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# UNHCR'S INVOLVEMENT IN THE GREAT LAKES REFUGEE CRISIS

Kristen Wagner\*

## INTRODUCTION

The international community was completely unprepared for the Great Lakes refugee crisis that occurred in Zaire following one of the most atrocious genocides in global history: the Rwanda genocide. The international community was not prepared to deal with the people who had committed the serious crimes involved and who had caused others to flee. Nor was the international community prepared "to assist in providing effective security in the countries to which the refugees fled."<sup>1</sup> As a result, the international community was faced with the almost impossible task of putting an end to the widespread violence and exploitation that festered within the refugee camps of the region.<sup>2</sup>

During the Rwanda genocide, Hutu-led forces and the Interahamwe civilian militia killed approximately 800,000 Tutsi and moderate Hutu. Very few people fled the country during the worst parts of the genocide.<sup>3</sup> Rather, people fled the country when the new Tutsi-led government took control of the country once the genocide was over.<sup>4</sup> When the genocide ended in July of 1994, there was a mass exodus of Rwandan refugees

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\* Managing Editor, *PACE INTERNATIONAL LAW REVIEW*. J.D. Pace University School of Law, 2009. B.A. Smith College, 2006. This article would not have been possible without the support of my family and the international law faculty at Pace University School of Law. I also extend deep gratitude to the 2008-2009 members of the *PACE INTERNATIONAL LAW REVIEW* for their tremendous efforts in publishing this issue.

<sup>1</sup> The Role of the Military in Refugee Camp Security – Some Reflections From a Human Rights Perspective (July 10-12, 2001), available at [www.humanrightsfirst.org/intl\\_refugees/issues/security/speech\\_071001.pdf](http://www.humanrightsfirst.org/intl_refugees/issues/security/speech_071001.pdf).

<sup>2</sup> *Id.*

<sup>3</sup> Todd Howland, *Refoulement of Rwandan Refugees: The UNHCR's Lost Opportunity to Ground Temporary Refuge in Human Rights Law*, 4 U.C. DAVIS J. INT'L L. & POL'Y 73, 75 (1998).

<sup>4</sup> *Id.* at 76.

over the borders of Tanzania, Burundi and Zaire.<sup>5</sup> The refugee population consisted of both Hutu and Tutsi, but most of the refugees were Hutu who fled Rwanda for fear of reprisal attacks from the new Tutsi-led government.

The refugee camps in the Great Lakes region of Zaire became home to over one million Rwandan refugees. The United Nations High Commissioner for Refugees (UNHCR), with the help of non-governmental organizations (NGOs), set up the camps. However, it has been said that the UNHCR was "[t]he single largest influence in these camps."<sup>6</sup> This paper addresses the problems faced by the refugee camps in the Great Lakes region of Zaire and how the UNHCR handled, or did not handle, these problems. Part I of this paper provides background information on the circumstances under which the camps were formed and what problems arose within the camps. Part II discusses the UNHCR's legal mandate with regard to refugee protection, and Part III discusses this legal mandate specifically in terms of applying exclusion clauses and performing refugee status determination (RSD) in the camps of Zaire. Part IV then makes suggestions as to how the UNHCR could have done things differently and what the UNHCR should do to improve its response to similar situations in the future.

The analysis of the UNHCR's legal mandate and its involvement in the Great Lakes refugee crisis is a pertinent matter as more and more conflicts, such as civil war and genocide, continue to occur in countries around the world, specifically in Africa. With such situations continuously occurring, and the increasing involvement of the UNHCR, it is necessary to figure out where the UNHCR went wrong in the Great Lakes region and how its legal mandate can be corrected in order to provide the necessary guidance in similar situations that are sure to come in the future.

## I. GREAT LAKES REGION REFUGEE CAMPS

From the very beginning of the crisis, the refugee camps of the Great Lakes region were doomed due to the unique nature

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<sup>5</sup> Dorinda Lea Peacock, Comment, "*It Happened and It Can Happen Again*": *The International Response to Genocide in Rwanda*, 22 N.C.J. INT'L L. & COM. REG. 899, 918-19 (1997).

<sup>6</sup> Howland, *supra* note 3, at 79.

of the mass exodus of Rwandans over the Zaire border. The nature of the refugee population itself was the largest cause of the problems suffered within the camps. The conditions within the camps proved to be poor in various aspects, and worsened dramatically over the course of the two years they were maintained. The UNHCR was there through it all. The High Commissioner, when speaking to the United Nations Security Council, described the refugee camps of the Great Lakes region as “a quandary of humanitarian, political and security challenges” and stated his belief that “a humanitarian disaster may be imminent.”<sup>7</sup> What caused the disastrous conditions of the refugee camps essentially came down to the simple fact that the people who fled Rwanda were more likely to be perpetrators of the genocide, rather than the victims of the genocide.<sup>8</sup>

On July 13, 1994 about 100,000 Rwandan refugees crossed the Zaire border into Goma where they were met by hundreds of humanitarian workers.<sup>9</sup> Camps were quickly constructed just kilometers over the border and four days later the refugee population rose to over one million.<sup>10</sup> Katale was the largest camp, while the Bukavu region had over 300,000 refugees in 27 camps, and Uvira had 180,000 refugees in 12 camps.<sup>11</sup> Officials called this “the greatest refugee flood in modern times.”<sup>12</sup> On July 19, 1994, cholera broke out in the camps, followed by other various diseases. These outbreaks caused 50,000 people to die, most of whom were women and children.<sup>13</sup> To correct the problem of disease, the UNHCR sought additional supplies and suggested that camps be set up further north in Zaire. However,

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<sup>7</sup> Sadako Ogata, United Nations High Commissioner for Refugees, Remarks to the Security Council (Oct. 25, 1996), available at <http://www.unhcr.org/admin/ADMIN/3ae68fbc.html>.

