICC or one of the UN tribunals and special courts. However, when the obligation falls on the state to prosecute those persons who are excluded under Article 1F(a) it becomes more problematic. There is undoubtedly an ethical and moral obligation to prosecute those who have been excluded under Article 1F(a), if not a legal requirement.

In this regard, James C. Hathaway has presented the following arguments in favour of prosecuting those who have been excluded under Article 1F:

Peremptory exclusion of fugitives from justice is not an ideal solution. To the contrary, it would be preferable to have a broader universal consensus on which acts are appropriately defined as criminal, uniformly enforced through an international mechanism – perhaps modeled on the International Criminal Court. Asylum seekers believed to have committed a relevant offense could

⁶³ Article 3(1) of the CRC 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.'

⁶⁴ The fundamental principle of international law here is '*aut dedere aut judicare*', that is, criminals in foreign jurisdictions must be either extradited or prosecuted. Ben Saul has argued that: 'Decisions not to exclude a person, or to offer them complementary protection, need not result in impunity for serious criminals. For treaty crimes of quasi-universal jurisdiction, such as hijacking or hostage taking, prosecution in the State of refuge may be an alternative to return to persecution.' Saul, above note 55, at 13.

then be prosecuted and punished for their crimes without any risk of direct or indirect refoulement to a place where persecution is feared.⁶⁵

However, various impediments stand in the way of states prosecuting those persons who have been excluded under Article 1F(a) and/or (c). It is worth noting that there is considerable overlap between Article 1F(a) and (c), in that crimes against peace, war crimes and crimes against humanity are all, of course, contrary to the 'purposes and principles of the United Nations'.⁶⁶

One such major impediment that is deleterious to prosecuting those who are excluded from Convention refugee status is the cost. Criminal proceedings of this nature are resource intensive and prohibitively expensive. Another major impediment is the differing legal and evidentiary standards in international and domestic refugee law and international and domestic criminal law. With respect to international and Canadian refugee law, for example, the 'serious reasons for considering' standard for invoking the exclusion clauses under Article 1F is not only below the criminal standard of proof, 'beyond a reasonable doubt', but, indeed, even below the civil standard of proof, 'a balance of probabilities'.⁶⁷ Clearly, for criminal prosecutions the standard of proof to obtain a conviction is significantly higher than the standard for finding that someone ought to be excluded from Convention refugee status. Furthermore, the evidentiary standards are, likewise, higher in criminal proceedings than refugee hearings. It should be noted that when the issue of exclusion is raised in a refugee proceeding, the proceedings change from an inquisitorial and/or non-adversarial proceeding to an adversarial proceeding. In addition, the burden of proof in establishing that the refugee claimant should be excluded from Convention refugee status shifts to the Minister of the Canada Border Services Agency (CBSA). Finally, it is relevant and significant to note that most refugee claimants

⁶⁵ Hathaway and Harvey, above note 53, at 319.

⁶⁶ UNHCR Handbook, above note 4, at 38, para. 162, further states, 'it is intended to cover in a general way such acts against the purposes and principles of the United Nations that might not be fully covered by the two preceding exclusion clauses. Taken in conjunction with the latter, it has to be assumed, although this is not specifically stated, that the acts covered by the present clause must also be of a criminal nature.'

⁶⁷ *Saul Vicente Ramirez v. Minister of Employment and Immigration*, F.C.J. No. 109, Canada: Federal Court, 7 February 1992, available at: <http://www.unhcr.org/refworld/docid/3ae6b7074.html> (accessed 16 April 2013). See also James C. Simeon, 'Exclusion Under Article 1F(a) of the 1951 Convention in Canada', (2009) 21(2) *International Journal of Refugee Law* 197.

who are excluded under Article 1F(a) are found to be complicit in war crimes or crimes against humanity. In most instances, it is the claimant's own evidence that results in their exclusion, such as indicating that they served in military units or rebel forces that are notorious for their human rights violations such as the use of torture, forced disappearances, and cruel and unusual forms of punishment and treatment that includes sexual violence, etc. Typically, they do not include the most senior officers or officials in the state's military or paramilitary apparatus or other state bureaucracy or the rebel forces' apparatus, both military and paramilitary personnel within the lower ranks of these armed forces.

A finding that someone ought to be excluded from Convention refugee status, then, is far different than finding a person is guilty in a criminal prosecution for a war crime or a crime against humanity. Nonetheless, a finding of complicity in war crimes and crimes against humanity ought not to go unpunished for justice to be done. Exclusion from Convention refugee status should hardly be the norm for ensuring that these heinous and despicable acts do not go without accounting and retribution, if not some appropriate measure of restitution and/or rehabilitation.