<sup>8</sup> Howland, *supra* note 3, at 75.

<sup>9</sup> Mariano-Florentino Cuellar, *Refugee Security and the Organizational Logic of Legal Mandates*, 37 *GEO. J. INT'L L.* 583, 592 (2006).

<sup>10</sup> Dennis McNamara, Assistant High Commissioner for Protection and Director of the Division of International Protection Services, Statement to the House Committee on International Relations, Sub-Committee on International Operations and Human Rights – Hearing on “Rwanda: Genocide and the Continuing Cycle of Violence” (May 5, 1998), available at <http://www.unhcr.org/admin/ADMIN/42b81cd22.html>.

<sup>11</sup> Cuellar, *supra* note 9, at 592-93.

<sup>12</sup> *Id.* at 588.

<sup>13</sup> McNamara, *supra* note 10.

the Zairian government refused such requests and did not allow for consideration of sites further from the border.<sup>14</sup>

Besides disease, inadequate supplies, and the less than favorable locations of the camps, the largest problem faced by the UNHCR in the camps was the fact that mixed in with the civilian Hutu refugee population were many perpetrators of the genocide.<sup>15</sup> As the Secretary General stated, “[c]onflict often leads to mixed movements of populations, comprising not only refugees, internally displaced persons and other civilians, but also armed elements seeking sanctuary in neighbouring countries.”<sup>16</sup> This particular refugee population consisted of former government soldiers and militia who were somehow able to regroup and pose military and political threats within the camps.<sup>17</sup> As a result, the refugees in the camps found themselves under virtually complete control of the former Hutu government and its allies “who had just perpetrated the fastest mass genocide in history.”<sup>18</sup>

The exiled Hutu leaders controlled food and supply distribution within the camps by rewarding their allies and punishing their enemies.<sup>19</sup> In an October 21, 1994 press release, the UNHCR stated, “[i]n some camps, the former authorities ha[d] virtually taken control of all food and relief distribution in order to consolidate their power and to manipulate and dominate the camp population.”<sup>20</sup> The former militia essentially held the refugee population hostage in the camps, getting humanitarian assistance, selling it on the black market, and buying arms to re-attack Rwanda.<sup>21</sup>

Civilian Hutu refugees were forced by the Hutu militia and former government members to remain in the refugee camps.

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<sup>14</sup> *Id.*

<sup>15</sup> Peacock, *supra* note 5, at 919.

<sup>16</sup> UNHCR Jakarta, Expert Meeting on Maintaining the Civilian and Humanitarian Character of Asylum, Background Paper: Under What Circumstances Can a Person Who Has Taken an Active Part in the Hostilities of an International or a Non-International Armed Conflict Become an Asylum Seeker?, at 38, UNHCR Doc. PPLA/2004/01 (June 2004) (prepared by Stéphane Jaquemet).

<sup>17</sup> Peacock, *supra* note 5, at 919.

<sup>18</sup> Cuellar, *supra* note 9, at 593.

<sup>19</sup> *Id.* at 595-96.

<sup>20</sup> Ogata, *supra* note 7.

<sup>21</sup> Metta Spencer, *A Doctor Without Borders: James Orbinski*, PEACE MAGAZINE, April 1997, at 20.

This was done in an attempt by the former militia and government to continue their campaign against the Rwandan Tutsi population from within the camps in Zaire.<sup>22</sup> The former militiamen and government members masqueraded as legitimate refugees and “exploited the chaotic conditions of the camps.” They used threats against the civilian population to keep them from leaving the camps and returning to Rwanda.<sup>23</sup> Many of the refugees said that they would have returned to Rwanda much sooner if “they had not been forced to stay by the Hutu militia that had controlled the camps by terror tactics since 1994.”<sup>24</sup>

The former leaders kept the refugees from returning to Rwanda through physical intimidation and the consistent use of propaganda that convinced many of the Hutu refugees that they would face deadly retribution if they were to return to Rwanda.<sup>25</sup> When the refugees were questioned about going home, men would surround them, sometimes with machetes in hand, in successful attempts to control their comments.<sup>26</sup> The former Hutu military and the civilian militia had no incentive to go back to Rwanda and they were trying to prevent the civilian refugees from returning. This left the refugees “at the center of a deadly propaganda war between the new Tutsi government and the old Hutu one, the latter of which offer[ed] a nightmarish choice between staying and risking death from disease, or leaving and risking being killed.”<sup>27</sup>

An additional problem that the camps and the UNHCR faced was the lack of power and authority of the local Zairian authorities.<sup>28</sup> This, along with the intimidation tactics of the perpetrators of the genocide, led to a general atmosphere of violence, corruption, destruction and chaos within the camps.<sup>29</sup> While the government of Zaire was required to help maintain the camps and enforce security measures, as the High Commis-

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<sup>22</sup> Peacock, *supra* note 5, at 900.

<sup>23</sup> *Id.* at 919-20.

<sup>24</sup> *Id.* at 920.

<sup>25</sup> Michael Hill, Hutu Refugee Flood Into Rwanda Grow; UN Aid Official Claims Magnitude Overwhelming, BALTIMORE SUN, Nov. 17, 1996, at 18A.

<sup>26</sup> Liz Sly, CHI. TRIB., July 28, 1994, at 1.

<sup>27</sup> *Id.*

<sup>28</sup> McNamara, *supra* note 10.

<sup>29</sup> Cuellar, *supra* note 9, at 601.

sioner stated, “[t]he local security forces were poorly led and unpaid, which conspired to create an atmosphere of corruption, extortion and anarchy.”<sup>30</sup> Eventually, an elite force of the presidential guard replaced the local Zairian authorities.<sup>31</sup> This force was financed by the UNHCR and trained by an international police force.<sup>32</sup>

## II. UNHCR'S LEGAL MANDATE

The United Nations High Commissioner for Refugees was established on January 1, 1951 pursuant to a decision of the General Assembly and the adoption of the Statute of the Office on December 14, 1950.<sup>33</sup> The UNHCR's Statute is the legal basis for the organ's responsibilities.<sup>34</sup> The 1951 Convention Relating to the Status of Refugees (1951 Convention) and its subsequent 1967 Protocol govern refugee status within the framework of the United Nations.<sup>35</sup> The 1967 Protocol simply gave the 1951 Convention a more “universal scope by removing the geographical and temporal limitations related to the definition of refugee.”<sup>36</sup> These two legal mandates give the UNHCR the role of protecting refugees and finding solutions to their problems.<sup>37</sup>

The UNHCR's primary responsibility is to provide protection and assistance to refugees.<sup>38</sup> This is to be done through the making of special agreements between the UNHCR and governments to execute any necessary measures to improve refugees' situations and to reduce the number of refugees requiring protection.<sup>39</sup> Under the 1951 Convention and the 1967 Protocol,

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<sup>30</sup> Ogata, *supra* note 20.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> United Nations High Commission for Refugees Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees at ¶ 14 (Jan. 1992) [hereinafter *Handbook*]. See G.A. Res. 428 (V), U.N. Doc. A/RES/428 (Dec. 14, 1950).

<sup>34</sup> Corinne Lewis, *UNHCR's Contribution to the Development of International Refugee Law: Its Foundations and Evolution*, 17 INT'L J. REFUGEE L. 67, 70 (2005). See U.N. Doc. A/RES/428 (Dec. 1950).

<sup>35</sup> *Handbook*, *supra* note 33, at ¶ 1.

<sup>36</sup> Lewis, *supra* note 34, at 76.

<sup>37</sup> Cuellar, *supra* note 29, at 609.

<sup>38</sup> McNamara, *supra* note 10.

<sup>39</sup> Lewis, *supra* note 34, at 70.

the High Commissioner also has the responsibility of maintaining the process of refugee status determination (RSD).<sup>40</sup>

The 1951 Convention was created in a post-World War II climate and, therefore, only applied to a narrow class of refugees. At the time of its creation, the 1951 Convention only applied to people who were displaced within Europe "on account of race, religion, political opinion, or nationality before 1950."<sup>41</sup> However, the UNHCR and its legal mandate have come to be designated, legally, as "the primary refugee advocate under international law" overseeing the organization of refugee camps, funding services for refugees, monitoring camp conditions and negotiating with host countries.<sup>42</sup> The High Commissioner is also supposed to work with NGOs to respond to the needs of refugees.<sup>43</sup>

In addition to the 1951 Convention and the 1967 Protocol, there are various regional agreements concerning refugee status<sup>44</sup> that the UNHCR must work with as well. In terms of the refugee crisis in the Great Lakes region, the 1951 Convention, the 1967 Protocol, and the 1969 Organization for African Unity Refugee Convention (OAU Convention) together form the relevant treaty obligations as all states in the Great Lakes region have ratified the OAU Convention and are party to the 1951 Convention.<sup>45</sup>

The OAU Convention extended the refugee definition of the 1951 Convention to include "those compelled to leave their country not only as a result of persecution, but also owing to conflict or 'events seriously disturbing the public order' in either part of the whole of their country."<sup>46</sup> The OAU Convention also identifies categories of people who are to be excluded from refugee status, just as the 1951 Convention does, in order to "make a distinction between a refugee who seeks a peaceful and normal life and a person fleeing his country for the sole purpose of fomenting subversion from outside."<sup>47</sup> These additions were

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<sup>40</sup> *Handbook*, *supra* note 33, at ¶ 19.

<sup>41</sup> Cuellar, *supra* note 9, at 655.

<sup>42</sup> *Id.* at 653.

<sup>43</sup> *Id.* at 609.

<sup>44</sup> *Handbook*, *supra* note 33, at ¶ 20.

<sup>45</sup> McNamara, *supra* note 10.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*



made in order to keep people from escaping justice by claiming refugee status.<sup>48</sup>

The UNHCR has also published specific guidelines to complement the 1951 Convention and the UNHCR Handbook.<sup>49</sup> The UNHCR's guidelines on the application of the exclusion clauses are particularly relevant to the discussion at hand.<sup>50</sup> These particular guidelines summarize the UNHCR's "*Background Note on the Application of the Exclusion Clauses*"<sup>51</sup> and are meant to "provide interpretive legal guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff carrying out refugee status determination in the field."<sup>52</sup> Exclusion and refugee status determination, as will be discussed later in this paper, are the two major areas in which the UNHCR could have improved its involvement in the Great Lakes refugee crisis following the Rwanda genocide.

### III. UNHCR'S LEGAL MANDATE AND THE GREAT LAKES REFUGEE CRISIS

#### *Exclusion*

Paragraph 7(d) of the 1950 UNHCR Statute, Article 1F of the 1951 Convention and Article I(5) of the OAU Convention all require States and the UNHCR to deny refugee status and its benefits to people who would not otherwise qualify as refugees.<sup>53</sup> These provisions are all exclusion clauses. The rationale behind the exclusion clauses is that "certain acts are so grave as to render their perpetrators undeserving of international protection as refugees. . . and to ensure that such persons do not abuse the institution of asylum in order to avoid being held legally accountable for their acts."<sup>54</sup> Another reason for the exclusion clauses is to protect the community of the host state from dangers associated with admitting refugees who

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<sup>48</sup> *Id.*

<sup>49</sup> UNHCR, *Guidelines on International Protection, Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 15 INT'L J. REFUGEE L. 492, 492 (2003) [hereinafter *Guidelines*]. See also Lewis, *supra* note 34, at 81.