CONCLUSIONS

The exclusion provisions of the Refugee Convention and its 1967 Protocol raise important ethical and moral issues and concerns. Given the advancement of the international human rights system and international criminal law and international humanitarian law, are the exclusion clauses under Article 1F still pertinent and relevant? Moreover, is it still appropriate to distinguish claimants on the basis of whether they are deserving or undeserving of international refugee protection? Under our ever-evolving and expanding international human rights system, is it still fitting or correct to label persons in this manner? Although this chapter takes the position that labels such as 'deserving' and 'not deserving' of international refugee protection are no longer apt or suitable for those who are seeking asylum from possible severe breaches to their human dignity or violations to their most basic human rights, there is still a necessity for the exclusion clauses. The exclusion clauses still perform an essential function in ensuring that those who have committed crimes against peace, war crimes, crimes against humanity, or serious non-political crimes outside the country of refuge, or are guilty of actions that are contrary to the purposes and principles of the United Nations, do not receive Convention refugee status and the substantial rights and benefits that accrue with this status. In other words, those who are the cause

of other peoples' suffering and/or serious infringement and/or violation of their most essential human rights ought not to be the beneficiaries of Convention refugee status. However, this does not preclude them from other critical human right guarantees such as non-refoulement to either persecution and/or torture and other inhuman, cruel or degrading treatment or punishment.

Harbouring fugitives from justice should never be masked as genuine asylum. Nor should the provision of international protection be extended to those who have been appropriately excluded from one of the most cherished universal core human rights, that is, first and foremost, intended to protect our humanity and dignity as persons. The wanton disregard of the inherent value of any person's dignity and worth as a human being through the commission of such despicable international criminal offences warrants the denial of asylum or international protection from a fear of persecution. Those who have persecuted others should not themselves, then, be the beneficiaries of the very protection that was intended for their victims.

The UNHCR has called on states parties to the Refugee Convention and its 1967 Protocol to use the exclusion clauses carefully and sparingly, given the serious consequences that exclusion entails to those who may be excluded from Convention refugee status. The procedural, evidentiary and legal test for exclusion, of course, must be met before a refugee claimant can be excluded from Convention refugee status. For example, the onus is on the Minister of the Canada Border Service Agency in Canada to make the case for exclusion under an adversarial proceeding. Only when all of the procedural and substantive standards have been properly met or satisfied can the refugee claimant be duly excluded. If a refugee claimant has been properly excluded, then states should determine whether they ought to prosecute and/or to extradite the person, whenever this is warranted. This needs to be done if justice is to be served. Immunity from prosecution should not be a by-product of the refugee determination process, particularly for those applicants who have been excluded under Article 1F. Justice, undoubtedly, demands no less.

It is relevant to note, however, that a decision to prosecute those refugee claimants who have been excluded under Article 1F(a) or (c) cannot be taken lightly given the costs and the substantially different standards for excluding a person from Convention refugee status versus the possibility of successfully prosecuting a person for having committed a war crime or a crime against humanity. It would be wrong to presume that an exclusion from Convention refugee status under Article 1F has established a *prime facie* case for prosecuting someone on criminal charges.

The intent, the mission and vision if you will, of our leading international body, the United Nations, established at the end of a cataclysmic Second World War, that saw horrific crimes of monumental proportions perpetrated against whole categories of peoples and nations, is to protect us from the 'scourge of war', protect the 'dignity and worth of the human person, in the equal rights of men and women', and provide for 'conditions under which *justice and respect for the obligations arising from treaties and other sources of international law* can be maintained'.⁶⁸ Anyone who works against these common UN purposes and principles ought not, then, to seek the protection of the United Nations' good offices or that of its member states.⁶⁹

With Article 1F of the Refugee Convention, it is evident that the drafters of the Convention thought that asylum should not be granted to those individuals where there were 'serious reasons for considering' that they had committed a crime against peace, a war crime or a crime against humanity, or that they were fleeing from prosecution as opposed to persecution, or that they had acted contrary to the very purposes and principles of the United Nations itself. Clearly, someone who is working contrary to the values and ideals of the United Nations and its member states should not expect to receive their protection.

The contention here is that the prosecution of those who are excluded from Convention refugee status under Article 1F, where there is sufficient evidence and there is a reasonable chance of securing a criminal conviction, is necessary and essential not only to ensure that those who commit serious international crimes are not immune from prosecution

⁶⁸ Preamble to the UN Charter of the United Nations (emphasis added), available at www.un.org/en/documents/charter/preamble.shtml.

⁶⁹ Indeed, since the establishment of various UN special tribunals and courts for the prosecution of those responsible for serious violations of international humanitarian and criminal law, such as the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993 (war crimes and crimes against humanity), the International Criminal Tribunal for Rwanda (ICTR) in 1994 (genocide), the Special Court for Sierra Leone in 2002 (war crimes and crimes against humanity), among others, and the creation of the International Criminal Court (ICC) in 2002 (war crimes, crimes against humanity, genocide and crimes of aggression), there is an obligation on the part of the United Nations and its Member States to prosecute those who are responsible for serious violations of international humanitarian and criminal law. The United Nations has also negotiated and established Special Tribunals for Lebanon, Cambodia and East Timor. See Global Policy Forum, 'International Criminal Tribunals and Special Courts', available at www.globalpolicy.org/international-justice/international-criminal-tribunals-and-special-courts.html.

but, even more significantly, that this is absolutely necessary to ensure that our international human rights system achieves its intended purpose, the protection of human rights under the rule of law in order to ensure that the 'scourge of war' is eradicated. In short, it is necessary to help fulfill the very mission and reason that the United Nations was established following the Second World War in 1945, the advancement of international peace and security in an ever-growing sphere of prosperity in greater freedom and justice for all peoples of the global community.