<sup>50</sup> See *Guidelines*, *supra* note 49.

<sup>51</sup> *Id.* at 492.

<sup>52</sup> *Id.* at 492.

<sup>53</sup> *Id.* at 493.

<sup>54</sup> *Id.* at 493.

have committed serious crimes.<sup>55</sup> Article 1F is the exclusion clause that most directly applies to the refugees that caused the problems in the Great Lakes regions.<sup>56</sup>

Article 1F states that the provisions of the 1951 Convention will not apply to people who have: (a) “committed a crime against peace, a war crime, or a crime against humanity;” (b) “committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;” or (c) “been guilty of acts contrary to the purposes and principles of the United Nations.”<sup>57</sup> Articles 1F(a) and 1F(c) are concerned with crimes whenever and wherever they are committed. By contrast, the scope of Article 1F(b) is expressly limited to crimes committed outside the host country prior to admission into the state as a refugee.<sup>58</sup> Article 1F(a) is the broadest category falling under the exclusion clause.<sup>59</sup> Under Article 1F(a) crimes against humanity include acts such as genocide, murder, rape and torture.<sup>60</sup> The distinguishing feature under this section is that these acts must be committed “as part of a widespread or systematic attack directed against the civilian population.”<sup>61</sup>

Additionally, asylum is not meant to be a vehicle by which combatants prolong their armed struggles. As stated before, international criminals are not supposed to be using the refugee protection system as a means to escape justice. This is why the 1951 Convention provides means by which to exclude such criminals from attaining refugee status.<sup>62</sup> This goal was thus never achieved in the Great Lakes region due to the UNHCR's failure to apply the exclusion clauses. There is no doubt that the former Hutu government members and militiamen fall into this category of excluded refugees as they perpetrated a mass genocide. Yet, these people were allowed into the refugee camps, thereby setting the stage for one of the most disastrous refugee situations in history.

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<sup>55</sup> *Handbook*, *supra* note 33, at ¶ 151.

<sup>56</sup> *Id.* at ¶ 140.

<sup>57</sup> United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137.

<sup>58</sup> *Guidelines*, *supra* note 49, at 494.

<sup>59</sup> *Id.* at 495.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> Cuellar, *supra* note 9, at 615-16.

Some may argue that due to the mass influx nature of the Rwandan refugees' flight into Zaire, application of the exclusion clauses was not possible. However, the UNHCR guidelines on the application of the exclusion clauses specifically state, "[t]he exclusion clauses can also apply in situations of mass influx, although in practice the individual screening required may cause operational and practical difficulties."<sup>63</sup> Until this screening process is undertaken, all people are to receive protection and assistance.<sup>64</sup> Therefore, while the guidelines do recognize that situations of mass influx will often result in difficulties with applying the exclusion clauses and that all refugees are entitled to protection and assistance until that process is complete, they nonetheless maintain that the exclusion clauses still do apply.

The guidelines also note that the screening process is subject "to the separation of armed elements from the civilian refugee population."<sup>65</sup> Therefore, in a situation of mass influx, the screening and identification process to facilitate the separation of armed elements and civilians is overridden by the need for assistance because of the emergent nature of such an arrival of refugees.<sup>66</sup> However, this need for assistance does not ultimately negate the duty to separate armed elements and complete the screening process.

While all of the refugees in the camps of the Great Lakes region did need assistance, and were entitled to it while separation and screening took place, it should not have been assumed that all of the refugees were legally deserving of and entitled to such assistance,<sup>67</sup> thereby relieving the UNHCR of its duty to apply the exclusion clauses. However, no efforts were ever made to apply the exclusion clauses in determining who out of the refugee population was legally deserving of the assistance.<sup>68</sup> This failure could have been a result of the unique situations that arise from a mass influx of refugees. Because of the mass influx nature of this particular refugee crisis, the UNHCR "did not even have an accurate name and number count, let alone sufficient information and control to begin to separate refuge-

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<sup>63</sup> *Guidelines*, *supra* note 49, at 500.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Jaquemet, *supra* note 16, at 3.

<sup>67</sup> Howland, *supra* note 3, at 76.

<sup>68</sup> *Id.* at 84.

seekers who were ineligible for assistance. While different mechanisms were considered, nothing large-scale was ever implemented.<sup>69</sup>

Unfortunately, the exclusion clause guidelines were not in place at the time. If they had been, perhaps the UNHCR would have made more efforts to isolate those who committed human rights violations from the rest of the refugee population.<sup>70</sup> But because this legal obligation was never performed, other problems arose within the camps. The camps were used as a sort of military base “to destabilize the Rwandan regime and to finish the genocide.”<sup>71</sup> Rather than imposing the exclusion clauses of the 1951 Convention, the UNHCR subjected the refugee population to group status determination.<sup>72</sup> This was not only a result of the UNHCR’s failure to follow its own legal mandate, but it was also a result of the provision in the OAU Convention that grants refugee status to people who flee their countries “as a result of events seriously effecting public order.”<sup>73</sup> However, the OAU Convention provides the same bases of exclusion as the 1951 Convention. And much like the exclusion clauses of the 1951 Convention, these exclusion clauses were not implemented either, thereby allowing people who “unquestionably instigated, or directly participated in, the genocide and were thus subject to the exclusion clause” to seek refuge within the camps of the Great Lakes region.<sup>74</sup>

Under both the 1951 Convention and the OAU Convention, the competence to decide when the exclusion clauses apply rests in the hands of the “State in whose territory the applicant seeks recognition as a refugee.”<sup>75</sup> However, under paragraph 8 of the UNHCR Statute and Article 35 of the 1951 Convention, the UNHCR has the responsibility to help the States with exclusion

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 96.

<sup>71</sup> *Id.* at 85.

<sup>72</sup> UNHCR, Evaluation Report: Lessons Learned From the Rwanda and Burundi Emergencies (Dec. 1, 1996), <http://www.unhcr.org/research/RESEARCH/3ae6bfc4.html> [hereinafter *Lessons*].

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 15 INT’L J. REFUGEE L. 502, 507 (2003).

determination and to supervise the practice.<sup>76</sup> In response to this particular crisis, the UNHCR recognized that it had failed in this respect, and expressed that it was “deeply concerned” with the “presence of suspected perpetrators . . . among the refugees.” However, neither the UNHCR nor the host State was able to exclude perpetrators of the genocide from refugee status because of “serious security constraints.”<sup>77</sup> The UNHCR claimed that it was impossible to identify the refugees who fell under the exclusion clause because of the dangers involved in any attempts to go through the identification process.<sup>78</sup>

### *Refugee Status Determination*

Refugee status determination (RSD) has been called “the doorway to the protection and assistance that the international community provides to refugees.”<sup>79</sup> The RSD process has two steps: (1) ascertaining the facts of the case; and (2) applying the refugee definitions provided in the 1951 Convention and 1967 Protocol to those facts.<sup>80</sup> In many cases, the UNHCR acts as the “gatekeeper” for this process by deciding who among the asylum-seekers can be saved from deportation and detention, who is entitled to receive humanitarian assistance and who can apply to settle in third countries.<sup>81</sup>

There is nothing in the UNHCR’s legal mandate that requires it to undergo the process of RSD.<sup>82</sup> Normally, the UNHCR does not undergo RSD in States that are party to the 1951 Convention.<sup>83</sup> RSD is the responsibility of the host governments under both the 1951 Convention and the OAU Convention.<sup>84</sup> The UNHCR’s role therefore is simply to offer advice and support to the host governments in carrying out RSD procedures.<sup>85</sup> However, the UNHCR is required to protect and assist

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<sup>76</sup> *Id.* at 507-08.

<sup>77</sup> *Lessons, supra* note 72.

<sup>78</sup> *Id.*

<sup>79</sup> Michael Kagan, *The Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination*, 18 INT’L J. REFUGEE L. 1, 2 (2005).

<sup>80</sup> *Handbook, supra* note 33, at 9.

<sup>81</sup> Kagan, *supra* note 79, at 2.

<sup>82</sup> *Id.* at 24.

<sup>83</sup> *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, supra* note 75, at 508.

<sup>84</sup> McNamara, *supra* note 10.

<sup>85</sup> *Id.*

refugees, and in many cases, for this to happen, the UNHCR must undertake RSD procedures when the host State cannot or will not.<sup>86</sup> Therefore, in exceptional cases where the host government is not fulfilling its duty with regard to RSD, the “UNHCR may take the lead on behalf of states, under its mandate and responsibility for recognition and exclusion of refugees, if requested to do so.”<sup>87</sup>

The 1951 Convention, 1967 Protocol, and the OAU Convention all provide that host governments may institute RSD procedures.<sup>88</sup> However, situations of mass influx pose problems for RSD just as they do for application of the exclusion clauses. The RSD provisions of the UNHCR’s legal mandate were not designed for situations of mass influx. Formal determination of refugee status of individuals in such situations is generally not considered to be necessary with a *prima facie* determination of the status of the group generally declared.<sup>89</sup> However, during situations of mass influx, such as the case in the Great Lakes region after the Rwanda genocide, individual determination of refugee status is nearly impossible, yet still essential to successful protection and assistance of refugees. As such, the main priority for the UNHCR in the Great Lakes region was first to “provide assistance and emergency protection measures so as to preserve life.”<sup>90</sup> This is exactly what happened in the camps; however, status determination, which was meant to ensue swiftly after initial emergency assistance and protection were provided,<sup>91</sup> never happened.

In cases where thousands of people simultaneously flee into a country, the UNHCR may make group refugee status determinations.<sup>92</sup> However, group determinations can cause their own problems “because they are necessarily somewhat *ad hoc* applications of a legal definition meant to apply to individuals.”<sup>93</sup> Convincing states to protect people who are fleeing “necessitous

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<sup>86</sup> Kagan, *supra* note 79, at 24.

<sup>87</sup> McNamara, *supra* note 10.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> Geoff Gilbert, *Current Issues in the Application of the Exclusion Clauses*, UNHCR Note, 30 (2001).

<sup>91</sup> *Id.*

<sup>92</sup> Cuellar, *supra* note 29, at 610.

<sup>93</sup> *Id.*

circumstances” is a primary concern of the UNHCR.<sup>94</sup> However, the UNHCR has recognized “that, in situations of mass influx, blanket protection at a minimal level is preferable to refoulement.”<sup>95</sup> This was the UNHCR’s approach in the camps of the Great Lakes region. However, this approach proved to be fatal, and made it clear that completing RSD is essential to effective refugee assistance and protection.

Many countries in Africa have not implemented the necessary institutional and legal structures in order to sufficiently respond to the needs of refugees.<sup>96</sup> This lack of domestic legislation allowing African host States the ability to fulfill their international treaty obligations not only “creates uncertainty about the status of refugees at the national and local level,” but also explains why the policy and practice of both governments and humanitarian organizations are often inconsistent with international human rights standards.<sup>97</sup> Adequate RSD procedures are lacking in Africa primarily because the UNHCR staff working on RSD often applies non-legal rules of convenience and lack proper training in refugee law. “[T]hose who have proper training are often compromised by the bureaucracies of their organizations.”<sup>98</sup>

In the case of the Great Lakes refugee crisis, among the 1.2 million Rwandan refugees were people who could have demonstrated that they were refugees according to the 1951 Convention, but were not given the opportunity to present their cases.<sup>99</sup> On the whole, most of the refugees only had a “subjective fear of returning, and did not have any individualized facts to support their claim to refugee status.”<sup>100</sup> The UNHCR decided that in this situation of such chaos and misery individual RSD procedures were impossible to carry out.<sup>101</sup> This decision was in accord with the UNHCR’s 1979 decision that in situa-

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<sup>94</sup> Joan Fitzpatrick, *Flight From Asylum: Trends Toward Temporary “Refuge” and Local Responses to Forced Migrations*, 35 VA. J. INT’L L. 13, 42 (1994).

<sup>95</sup> *Id.*

<sup>96</sup> Zachary A. Lomo, *The Struggle for Protection of the Rights of Refugees and IDPs in Africa: Making the Existing International Legal Regime Work*, 18 BERKELEY J. INT’L L. 268, 275 (2000).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 279.

<sup>99</sup> Howland, *supra* note 3, at 82.

<sup>100</sup> *Id.*

<sup>101</sup> Fitzpatrick, *supra* note 94, at 56-57.



tions of mass influx, those seeking asylum should always be guaranteed temporary refuge at the very least.<sup>102</sup> Therefore, “refuge and international assistance was extended even to likely militia members and the remnants of the Rwandan army.”<sup>103</sup>

Efforts were made to identify separate sites that were suitable for the former militiamen, away from the rest of the refugee population; however, this mission was never successful due to the UNHCR’s inability to distinguish between the two populations.<sup>104</sup> While some of the former combatants had entered the camps clothed in their uniforms, many of them had dressed themselves in civilian clothes, making it impossible for the UNHCR to distinguish them from the rest of the refugee population.<sup>105</sup> Additionally, there were between ten and fifteen thousand Interahamwe members within the camps who, unlike the soldiers, never wore uniforms, making them indistinguishable from the very beginning.<sup>106</sup>

#### IV. SUGGESTIONS

##### *Separation, RSD, and Exclusion*

One of the biggest mistakes that the UNHCR made in setting up the refugee camps in the Great Lakes region was allowing the refugees to maintain their political and social hierarchies within the camps. There was a serious lack of understanding with regard to the social, cultural, and political background of the Rwanda genocide on the part of the UNHCR.<sup>107</sup> If the UNHCR had been more familiar with these aspects of the refugees’ lives, it would have been more able to develop policies to deal with the “former militia members, army contingents and government authorities many of whom may have been subject to the exclusion clause due to their involvement in the genocide.”<sup>108</sup> However, when the camps were es-

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<sup>102</sup> *Id.* at 42.

<sup>103</sup> *Id.* at 56-57.

<sup>104</sup> UNHCR, *Refugee Camp Security in the Great Lakes Region*, Evaluation Report, 10 (April 1997).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at para. 38

<sup>107</sup> *Lessons, supra* note 72.

<sup>108</sup> *Id.*



established, the UNHCR had not adequately researched the social and political circumstances of the Rwanda genocide; therefore, the staff was not prepared for these obstacles and did not put the necessary procedural measures into place.

Generally speaking, people who had played a direct role in the conflict and who had not yet laid down their arms should have been disarmed and separated from genuine asylum seekers, and then interned.<sup>109</sup> This could have been achieved by the establishment of specialized exclusion units within the institution responsible for RSD, and given the job of handling exclusion cases in order to ensure that they were expeditiously dealt with.<sup>110</sup>

Requiring refugees to register with the authorities within the camps in order to obtain aid and verifying the registration information with information regarding the refugees' identities would have resulted in the RSD process being performed and the exclusion clauses being successfully implemented.<sup>111</sup> Such a practice would provide a mechanism by which the refugee population could be separated into groups of people who were and were not eligible for aid.<sup>112</sup> The fact that most of the "members of the non-governmental armed groups or local militias mingle[d] with civilians and rarely [wore] military uniforms or distinctive signs" made it even more difficult for the host State and the UNHCR to assess these individuals' asylum claims.<sup>113</sup> In a situation of mass influx such as this, where a failure to separate will undoubtedly lead to grave consequences, a response in this regard is necessary under refugee law, international humanitarian law, and the UN Charter.<sup>114</sup>

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<sup>109</sup> Stéphane Jaquemet, Deputy Regional Representative, UNHCR Jakarta, *Under What Circumstances Can a Person Who Has Taken an Active Part in the Hostilities of an International or a Non-International Armed Conflict Become an Asylum Seeker?*, at iv, UNHCR Doc. PPLA/2004/01 (June 2004).

<sup>110</sup> UNHCR, *Guidelines on International Protection, Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees*, 15 INT'L J. REFUGEE L. 492, 500 (2003).

<sup>111</sup> Todd Howland, *Refoulement of Rwandan Refugees: The UNHCR's Lost Opportunity to Ground Temporary Refuge in Human Rights Law*, 4 U.C. DAVIS J. INT'L L. & POL'Y 73, 96-97 (1998).

<sup>112</sup> *Id.*

<sup>113</sup> Jaquemet, *supra* note 16, at 18.

<sup>114</sup> *Id.* at 19-21.

The UNHCR failed its obligations in the refugee camps of the Great Lakes region by not making early, formal assessments of the refugee caseload.<sup>115</sup> If these assessments had been made, those deserving of refugee status would have been separated from those who perpetrated the genocide, thereby bypassing many of the problems that were soon to follow within the camps.<sup>116</sup> Additionally, the UNHCR should have assessed the host State's ability to maintain public order within the camps. If this assessment had been made, the UNHCR would have known better what kind of conditions it was dealing with and could have staffed the camps and prepared accordingly.<sup>117</sup>

The separation of armed combatants and perpetrators of genocide from the civilian refugee population "is critical to core principles of refugee law, including: 1) the humanitarian and non-political nature of asylum and refugee status; 2) the civilian character of refugee camps and settlements; 3) the principle of non-refoulement; and 4) asylum for all those who meet the refugee criteria."<sup>118</sup> However, separation is not a single legal concept; separation is comprised of "acts and processes and outcomes" whose object is the identification and removal of certain members of the population from the general population of refugees.<sup>119</sup> The ultimate issue here is that there is nothing in the UNHCR's legal mandate providing means by which to achieve this necessary goal.

### *Legal Mandate*

It is easy to say what the UNHCR should have or could have done, but the truth is that the UNHCR's legal mandate is not expansive enough to provide for such remedies. While the UNHCR operates under its statute, the 1951 Convention, the 1967 Protocol, the OAU Convention, and other regional agreements, the only guidelines as to how the UNHCR is to actually

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<sup>115</sup> *Lessons*, *supra* note 72.

<sup>116</sup> UNHCR, Evaluation Report, *Refugee Camp Security in the Great Lakes Region*, 2-3, U.N. Doc. EVAL/01/97 (Apr. 1997) [hereinafter *Refugee Camp Security*].

<sup>117</sup> *Id.*

<sup>118</sup> Jaquemet, *supra* note 16, at 35.

<sup>119</sup> Deirdre Clancy, Lawyers Committee for Human Rights, Protection of Refugees in Mass Influx Situations, Statement on Behalf of NGOs, Global Consultations on International Protection (Mar. 8, 2001), available at [http://www.humanrightsfirst.org/intl\\_refugees/issues/security/armed\\_elements.pdf](http://www.humanrightsfirst.org/intl_refugees/issues/security/armed_elements.pdf).

carry out these legal obligations are its Handbook and various "Guidelines" that have been published.<sup>120</sup> Beyond these documents, there is little to nothing that is actually guiding the UNHCR in terms of how to carry out its legal mandate in the various refugee situations that it comes across.

Specially trained personnel should staff refugee camps in situations of mass influx. Properly trained personnel would have the specialized training to assess "the features of the local situation [and] identify actual or potential security problems . . . on the basis of the general guidelines in the handbook."<sup>121</sup> In response to the mixed refugee population, in which genuine refugees are mingled with armed militiamen, that results from situations of mass influx, Security Council Resolutions 1208 and 1296 were passed to set out parameters for such a situation.<sup>122</sup> These Security Council Resolutions stated the obvious conclusions<sup>123</sup> that certain results from having armed elements mixed with the civilian refugee population within refugee camps are less than favorable, but the Resolutions provide no concrete guidelines to follow in order to avoid these negative, yet obvious, results.

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<sup>120</sup> See *Handbook*, *supra* note 33. See also *Guidelines*, *supra* note 49.

<sup>121</sup> Refugee Camp Security, *supra* note 116, at 4-5.

<sup>122</sup> Jaquemet, *supra* note 16, at 27.

<sup>123</sup> *Id.* Acts of violence directed against refugees have an impact on durable peace, reconciliation and development (S.C. Res. 1296, pmb. para. 4, U.N. Doc. S/RES/1296 (Apr. 19, 2000)). Situations where refugees are vulnerable to the threat of harassment or where their camps are vulnerable to infiltration by armed elements may constitute a threat to international peace and security (S.C. Res. 1296, ¶ 14, U.N. Doc. S/RES/1296 (Apr. 19, 2000)). The provision of security to refugees and the maintenance of the civilian and humanitarian character of refugee camps and settlements is an integral part of the national, regional and international response to refugee situations and can contribute to the maintenance of international peace and security (S.C. Res. 1208, pmb. para. 3 & ¶ 3, U.N. Doc. S/RES/1208 (Nov. 19, 1998)). It is unacceptable to use refugees and other person in refugee camps and settlements to achieve military purposes in the country of asylum or in the country of origin (S.C. Res. 1208, pmb. para. 7, U.N. Doc. S/RES/1208 (Nov. 19, 1998)). *Measures have to be taken by the host State, with the support of the international community, if need be, to disarm armed elements and to then separate them from the refugee population* and prevent them from getting engaged in military activities (S.C. Res. 1208, ¶¶ 3, 6, U.N. Doc. S/RES/1208 (Nov. 19, 1998)) (emphasis added). Armed or military elements and persons who want to achieve military purposes from the territory of the host country do not qualify for the international protection afforded refugees (S.C. Res. 1208, pmb. para. 8, ¶ 6, U.N. Doc. S/RES/1208 (Nov. 19, 1998)).

Security Council Resolution 1208, adopted in 1998, recognizes the need to maintain the “civilian and humanitarian character of refugee camps” and the “unacceptability of using refugees and other persons in refugee camps . . . to achieve military purposes in the country of asylum or in the country of origin.”<sup>124</sup> The resolution then goes on to call for the UNHCR’s support in the “separation of refugees from other persons who do not qualify for international protection afforded refugees.”<sup>125</sup> However, nowhere in the resolution does it state how this is to be done. This is a prime example of why the UNHCR’s legal mandate is not expansive enough to properly handle such situations as the Great Lakes refugee crisis; the UNHCR is simply not provided with the necessary, well-articulated guidelines and procedures to carry out its legal obligations.

In response to the Great Lakes refugee crisis after the Rwanda genocide, the separation of armed elements from refugees became a primary issue to be discussed within the UNHCR.<sup>126</sup> This discussion resulted in the ExCom/Global Consultations meeting that eventually produced the Executive Committee Conclusion that reiterates the general principles of Conclusion No. 48, thereby providing “more specific guidance as to the manner in which the civilian character of refugee settlements could be maintained.”<sup>127</sup> Executive Committee Conclusion No. 94 includes principles such as early identification, separation, and internment of armed elements.<sup>128</sup> Additionally, Executive Committee Conclusion No. 22 concludes that in situations of mass influx, separation should not occur at the border “so as to hinder the admission of those in the mass influx.” Rather, the movement of the entire refugee population into the host country should “be restricted for security reasons until such time as armed elements can be identified and separated from the civilian populations.”<sup>129</sup> While these Conclusions set out admirable goals, they do not provide the means by which to achieve them.

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<sup>124</sup> S.C. Res. 1208, U.N. Doc. S/RES/1208 (November 19, 1998).

<sup>125</sup> *Id.* at ¶ 4.

<sup>126</sup> Jaquemet, *supra* note 16, at 38.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 42.

For example, Executive Committee Conclusion No. 94 states, “[c]ombatants should not be considered as asylum-seekers until the authorities have established . . . that they have genuinely and permanently renounced military activities.” It then goes on to state, “once this has been established, special procedures should be put in place for individual [RSD], to ensure that those seeking asylum fulfill the criteria” of refugee status with “utmost attention paid to article 1F of the 1951 Convention.”<sup>130</sup> However, yet again, the conclusion does not provide any guidelines by which to “establish” these “special procedures,” or what these procedures should consist of.

### NGOs

NGOs have expressed their own concerns with mass refugee migrations such as the Great Lakes Refugee crisis. The NGOs generally accept the notion that individual “states and the international community have an obligation to insure that a distinction is made between refugees, armed elements and others not deserving of protection under international refugee instruments.”<sup>131</sup> NGOs note that physical separation is the most effective way to maintain this distinction. However, as explained throughout much of this article, it is a very complex practice to accomplish. Various NGOs have urged that there is a need for the elaboration of certain aspects of this process.<sup>132</sup> At a meeting of experts on the OAU Convention, it was recognized that no clear legal criteria exists for identifying and separating armed elements.<sup>133</sup> Clearly, this is an ambiguous area in the procedures to be utilized in situations such as the Great

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<sup>130</sup> UN High Commissioner for Refugees, *Conclusion on the Civilian and Humanitarian Character of Asylum*, October 8, 2002, No. 94 (LIII), available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/Rwmain?docid=3dafdd7c4>.

<sup>131</sup> Deirdre Clancy, Lawyers Committee for Human Rights, Protection of Refugees in Mass Influx Situations, Statement on Behalf of NGOs, Global Consultations on International Protection (Mar. 8, 2001), available at [http://www.humanrightsfirst.org/intl\\_refugees/issues/security/armed\\_elements.pdf](http://www.humanrightsfirst.org/intl_refugees/issues/security/armed_elements.pdf).

<sup>132</sup> *Id.* The legal basis for lawful ‘separation’ activities: the folder of rights attaching to the various categories of separated persons; the procedural safeguards attaching to a separation exercise; the actors responsible for carrying out and monitoring such activities; and the conditions for termination of separation (tied to the particular purpose determined for the activity).

<sup>133</sup> *Id.*

Lakes refugee crisis, and the UNHCR is probably one of the better sources of such clarification.

NGOs also urge that camps be located a safe distance from the border with early intervention at the border and effective policing of the refugee settlements. Specifically, NGOs “*recommend the formation of a working group of States, UN and ICRC officials, experts and NGO representatives charged with articulating the legal parameters, and setting out practical guidelines, for the conduct of separation activities in situations of mass influx.*”<sup>134</sup> This is exactly the conclusion reached in this article analyzing the Great Lakes refugee crisis in the context of the UNHCR’s legal mandate. It is this lack of articulation in the guidelines that has led to the failures of the UNHCR in the Great Lakes region after the Rwanda genocide. Without collaboration of all actors involved and the creation of specific guidelines and procedures, the international community’s response to such situations of mass influx of refugees will continue to fail in providing the very protection and assistance that is promised to refugees.

Some have pointed out that effective separation procedures may require the use of force, which the UNHCR is not authorized to use. However, in response to this proposal, others have suggested that the “only truly effective way to secure camps is by means of a force trained in issues of refugee protection and human rights with the mandate and capability to use armed force.”<sup>135</sup> This is an additional measure that could be taken to improve the legitimacy and strength of the UNHCR’s role. Specially trained forces with the ability to use force when needed may be of crucial importance in the face of such refugee crises.

While it remains the duty of the host State to provide security to the refugee population, State action sometimes needs to be augmented “either through technical and capacity building cooperation or via direct intervention.”<sup>136</sup> NGOs agree that “the absence of procedures to deal with exclusion in the context of mass influx situations poses a major operational challenge in refugee protection.” Therefore, NGOs suggest that the operational guidelines be developed “on applying the exclusion

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<sup>134</sup> *Id.* (emphasis added).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

clauses in situations of mass influx.”<sup>137</sup> Again, there is a severe need for the expansion of the UNHCR’s legal mandate so that it has the necessary procedures and guidelines to follow in order to handle such situations effectively and successfully.

## V. CONCLUSION

In conclusion, the Great Lakes refugee crisis was a disaster in the eyes of the international community primarily due to the UNHCR’s failure to implement the exclusion clauses of its legal mandate and its failure to perform the necessary RSD. These failures were partially due to the UNHCR’s lack of preparation in having the full and necessary understanding of the social and political situations surrounding the Rwanda genocide. Additionally, the mass influx nature of the crisis was something for which the UNHCR’s mandate does not provide adequate remedies. Ultimately, the UNHCR’s failure can be boiled down and attributed to the lack of articulation and specificity of its own legal mandate. In order to prevent such a refugee crisis from occurring again in the future, it is essential that the UNHCR add more specific guidelines and procedures to its mandate and provide its staff with the necessary training and preparation to follow these guidelines and procedures. Without updating the UNHCR’s legal mandate, there is no way that the UNHCR can fulfill its international legal obligation in refugee crises such as the Great Lakes refugee crisis.

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<sup>137</sup> *Id.*